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Proceedings of the Eighth International Humanitarian Law Dialogs, August 24–26, 2014, Chautauqua Institution

# Proceedings of the Eighth International Humanitarian Law Dialogs

August 24–26, 2014, Chautauqua Institution

Edited by Mark David Agrast and David M. Crane



American Society  
of International Law

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

August 24–26, 2014  
at Chautauqua Institution

**Edited by**

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# Eighth International Humanitarian Law Dialogs

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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 of fifteen.



*This volume is dedicated to*

***Zeid Ra'ad Al-Hussein***  
*2014 Recipient of the Joshua Heintz*  
*Award for Humanitarian Achievement*





*In Memoriam*

***Hans-Peter Kaul (1943–2014)***  
*Judge, International Criminal Court (2003–2014)*



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## Prosecutors at the Eighth International Humanitarian Law Dialogs



*Back row, left to right: Andrew T. Cayley, Sir Desmond de Silva, David Crane, Stephen Rapp*

*Front row, left to right: Nicholas Koumjian, Brenda J. Hollis, Fatou Bensouda, Hassan Jallow, Serge Brammertz*



# **Introduction**





## **Introduction**

### **A New World (Dis)order: International Humanitarian Law in an Uncertain World**

**David M. Crane\***

At no time in the past fifty years has the world been so unstable. The world's power structures are changing with the power centers shifting away from Europe, NATO, the United States, and even the United Nations. The rule of law seems diminished and non-state actors ascendant. Conflict is ungoverned, IHL ignored. The Eighth International Humanitarian Law (IHL) Dialogs focused on this power shift and diminished standing of the rule of law and considered how this has impacted the decades-long respect and adherence to IHL.

The IHL Dialogs (as they are known) bring the right mix of practitioners, academics, policymakers, and students to the Chautauqua Institution in upstate New York to discuss key IHL issues in an informal and relaxed atmosphere along the banks of Lake Chautauqua. It is the only time during any given year that all of the world's current and former chief prosecutors gather to lead a dialog on key aspects of the rule of law. What follows in this volume is a compilation of the speeches, reflections, panels, dialogs, and considerations of just how tenuous the rule of law is in this age of extremes.

The Eighth IHL Dialogs began on August 24, 2014 with a reception at the Robert H. Jackson Center in Jamestown followed by the awarding of the Joshua Heintz Humanitarian Award to H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein, the newly appointed High Commissioner for Human Rights. After the ceremony, a roundtable conversation was

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

convened to discuss the first international court in Africa. Moderated by Greg Peterson, Sir Desmond DeSilva, Fatou Bensouda, and Hassan Jallow reflected on this court set up to try persons who had attempted a coup in The Gambia.

The next day, August 25, Ambassador Tiina Intelman, president of the Assembly of States Parties of the International Criminal Court gave the keynote address on the challenges this state of extremes has on the world's first permanent international criminal court. Her address was followed by an update by the current international prosecutors from the ICTY, the ICTR, the SCSL, and the ICC moderated by Professor Jennifer Trahan.

After lunch the Clara Barton Lecture was given by Professor Kimberly Theidon, hosted by the American Red Cross, followed by a roundtable on the relevance of IHL in 2014, given the current challenges. Professor Leila Sadat moderated this dialog with Professor William Schabas, Ambassador Hans Corell, and Ambassador David Scheffer. That evening H.E. Zainab Bangura, U.N. Special Representative on Sexual Violence in Conflict, gave the Katherine B. Fite Lecture.

On August 26, the last formal day of the IHL Dialogs, Ambassador David Scheffer gave a briefing on the Extraordinary Chambers in the Courts of Cambodia. After this breakfast talk, the international prosecutors present met to draft the Eighth Chautauqua Declaration. That declaration can be found at Appendix II. During this deliberation, Professor Valerie Oosterveld delivered the annual year in review for international criminal law.

After her lecture, the prosecutors rejoined the dialogs at the Porch Sessions. There were three on such topics as Non-state Actors and IHL (led by Hans Corell and Paul Williams); Islamic Extremism (led by David Scheffer and Leila Sadat); and Cyber Warfare and Law of

Armed Conflict (led by Michael Scharf and William Schabas). The lunch keynote was given by Colonel Morris Davis (U.S. Air Force, ret.), former chief prosecutor at Guantanamo on the legacy of that institution.

The formal portion of the dialogs ended with the issuance and signing of the Eighth Chautauqua Declaration moderated by Jeanne Freedberg of the U.S. Holocaust Memorial Museum. That evening all of the participants of the dialogs enjoyed a dinner cruise around Lake Chautauqua, hosted by the Case Western Reserve University School of Law with Dean Michael Scharf.

As the Eighth IHL Dialogs participants departed, there was a sense of renewed energy to take on the many challenges faced by the rule of law in this age of extremes. As you read the following pages of this volume you will get the sense that despite these challenges, the rule of law will prevail in the end.



# Lectures



## Keynote Address

**Tiina Intelmann\***

Good morning to everybody, and thank you very much, David Crane, for this very kind introduction and also for the invitation to speak here. This morning, I woke up, and the gravity of the situation, all of a sudden, hit me that I have promised to analyze the world disorder.

And unfortunately, I had my e-mails, so I opened your e-mails, and I saw that Mr. Lavrov, foreign minister of Russia, had given a press conference announcing another humanitarian convoy that was going to Ukraine. And he also said that everything in the world will be back to business as usual fairly soon, so that was good news.

So when David called me several months ago to ask me if I wanted to talk in Chautauqua, we, of course, had no way of predicting what was going to happen over the summer; however, we did know that the security situation in the world had changed dramatically. We also knew that those of us who still had Francis Fukuyama's book, *The End of History and the Last Man*, on the bedside table had to get rid of it and find something else.

As we sit here today and I am trying to analyze the world disorder, none of us has a crystal ball to tell what the future brings; but it is quite clear that we are witnessing a very surprising and very worrying state of the world today, and it was not supposed to be like that. The twenty-first century was supposed to be much better than the previous ones.

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\* Ambassador and President of the Assembly of States Parties, International Criminal Court. This publication is based on Intelmann's keynote address on August 25, 2014 at the Eighth International Humanitarian Law Dialogs held in Chautauqua, New York.



Just very recently, I learned that there is a saying that an optimist is a person who has not read the news, and this seems to be very appropriate in present circumstances. And then there are all these other sayings that things are so bad that they can only get better, which does not seem to be applying right now, and that things can be much worse. And this is, I think, what we are facing right now.

It seems that many places in the world are falling apart, and some of us are worried about the situation in the Middle East. Some of us are looking at Iraq, specifically, at Syria. Speaking as an Estonian and an Estonian diplomat, I cannot help being worried about what is happening in Ukraine and about the actions of Russia. As Estonians, we are sometimes wondering if history has a tendency to repeat itself.

And here, I have to remember our former president, Lennart Meri. When we restored independence, he said: “We don’t have much time. You have to be aware; we have to hurry. There is no time.” Now, he’s dead, and we realize there was not much time.

David also asked me to analyze where the International Criminal Court (ICC) stands in this world disorder and what the future of the Court will be. We all know that the Court was supposed to be part of this better world that we were constructing, where there was no impunity; which was all put in place when we were a little bit more optimistic than we are right now. But is this not a blessing that you have had almost twenty years to establish the Court in circumstances that were a little bit more—or even much more—unanimous and much more supportive towards international criminal justice than we see the situation right now?

And one thing: Sometimes the small things are very striking. Just recently, somebody told me: “But look, everybody now knows that the Court is the court in The Hague.” It was not like that two or three years ago. Now, apparently, everybody knows that the Court is the

court in The Hague, and this is thanks to you. You have been working towards that.

So the state of affairs at the Court—and I should be very humble speaking in the presence of a prosecutor and deputy prosecutor, but the mantra usually is that there are twenty-one cases arising from eight situations, and most of these situations stem from the fact that the country concerned has approached the Court and asked the Court to become involved. But this does not tell the whole story.

It is also useful to look over the years, and in this respect, this year has been extremely, extremely amazing. There are so many requests for the Court to get involved, either by states, by organizations, or through the U.N. system. That is absolutely unprecedented. There has been an attempt to refer Syria to the the Court, although it was a failed attempt. The Human Rights Council Commission of Inquiry has looked into the situation in Democratic Republic of Korea, again, suggesting that that would be a case for the Court. We also know that Ukraine has made a self-referral. We also know that the Foreign Minister of Palestine has recently visited the Court, asking what were the options for Palestine to create a relationship with the ICC, and so many other developments have happened, which really means that the news has gotten out, and the Court is doing good work, and it has states' confidence.

We also have to say that the Court has started to work as a real court. This was one of the things that President Sang-Hyun Song told me when I first met him: “I’m quite sure that you are a fine diplomat, but you have to understand that you will be working in a system where you have to deal with a real court.” It is a court. It is not an international institution or a political playing field.

So the Court has started to work like that, and of course, from my position, I have been mostly dealing with the political support through

the activities of the Court. How do you measure political support to the Court? Through the budget, for instance, it is very easy. Through the budget, the political support is there, although every year we have to go through certain fights. But every year, the Court gets more money.

The diplomatic and political support is also there through the U.N. Security Council. If we look at how many peacekeeping mandates now have the capability of working with the Court, there is still a question: How do you measure political support? And what happens if things get tough? One way of measuring the support is if the support is maintained, when you have to suffer from it.

Last year, around this time and even earlier, some of our African states already started approaching us, saying that they were not able to maintain their cooperation and good attitude to the Court because that may bring about significant economic problems or even political problems, and this news was not received well by other states parties. But those African countries said that they were afraid about the economic well-being of their country if things became complicated and if they still had to maintain the support to the Court.

Let's fast forward one year. We are right now in the circumstances where we are, and we know that one European country has annexed a part of another European country. The United States has sanctions against that country, and the European Union also has decided on sanctions. And we are looking at what is happening in the world, and in Europe, some of the biggest supporters of international law, international criminal law, all of a sudden are now speaking about remaining neutral, and some are speaking about economic implications of these sanctions, which are not entirely welcome. So I think we have to take that aspect into consideration. When the real situation comes closer to you, you will start thinking about your national interests.

Right now, a state party has commissioned a report to look into what to do if states are not cooperating with the Court. This famous issue on noncooperation actually involves only one issue, the failure to arrest a sitting president of a country, and in that report, I was surprised to see that sanctions are proposed. I guess it is very easy to propose sanctions against smaller countries in Africa because it really does not affect us.

We're now coming to this issue of prosecuting sitting heads of state and the basic principle that nobody is above the law, which you know was a major achievement in the Rome Statute. We are not very good at this. No, not yet. The problems that we faced with the issue of Kenya last year and also the problems that we faced with the failure to arrest the President of Sudan, Omar al-Bashir, these are all linked to the issue of whether nobody is above the law and what do we do if investigations are concerning heads of state.

Last year, when the Assembly of States Parties all of a sudden turned itself into a political body, because it is supposed to be just an administrative body adopting the budget, we just found no other way of sorting out the political turmoil that had arisen around the Court. So we thought, okay, let the assembly be a political body. So I even had to hear people trying to convince me that if the assembly decided on a different regime concerning heads of state, then maybe even President al-Bashir would agree to appear before the Court, represented by counsel. This has not happened yet, but we are still hopeful.

So concerning the Assembly of States Parties and what we saw last year, again, I hope that we will not have the opportunity of turning into a political body anymore in the near future. We also have to be mindful of the fact that the request to review the legal framework in which this court works is still there, and this request is not going to

disappear. The understanding of a lot of countries is that a head of state should not be prosecuted while he is carrying out his tasks.

So this is where we stand right now. What does all that mean? Is there a place for the Court in the future? Yes, there is, but the Court has to be mindful of the fact that the political support of states parties is not limitless. It was said very clearly to the Court last year through the Assembly meeting and through all these discussions that we had and that also happened in the U.N. Security Council, and the best way for this court right now to render service to states parties is clearly responding to the requests of states parties to get involved. Whether that fully covers the goal that was there and the idea that was there in the Rome Statute and that is written in the Rome Statute, I do not know, but this is where we stand right now.

The very promising fact is that there is a yearning for justice. And maybe just to finish, I will tell you about one of the things my office and the Court did. I had explained that, nowadays, a lot of things get done through social media; so we launched the social media campaign for the Day of International Criminal Justice. Everybody was asked to take pictures with a sign to celebrate it. It does not cost anything, and you get people from all over the world to do it. And a lot of people participated in it, and they did not see any problems in having their photos posted. Then when all of that finished, then we started getting requests from people who said, "Can you please take off my photo? Because I got in trouble."

I hope that we are able to continue building the Court, able to continue supporting international criminal justice and international justice in general, and I wish you all the best in your discussions over the next two days.

Thank you.

## The Fourth Annual Katherine B. Fite Lecture

**Zainab Hawa Bangura\***

Distinguished guests, colleagues, ladies, and gentlemen,

Good evening, and thank you very much for welcoming me here tonight. I am deeply gratified to be here with so many professionals who have dedicated their careers to helping survivors of atrocities, such as sexual violence, on their long road toward justice.

I am proud to address you this evening in the name of Katherine Fite. I am inspired by the depth of her courage and commitment to justice at the Nuremberg Tribunal. At a time when the world was reeling from the horrors of the Second World War, Fite gathered evidence and prepared arguments to help bring Nazi leaders to trial.<sup>1</sup> The Nuremberg Trials, while controversial at the time, marked an important step in international law, and it is due in large part to Fite's contribution—and in furtherance of her vision—that we are gathered here tonight.

The Nuremberg Trials symbolized a paradigm shift in how the world viewed, and punished, war crimes and crimes against humanity. They laid the foundations for a permanent International Criminal Court and set a powerful precedent for dealing with genocide and other crimes that shock the collective conscience.<sup>2</sup>

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\* Zainab Hawa Bangura of Sierra Leone was appointed to serve as Special Representative of the Secretary-General on Sexual Violence in Conflict at the Level of Under-Secretary-General of the United Nations in 2012. This publication is based on Bangura's address on August 25, 2014 at the Eighth International Humanitarian Law Dialogs held in Chautauqua, New York.

<sup>1</sup> *Katherine Fite Lincoln Papers*, HARRY S. TRUMAN LIBRARY AND MUSEUM, <https://www.trumanlibrary.org/hstpape/lincoln.htm> (last visited June 16, 2015).

<sup>2</sup> *Nuremberg Trials*, HISTORY, <http://www.history.com/topics/world-war-ii/nuremberg-trials> (last visited June 16, 2015).

The Nuremberg Tribunal attempted to address the horrors of the Holocaust, including crimes against peace, war crimes, and crimes against humanity.<sup>3</sup> Despite its historic achievements, we must acknowledge that the issue of sexual violence was sidelined. Given what we now know about the scale of rape and sexual slavery during the Second World War, it is a conspicuous and tragic absence.

After the Nuremberg Trials ended, many people wanted to believe that justice had been delivered. They wanted to believe that, at last, the victims of the Holocaust were named and counted. They wanted to focus on reconstruction efforts and reestablish a sense of normalcy. In addition, the perception that rape was a “private” matter and a second-class crime committed primarily against second-class citizens, namely women and girls, meant that it was easily overshadowed by other horrors of the war. As a result, survivors of sexual violence who tried to tell their stories were met largely with war weariness and indifference.

Then, in 2000, researchers at the U.S. Holocaust Memorial Museum began documenting all of the ghettos, slave labor camps, concentration camps, and killing centers operated by the Nazis.<sup>4</sup> In 2013, they released findings that shocked Holocaust scholars, as well as the global community.<sup>5</sup>

Based on post-war estimates, the researchers expected to find about 7,000 Nazi camps and ghettos, but the numbers kept climbing until the researchers identified some 42,500 sites, including at least five

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<sup>3</sup> *Id.*

<sup>4</sup> Eric Lichtblau, *The Holocaust Just Got More Shocking*, N.Y. TIMES, Mar. 1, 2013, <http://www.nytimes.com/2013/03/03/sunday-review/the-holocaust-just-got-more-shocking.html> (last visited June 15, 2015).

<sup>5</sup> *Id.*

hundred brothels where women were held as sex slaves.<sup>6</sup> They also uncovered thousands of sites where pregnant women were routinely forced to undergo abortions or their children were killed after birth.<sup>7</sup>

What obscured these shocking crimes?

It may have been that when investigators and prosecutors at Nuremberg examined the gruesome forensic evidence, sexual violence was invisible and therefore omitted from indictments. It may have been that, relative to the litany of other atrocities committed during the Holocaust, rape was deemed a lesser crime. There is also the deeper question of historical and structural gender-based discrimination. Male authorities and political leaders of the time largely dismissed sexual violence as an inevitable byproduct of war, the random acts of a few renegades, or mere collateral damage.

As a result, thousands of women and girls died before the true horror of their experience was acknowledged.

In the decades that followed, great strides have been made in the legal fight against rape in war, largely due to the advocacy and activism of women's groups. It is now clearly established that sexual violence can constitute a war crime, crime against humanity, and/or constituent act of genocide, within the jurisdiction of the International Criminal Court.<sup>8</sup> The *ad hoc* tribunals for Rwanda and the former Yugoslavia held accountable high-level commanders who had ordered, or otherwise enabled, the mass rape of civilians. But despite the progress made, too often conflict-related sexual violence is slow to come to light, and placed at the bottom of a hierarchy of human rights violations. For example,

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Rome Statute of the International Criminal Court, arts. 6, 7, 8 (July 17, 1998) (U.N. Doc. A/CONF.183/9).



the Holocaust is widely regarded as the most well-studied genocide in history, but despite decades of scholarship researchers have only recently analyzed sexual violence as an intrinsic part of the machinery of genocide. It was not an inevitable consequence of war; nor was it the opportunistic excesses of a few undisciplined soldiers—it was a weapon and a deliberate feature of the Nazi program of extermination.

Indeed, this is what we see in many modern wars: not just *rape out of control*, but *rape under orders*, as a means of pursuing military, political or economic ends.

The struggle for justice is compounded by the “wall of silence” that surrounds these attacks. It is a wall built from bricks of shame, stigma, fear, and futility. It conceals from public view the victims who are too traumatized to speak, and separates them from a society that is not prepared to listen. Other war crimes leave tangible evidence that cannot be so easily denied. Crematoriums in Auschwitz, mass graves in Srebrenica, landmine injuries in Cambodia, and amputees in Sierra Leone provided physical corroboration of alleged brutality in breach of the laws and customs of war. They provided symbols of the acute need for justice and redress.

Sexual violence, by contrast, leaves scars on survivors, their families, and communities that are much harder to see. Depression, anxiety disorders, post-traumatic stress, flashbacks, difficulties in re-establishing intimate relationships, and fear are among the common long-term psychological impacts of this crime. Survivors of rape often face unwanted pregnancy, sexually transmitted diseases including HIV/AIDS, as well as other crippling physical repercussions. In some communities, the victims bear the shame and stigma of this crime and are abandoned by their families and socially ostracized. Survivors are often unable to think about their future because they are haunted by a past that has never been officially acknowledged or addressed.

A rape survivor from Bosnia captured the enduring consequences when she said: “They have taken my life without killing me.”<sup>9</sup>

Sexual violence tears the fabric of families and communities, directly inhibiting peace and stability even after peace agreements have been signed and the guns have fallen silent. If unaddressed, it leaves a legacy of poverty, marginalization, and continued violence that makes peace less possible.

When perpetrators are allowed to walk free, it undermines the Rule of Law as well as public trust in government. Though the scars may not be evident, I have seen the long-term effects of sexual violence on the political and economic stability and unity of post-conflict communities. We must therefore treat sexual violence with the gravity it deserves if we hope to restore lasting peace to countries emerging from conflict. Two recent trials illustrate that all too often, these crimes are not handled with the same sense of urgency, or the same level of political resolve and resources, as other international crimes.

The Extraordinary Chambers in the Courts of Cambodia (or ECCC) made history earlier this month when it found two key leaders of the Khmer Rouge guilty of crimes against humanity and sentenced them to life in prison. It has taken more than a decade to bring these senior Khmer Rouge leaders to justice.<sup>10</sup> However, they must still stand trial for charges of forced marriage and rape. The first sentence handed down delivered a partial victory, but we continue to wait for justice

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<sup>9</sup> Statement from the Special Representative of the Secretary-General on Sexual Violence in Conflict to the U.N. Security Council (Apr. 14, 2011), <http://www.un.org/sexualviolenceinconflict/wp-content/uploads/2012/07/Statement-to-UN-Security-Council-14-April-2011.pdf> (last visited June 15, 2015).

<sup>10</sup> *Id.*

for the full spectrum of crimes, including forced marriage and sexual violence, committed during the Khmer Rouge regime.

In the Democratic Republic of the Congo (DRC), despite dramatic recent progress in terms of political will and action, evident in the presidential appointment of a Special Representative on Sexual Violence and Child Recruitment, the establishment and engagement of a Special Commission on Sexual Violence in the Senate, and training and Codes of Conduct on sexual violence for the national army, there are still major capacity constraints and obstacles to justice. For instance, a trial of thirty-nine soldiers suspected of committing 127 rapes in Minova in 2012 resulted in just two convictions for rape. Thirteen other accused soldiers were cleared of all charges.<sup>11</sup> More than 50 survivors bravely came forward to testify.<sup>12</sup> However, the sentences handed down did not vindicate the experience of those victims, owing to challenges in positively identifying the assailants.

In addition to the challenge of successfully bringing the perpetrators to justice, there are also challenges in delivering justice to the victims, specifically in terms of reparations and redress. Prosecuting sexual violence in a conflict-affected setting like the DRC presents numerous difficulties in terms of evidence-gathering and handling. Such issues are addressed in the new U.K. *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, which sets out basic standards of best practice in this regard.<sup>13</sup> But the most survivor-centered form of justice is reparations, and this must be seen as a vital link in the justice chain. The United Nations has

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See generally INTERNATIONAL PROTOCOL ON THE DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT (June 2014), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319054/PSVI\\_protocol\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf) (last visited June 15, 2015).

recently launched its “Guidance Note on Reparations for Conflict-Related Sexual Violence” to give greater prominence to this issue.<sup>14</sup> It may never be possible to make amends for this crime, but the symbolic power of awarding reparations is to recognize that the victim is a holder of rights that will be enforced.

To provide just one poignant example of incomplete justice: In 2006, a women’s collective in Songo Mboyo, DRC, successfully secured judgment for mass rape. Damages were awarded. For a time, whenever these women heard a helicopter overhead, the rotor blades loudly chopping the air, they looked up with hope that compensation was coming. But that was eight years ago. Today, some of the women who were awarded compensation have died waiting. The others no longer look up at the sky with any expectation of justice. For them, the judgment they fought so hard to obtain did not deliver *justice*, only *law*.

In Syria and Libya, we still don’t know the full extent of sexual violence perpetrated by the parties to conflict, despite hundreds of survivor testimonies. In Iraq, disturbing information on sexual violence, including forced marriages imposed by the Islamic State militants, is emerging. And in Nigeria, a terrorist group like Boko Haram can abduct hundreds of girls from their schools with impunity. U.N. teams and NGOs find themselves without the necessary resources, access or physical security to gather data on sexual violence in real time. Too often this information is lost in the so-called “fog of war,” and future prosecutions and strategies to help survivors suffer as a result. In order to fully prosecute these crimes, deliver justice to victims and complete the historical record, we need to gather information on sexual violence whenever and wherever

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<sup>14</sup> Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence (June 2014), <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf> (last visited June 15, 2015).

it occurs, not decades after the fact when the trail has gone cold, the perpetrators have long since fled the scene of the crime, and the survivors have all but abandoned the hope of seeing justice in their lifetime.

We are still a long way from transforming the culture of impunity for sexual violence into a culture of deterrence, but we are living in a time of unprecedented momentum in this fight.

Throughout history, survivors have suffered the shame, stigma and taint of rape. But the spotlight of the International Criminal Court, the U.N. Security Council and its sanctions committees, as well as other national and international bodies, is finally trained squarely on the perpetrators. It is time they were held accountable so that survivors, their families and communities can begin their road to recovery.

In order to end impunity once and for all, we need to provide special training for police, judges and prosecutors so they can build effective cases and move them expeditiously through the justice system. We must provide the necessary resources for gathering and preserving information on sexual violence in real time. All nations need political will, a sound legislative basis, conducive rules of procedure and evidence, and a commitment to gender balance on the bar and bench—as well as on the frontlines of law enforcement—to comprehensively address this scourge. This approach will help national and international courts and tribunals to secure convictions, including convictions of high-level leaders who command, condone or fail to condemn sexual violence by their subordinates.

The narrative surrounding sexual violence has changed substantially in recent years, and most judicial representatives understand that examining these cases is important. Now they are asking: How should we charge these offenses? How can we protect victims and witnesses?

How can we safely and ethically collect and preserve evidence? This presents an opportunity for the global legal community to provide specialized training and share best practices in the investigation and prosecution of these crimes. Providing specialized training for the judicial system and the resources for data collection in live conflicts will improve the quality of prosecutions on both the international and national level and establish a more effective deterrent against sexual violence for the future.

My office is mandated by the U.N. Security Council to help the U.N. system improve its monitoring, analysis and reporting on conflict-related sexual violence, which in turn will support the development of timely, targeted and effective efforts to provide services for survivors and hold perpetrators to account.<sup>15</sup>

International criminal tribunals are important complementary mechanisms, but we must focus primarily on increasing *national* capacity to address this issue. We must strengthen domestic legal systems so that they are more responsive to sexual violence survivors and can treat these crimes swiftly and seriously. Prosecution is also about prevention. Therefore, it is imperative that justice is not only done, but also seen to be done by the local community as a whole.

Ending impunity for rape in war will help promote other tangible results for reconstruction efforts in conflict-affected countries. Improved access to justice will provide the basis for more durable peace and reconciliation efforts in post-conflict societies. It will help restore dignity to survivors and their families. It will strengthen the Rule of Law in conflict-affected states, as well as improving the public's faith in government to hold perpetrators accountable.

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<sup>15</sup> *About the Office*, OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON SEXUAL VIOLENCE IN CONFLICT, <http://www.un.org/sexualviolenceinconflict/about-us/about-the-office/> (last visited June 16, 2015).

Improving the quality and quantity of prosecutions will raise the cost of rape and thereby establish a more effective deterrent.

My home country of Sierra Leone is a testament to what judicial systems can achieve when they commit to prosecuting sexual violence and delivering reparations—both individual and collective, material and symbolic, including guarantees of non-repetition, to survivors.

During my country's civil war, the Revolutionary United Front (or RUF) and the Armed Forces Revolutionary Council became infamous for gender-based crimes including widespread rape, sexual slavery and forced marriage. An estimated sixty-five thousand women were raped during the eleven-year conflict. During the darkest moments of this conflict, we thought we would never know peace again. When the war finally ended, the Special Court for Sierra Leone as well as the Truth and Reconciliation Commission were established and began seriously examining crimes, including sexual violence.

The Prosecutor of the Special Court for Sierra Leone charged three RUF members with one count of rape as a crime against humanity; one count of sexual slavery as a crime against humanity; one count of the crime against humanity of other inhumane acts under which forced marriage was considered; and one count of outrages upon personal dignity. The RUF trial judgment delivered the world's first convictions in an international tribunal for the crimes against humanity of sexual slavery and forced marriage. I was honored to participate in the proceedings as an expert witness on forced marriage and gathered hundreds of testimonies from victims of horrendous assaults. I experienced first-hand the shockwaves these convictions sent through the judicial system and the whole of Sierra Leone. They did more than merely set a legal precedent. They changed our national discourse on rape, including the need to empower survivors and shine a spotlight on the perpetrators.

No one embodies this transformation better than the women I worked with in the district of Kailahun. These women were survivors of wartime sexual violence who once faced a grim, uncertain future. But thanks to small grants from NGOs, they were able to open small businesses and begin their road to recovery. I have kept in touch with those women, and the change I have seen in them and their community is nothing short of extraordinary. Today they are not beggars, but business owners. They are not outcasts, but activists. Many of the women have been so successful that they have hired staff, including former combatants, to work for them. As we see so often, in many corners of the world, women's economic empowerment also translated into social and political power. In the 2012 elections, Kailahun fielded the highest number of female candidates for political office of any district in Sierra Leone.<sup>16</sup>

In just twelve years, my country has gone from violent upheaval to a place where women are successful business owners, community leaders and role models. This is how real change happens: In every village, every town, and every city, children see, day in and day out, that women are valuable members of society whose rights and aspirations are respected.

Just a few months ago, the United Nations closed its peacebuilding mission in Sierra Leone after 15 years.<sup>17</sup> I was honored to accompany the United Nations Secretary-General to the closing ceremony. Sierra Leone had—prior to the current Ebola crisis—one of the fastest-growing economies in West Africa, and was becoming a center for

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<sup>16</sup> *Power to the Women of Sierra Leone*, CHRISTIAN AID, May 2013, at 1, 2, available at <https://www.kpmg.com/eastafrica/en/IssuesAndInsights/ArticlesPublications/Documents/Sierra%20Leone%20case%20study%20on%20women%20in%20leadership.pdf> (last visited June 16, 2015).

<sup>17</sup> Nina DeVries, *U.N. Peacekeeping Shutting Down in Sierra Leone After 15 Years*, VOICE OF AM., Mar. 5, 2014, <http://www.voanews.com/content/un-peacekeeping-shutting-down-in-sierra-leone-after-15-years/1864711.html> (last visited June 16, 2015).



foreign investment and trade.<sup>18</sup> The political system has stabilized and we've had several successful elections since the conflict ended in 2002.<sup>19</sup> From hosting a peacekeeping mission, we are now a nation that contributes troops to peacekeeping efforts in other parts of the world. The empowerment of survivors through successful judicial processes and socially transformative reparations schemes has been key to my country's development. I know how daunting reconstruction can be, but I've also seen the immeasurable benefits to society that come from confronting the realities of wartime atrocities, including sexual violence, head-on.

When we fail to deliver justice to survivors, we send a message that their suffering is insignificant, and when the history books are written about what happened during war, their stories are left out and lost to future generations. When we deliver justice for conflict-related sexual violence, we help to write a more accurate narrative of wartime atrocities that doesn't diminish the experiences of some survivors or give less credence to their trauma. Justice can be a transformative force that helps survivors move from marginalized victims to active participants in reconstruction and reconciliation.

Most importantly, justice sends a powerful message to both survivors and perpetrators around the world: to survivors, it says that what happened was not your fault and that you will not have to bear this suffering alone. To perpetrators, it says: No matter how far you run, no matter where you hide, and no matter how long it takes, you will be called to account.

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<sup>18</sup> Carolyn Dunn, *Ebola Virus Continues to Fuel Sierra Leone's Economic Free Fall*, CBC NEWS, Jan. 11, 2015, <http://www.cbc.ca/news/world/ebola-virus-continues-to-fuel-sierra-leone-s-economic-freefall-1.2896919> (last visited June 16, 2015).

<sup>19</sup> *U.S. Relations with Sierra Leone*, U.S. DEP'T OF STATE (Jan. 22, 2014), available at <http://www.state.gov/r/pa/ei/bgn/5475.htm> (last visited June 16, 2015).

If our final goal and destination is justice for all survivors, prosecution for all perpetrators, and deterrence for the future, then the road before us is long. It will demand the courage and conviction of all members of society, from journalists to judges, from religious leaders to community activists, from presidents to police officers and prosecutors.

I am deeply moved by the courage of the people sitting in this room to pursue justice, often against overwhelming odds. I am inspired to see so many talented and humane professionals applying their efforts to end the use of sexual violence, including as a tactic and weapon of war. In the spirit of Katherine Fite, we must work together to deliver justice for what has been called history's oldest, most silenced and least-condemned crime of war.

I thank you for your commitment and partnership in the fight to end rape in war and consign it—*once and for all*—to the pages of history.



## Reflections

David Scheffer\*

In addition to my professorial duties at Northwestern University School of Law, I am the U.N. Secretary-General's Special Expert on U.N. Assistance to the Khmer Rouge Trials, and I have been in that position since January of 2012. There are some individuals in the room who have great experience and exposure to the Extraordinary Chambers in the Courts of Cambodia (the "Court"). Obviously, Nicholas Koumjian, the International Co-Prosecutor who came on board within the last year, is here with us. Andrew Cayley, who had several years of experience as the International Co-Prosecutor, also is here. Hans Corell, the former U.N. Legal Counsel who was head of the U.N. negotiating team in the late 1990s and early 2000s is with us, as is Kip Hale, who worked in the International Co-Prosecutor's office with Andrew Cayley. So all of the wisdom is out there among us, and I will just do the best I can here.

I want to provide you with an update on where things stand presently with the Extraordinary Chambers in the Courts of Cambodia. My responsibilities are basically threefold in this job. One is obviously keeping up with the substance of the Court at all times in terms of the motion practice and the judgments, *et cetera*, and working with U.N. lawyers in overseeing the U.N. component of the Court. This is a joint venture between the United Nations and the Royal Government of

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Cambodia. We have a treaty relationship with Cambodia for the Court, but it is a Cambodian court that is internationalized with staff, judges, prosecutors, and administrators from the United Nations, as well as foreign defense counsel. But there is also a very heavy Cambodian component to the Court to the extent that the Cambodian judges are in the majority, but there are two co-prosecutors, one international, one Cambodian. There are two co-investigating judges, one international, one Cambodian. So it is a unique judicial entity. All of you have been reading about it. It has been debated for years, but today I intend to update you about it.

With respect to the cases, the Court is finished with Case 001. Kaing Guek Eav (alias “Duch”) was convicted for crimes against humanity and war crimes and is serving life imprisonment. I have visited him in Kandal prison, south of Phnom Penh on two occasions. He is still relatively young; he was convicted at sixty-nine years of age. I suspect he will be there for quite some time in his life.

Regarding Case 002, phase one, Khieu Samphan and Nuon Chea were convicted on August 7, 2014, with a sentence of life imprisonment, which is now on appeal. The reparations that were confirmed in the judgment for phase one of Case 002 are quite unique, path-breaking, interesting to read, and academically interesting to study, but these are reparations which are not cash payments to victims. They are basically projects like setting up memorials, addressing mental health rehabilitation, and various activities of remembrance. There is a tremendous amount of trauma that still pervades the Cambodian population and there are almost no mental health facilities in Cambodia. So there is a lot of focus on that issue by non-governmental groups. One reparation project also distributes the judgment in Khmer to as many villages as possible throughout the country. Sources of support for these projects came from the German Foreign Ministry, the Swiss Development Agency, and private donors. So that took a lot of work, from October 2013 through March 2014. I got quite involved with

that, including much lobbying with governments and other entities to generate those voluntary contributions.

One last point on reparations: The Trial Chamber ruled in 2013 that by October 2013 it has to be informed of the exact character of the projects and then the Trial Chamber would be in a position to approve those projects, so that they are a part of the actual judgment that is delivered in the event of a guilty verdict. But the project would only be activated if there are enough funds pledged by March 31, 2014 actually to cover those reparations. So the challenge was to get enough money pledged by March 31, 2014, and fortunately we achieved our objective. It was a real success story on the issue of reparations.

The NGOs are now gearing up for phase two of Case 002. The NGOs have learned their lesson not to leave it to the last moment, and there is already a tremendous amount of planning for reparations that would flow out of phase two if the Court renders a guilty verdict. If there is no guilty verdict, there will be no reparations.

The Court is now launching into the trial proceedings of phase two of Case 002. International Co-Prosecutor Koumjian has explained phase two in terms of its complex range of crimes that are now before the Court.

Case 003 and Case 004 are under very active investigation, which cannot be disclosed publicly yet. But it is happening, and you will hear about it in the future as Closing Orders and other proceedings occur.

The NGOs in particular—and I hear this every time I am there—always grate at this because they want transparency. They want to know what is going on, and the problem is, it is an investigation. The Court cannot be that transparent at this stage. But I think, ultimately, you are going to see a lot of information emerge. There will be the

possibility of summons and arrest warrants and charging and finally either indictments or dismissals, so stay tuned. And then there will be no further cases under investigation. The Court's mandate will end with Case 004.

Public attendance at the Extraordinary Chambers in the Courts of Cambodia is impressive. These numbers far exceed the totality of all attendees who visited all of the proceedings of all the other war crimes tribunals, as well as Nuremberg and Tokyo. For Case 001, *Duch*, 36,493 people attended the trial proceedings. For Case 002 and all of its hearings since January 2011, a total of 113,830 visitors, mostly Cambodians, have attended. The Court's public seating holds about 320 people at a time. So there is a total as of 30 June 2014 of more than 150,000 Cambodians who have witnessed these proceedings, and it is fascinating to watch them. It ranges from high school students in their uniforms to elderly people to Buddhist monks. You name it; they are all there. And the Cham Muslims arrive in large numbers in the courtroom; they are attending in significant number to witness the trial in phase two of Case 002, where genocide charges will be litigated.

The outreach program number is impressive, standing today at about 93,000 Cambodians. This is where the Court is not in session, but they are still bringing Cambodians in for lectures into the courtroom, so that is a large number of visitors absorbing a sort of a classroom experience. Then the Court staff have held 58 lectures around the country, embracing about 86,000 Cambodians in that process.

There are major issues that are confronting the Court. None of these constitute a crisis. These are just issues that are popping up. There is an interesting motion for disqualification that has been filed recently by defense counsel for some of the Trial Chamber judges in phase two of Case 002, the motion basically being: "If you sat on phase one, how can you possibly be sitting on phase two?" There have been a lot of

arguments around that. So the Court is going to have to deal with that motion for disqualification.

Judge Silvia Cartwright of New Zealand recently retired from her judgeship on the Trial Chamber. Now she is going to engage in investigations of atrocity crimes in Sri Lanka. She has been succeeded by Judge Claudia Fenz of Austria, who was the Trial Chamber reserve judge since the beginning of trial proceedings at the Court. The United Nations is very close to announcing who will replace Claudia Fenz as the reserve judge.

In the judgment on phase one on August 7, 2014, there was a split decision between the national judges and the international judges on the merit of insisting that certain senior Cambodian officials appear as witnesses, not as defendants, in phase one. They refused to appear in the courtroom. But in the end, that difference between them did not override reaching judgment on guilt or innocence with respect to the two defendants. Nonetheless, academically, it is a very interesting split decision to look at. It is an issue that defense counsel likely will bring up on appeal in phase one. So it will go to the Supreme Court Chamber for further consideration.

The Court is now into the appeal phase on phase one. It is usually an eighteen-month process, and I think one of the great challenges—which I was exploring a couple of weeks ago in Phnom Penh—was whether once the motion practice is finished on appeal, which is usually about six to seven months long, is there any way for the judges to reach their decision, not in a typical twelve-month period, but can we perhaps be looking at eight or nine months? Would that be possible? A primary reason for the concept of accelerated consideration at the appeals level is the health of the defendants, an issue that always remains problematic. We would like to get an appeals judgment as early as feasible, in accordance with due process, given the advanced ages of the defendants.



The international co-prosecutor, Nicholas Koumjian, mentioned yesterday his motion to amend the Internal Rules. Mr. Koumjian, along with his Cambodian colleague, put forward a motion earlier this year for consideration by the plenary of the Court to amend the Internal Rules, so as to allow a far easier reduction in the number of crime sites to be investigated without modifying the charges. In the original submission on this point, there are a number of charges with a number of crime sites associated with those charges, and this would give the Co-Prosecutors the ability to say: “Well, look, we can reduce a certain number of crime sites and get the approval of the judges as to that proposal, without violating civil law procedures with respect to that type of initiative.” I will not go into it in detail, but it is a very interesting motion, and I think the judges are having a very constructive time discussing it. We will see the outcome of that very shortly, I believe.

Then, finally, defendants Khieu Samphan and Nuon Chea for the entire prosecution of Case 002 so far do have a clean bill of health. They are healthy. Doctors examine them regularly.

There are potential summons against additional suspects to appear before the International Co-Investigating Judge in Cases 003 and 004. Obviously, once these summonses are issued, the question becomes whether these particular suspects actually respond to them and whether the judicial police actually follow through to enforce any subsequent arrest warrants, if the latter are required. The U.N./Cambodia agreement and the ECCC law state that it is the judicial police that enforce arrest warrants, and so we have to wait for all of that to unfold.

The big one is the potential disagreement between the Co-Investigating Judges and/or the Co-Prosecutors in Case 003 and/or Case 004. Notice the “and/or.” There are procedures in the constitutional documents of the Court to deal with these disagreements. So the procedure is

set and the question is: Will there be disagreements? I think it is more complicated than anyone assumes, namely complicated in the sense that you may see some disagreements, but you also may not see some disagreements. Do not assume that everything is going to lead to disagreements. There is a lot of work being done within the Court on this issue, and do not think that Case 003 and Case 004 are so synonymous that they are thinking about both cases as exactly identical. There are differences among these cases. There are differences among the suspects, so do not assume that everything is going to be in dispute.

And then, finally, secondments for the Office of the Co-Prosecutors and the Office of the Co-Investigating Judges. Nick Koumjian could speak at much greater length about this, but since February or March 2014 I have been reaching out for seconded lawyers and investigators. At the American Bar Association, Kip Hale was just fantastic on this, getting the word out to American lawyers, saying: “If you are interested in being seconded to the Court to assist the judges or the prosecutors, let us know.” Now, seconded means someone has to cover all of your expenses, salary, and benefits. It is not going to be the Court. It is not the United Nations. We are not paying. Someone else pays, so that is the big caveat. Your employer says, “Go off and do good things for six months, and I will cover you.” This narrows the field considerably.

Secondment means secondment, period. I had to put that in bold in the note. But guess what? Which is the one country in the world that just flooded us with applications? Australia. We worked through the Australian Mission to the United Nations in New York and then the Australian Law Society, which is comparable to the American Bar Association, and they put out the notice. And unfortunately, it was my e-mail address they put in for everyone to respond to, so I received hundreds of e-mails from Australia. I finally said, “Do they not want

to work on their jobs? Is there not any work in Australia? What is this?"

But just hundreds of lawyers in Australia wanted to work for the Court. Well, we got back to them and reminded them, "You may not understand what secondment means." Anyway, that effort is in process, and I think we will have some progress on that front soon.

The big question everyone asks is "projected timelines." The donor governments always ask this question. I just want to show it to you [on powerpoint slides]. You will see that there are several years ahead of us with this Court, which is the funding challenge, of course. But this is the most realistic assessment of getting this work accomplished. Of course, on Cases 003 and 004, if we do get to a Closing Order that is an indictment that moves towards trial on either or both Cases 003 and 004, then one is really talking about a Court that potentially will have work stretching to 2020 or 2021 in order to deal with those cases.

When one examines the budget, it ultimately declines because the Co-Investigating Judges and the Pre-Trial Chamber would be phased out. There is a fair amount of infrastructure removed once we get through the investigative stage of the Court's work. So one can start to look at a budget line that comes down a bit, but it is still going to be up there to get through phase two of Case 002 and then deal with whatever is there for Cases 003 and 004.

From last summer until April 2014, we worked very hard in New York to break the mold, and the U.N. General Assembly finally approved, in April 2014, what we call "commitment authority," but which is also known as "subvention." The Special Court for Sierra Leone, I think, uses the word "subvention" in terms of what it achieved with the General Assembly. Ours is a little bit different. It is called "commitment authority." We received a commitment authority of \$15.5 million, which means that if we are short on the budget, we can draw from

that \$15.5 million as if it were a (repayable) line of credit to cover the cost of the Court in any particular month of the fiscal year at the United Nations. This is just a one-year facility. It has to be renewed in order to continue to be available. So we are gearing up now to return in November 2014 to obtain a renewal of the commitment authority, but here is a twist. As our good friends in the Fifth Committee said to us: “Well, yes, we are going to give you \$15.5 million, but do not use it.” In other words, “We want you to raise everything voluntarily. This is sort of your backup guarantee, but of course, we do not want you to draw on your guarantee,” because if we draw on the \$15.5 million, the United Nations has to sacrifice that money somewhere else. It is not new money. Some other program has to get cut, and so we are still under enormous pressure to raise the necessary funds voluntarily. But we have sort of this security blanket, which gives us a foundation to work with and also the support of the member states of the United Nations for what we are doing, and it is extremely helpful to have that commitment authority backing us up because it actually incentivizes countries to fund us. It is a confidence-building measure.

Also, the major reason we sought the commitment authority is that it enables the U.N. Controller at the beginning of the fiscal year to sign off on one-year contracts for the international staff because the United Nations then knows that it can back up the payments, if necessary. If we have not received solid pledges, the U.N. cannot sign those one-year contracts. That was a huge problem in 2012 for the Court when I came on board, namely not being able to sign those one-year contracts. Now the U.N. Controller can sign one-year contracts. That helps stabilize the staff enormously.

This year, we have started issuing quarterly completion plans, which is a new procedure. It used to be that we would tell the donors every two years what is happening with the Court, what is our timeline, and what are the projections. Now we do it every quarter. It is a public document. It goes up on the ECCC website, and it is a very detailed

plan. And the point is it is not prepared by the administrators of the Court. It is prepared by the judges and the prosecutors who inform us of what they see as the timeline of their work. The substance, the guts of this report, the facts of this report, come from the real players. The judges and the prosecutors are the ones who are putting this together in terms of its empirical value, and this is of tremendous benefit to the donors. They like seeing this. As long as we do it on a quarterly basis, it is a tremendous tool with the donors to sustain their confidence in the work.

We had visits of U.N. officials and representatives throughout the year. Such visits were very helpful. I joined the U.N. legal counsel and the U.N. Controller in January 2014 during their visit to Phnom Penh, including the Court, diplomats of the major donors, and government officials. I joined with New York diplomats of the major donors during their visit to Phnom Penh in late June. I was just there with Steve Mathias, the U.N. Assistant Secretary-General for Legal Affairs, in August. All of that is extremely helpful back in New York to have that sort of eyes-on view of everything.

Finally, we have revised the budget requirements for 2015 because of the ongoing investigative work and the demands, particularly in Co-Prosecutor Koumjian's office, to handle phase two of Case 002. So we have to work that through with the donors now. That is the next huge step.

We have basically stabilized the funding of the Court for the present. So all of this talk about financial crisis, *et cetera*, really is a historical statement, at least for now. In 2012, the crisis was in the international budget, and all of this was basically, to be quite frank with you, it was simply because Japan pulled out. Japan was hit hard by the tsunami in 2011 and they do not fund in the large amounts of money that they used to. And so when that Japanese money was pulled from the international budget in 2012, we had a gap of at least \$6 or 7 million

that had to be filled with new donors. That created the crisis in the international budget, so that took a lot of work to get through. But we stabilized it by the end of the year.

And then in 2013, the Japanese money that had been allocated for the national budget was pulled. So again, withdrawal of the Japanese money created the crisis we had in the much smaller national budget. We spent a long time insisting with the Cambodian government that they pay it all, and the Cambodian government said, “Wait a minute. You are changing the rules of the game for us. We always paid operational costs out of our budget, and then we had foreign donors like Japan paying the salaries, and now you are saying we have to pay the salaries.” And we said, “Yes, under the agreement, you have to pay the salaries, or find foreign donors who will.” So we went through a tough year in 2013, but we finally came out of it, and in the fourth quarter, the Cambodian government agreed to pay the fourth-quarter salaries and then they agreed to pay the first quarter of 2014 salaries of \$1.1 million. But we struck a deal with them that then we would work with them to find foreign donors for the second, third, and fourth quarters, which we have done. Norway has covered the second quarter. Sweden covered the third quarter, and we are working on the fourth quarter of 2014.

So then commitment authority was achieved, and then the final point that, obviously, it requires a constant process of fund-raising and also dealing with individual governments’ fiscal years, with many different fiscal years to contend with. Fundraising for a tribunal of this character is a rolling process. One never starts the calendar year saying, “Oh, I have got all these pledges now recorded.” No, the pledges come in throughout the U.N.’s fiscal year, depending on the fiscal year calendars for each government.

I wanted to highlight the major funders, historically, since 2006. Japan is still at the top with 40 percent total on the international budget,

30 percent on the national, but just remember Japan is now funding at lower annual amounts. In fact, we have not received any money from Japan for 2014 yet, and we are still working on that. The United States is now the major funder of the Court among all the other major funders: Australia, Germany, Cambodia (I put in Cambodia because of their contribution to the national budget), the United Kingdom, the European Union (this is a little deceiving because we know the European Union is going to come through for us at the end of this year with a very large amount of money for both national and international budgets, but their decision-making process in Brussels has delayed the process), France, and then Sweden, which has become a major funder to the extent that it is now in the Principal Donors Group of the Court and is a tremendous force behind making the Court work and supporting it. Norway is also competing with Sweden a little bit but still has not caught up.

New funders that we have brought in since 2012 are: the Republic of Korea; Denmark, Finland, New Zealand, Austria, Malaysia, Liechtenstein, Qatar (which is the first Arab country to contribute), and Chile (the first South American country to contribute). My name is listed as a donor, not to promote myself at all but to demonstrate to donor governments and to potential donors that I put my money where my mouth is. And so I use it as a marketing device. There is no other private individual donor on that list yet, but it is my goal to add some additional names!

Other potential funders on deck are Kuwait, India, and Indonesia. We are working them extremely hard. Two out of three of those look extremely promising.

The 2014 budget is \$23.4 million. We have a subtotal outstanding of \$12.3 million, but then, of course, we have a lot of pledges that need to be paid in. We know the money is coming. It is just what is your

cash in the bank versus what your pledges are. We have a pledging shortfall of \$6.8 million, but we know of future pledges that should be announced.

On the national budget, the donors have been Malaysia, Norway, and Qatar. These contributions from Malaysia, which was the first ASEAN country to contribute in recent years, and then Qatar, the first Arab country, are small, but they broke the ceiling. It was very tough to break those ceilings with those two groups of countries, but now we have broken it, and we use it as leverage in our negotiations. And countries like Qatar said, “We are giving you \$20,000 this year. We want you to know we are here for the long term. It will be more in later years, but this is a beginning.” The Chile pledge, the first one from a Latin American country, is allocated for the national component.

Thank you very much.





## **Luncheon Keynote Address**

**Morris Davis\***

It's an honor to be here. Thank you to Michael Scharf, to David Crane, and to my former classmate and bowling partner Jim Johnson. Thank you for having me.

What I'd like to do is try to run through a little bit of where we have been, where I think we are now, and where I would like to see us go in the future, and then hopefully leave some time at the end for some discussion.

I resigned from the military commissions, which didn't sit well with the Bush administration. In fact, normally when you leave a military assignment, you don't get a bonus; you get a medal. When I was submitted for a medal after serving as the chief prosecutor for more than two years, the medal was turned down. They said I served dishonorably because I resigned over the issue of torture, which didn't sit well with administration's senior leadership. After I retired from the Air Force, I went to work at Congressional Research Service. Now that I was no longer on active duty, for the first time in twenty-five years, I got to actively participate in the political process.

That was October 1, 2008. The presidential election was coming up a couple of weeks later. I had put an Obama sign in my front yard. I live in a gated community outside of Washington, D.C., in the Virginia suburbs. One of my neighbors came over one night, doused my Obama sign in lighter fluid, and set it on fire. So I put up another one. I went door-to-door campaigning for President Obama, and no one was happier to see him win than I was.

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\* Colonel, U.S. Air Force (ret.). Assistant Professor of Law, Howard University School of Law. This publication is based on Davis' keynote address on August 26, 2014 at the Eighth International Humanitarian Law Dialogs held in Chautauqua, New York.

I started working at Congressional Research Service as head of the Foreign Affairs, Defense, and Trade Division, which is—if you're not familiar with CRS—a tremendous organization. My division was the biggest, about one hundred folks, mainly Ph.D.s in some of the most esoteric areas you can imagine. But it was fun to arrive at work in the morning, get a cup of coffee, walk around the office, and see what people were working on.

What was the first thing President Obama did when he took office? The first thing he did was sign the Lilly Ledbetter Act. The second thing he did was sign the order to close Guantanamo. (That stumps everybody; don't feel bad.) He signed the order and said Guantanamo would be closed within one year of that date, in January of 2009. I was in my new job at CRS then. Life was looking pretty good—I was a retired colonel, and I was a senior executive in the Civil Service.

Then, that summer, things began to backtrack. By the fall, President Obama had begun to waffle on his commitment to close Guantanamo, and Attorney General Eric Holder announced that he was reconsidering the use of military commissions. That's when I wrote an op-ed in the *Wall Street Journal* criticizing military commissions.<sup>1</sup> I was fired for writing the op-ed, and I've been fighting in federal court now for five years to try to get my job back.

In 2009, the President gave a speech at the National Archives.<sup>2</sup> He had signed the order to close Guantanamo in January 2009 and he gave the speech at the National Archives in May 2009, where he talked about how our values and our principles are our strongest national

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<sup>1</sup> Morris Davis, Op-Ed, *Justice and Guantanamo Bay*, WALL ST. J., Nov. 10, 2009, available at <http://www.wsj.com/articles/SB10001424052748704402404574525581723576284>.

<sup>2</sup> Remarks by the President On National Security, 5-21-09, <https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

security assets. I don't think anyone in this room would disagree with the President's rhetoric. When I became the chief prosecutor for the Guantanamo military commissions in 2005, I was the third to do so. The military commissions are currently on their sixth chief prosecutor. If your team has had six head coaches in thirteen years, your team probably isn't doing very well.

The first talk that the Pentagon allowed me to give was at Case Western in the spring of 2006. I started writing and they let me do op-eds touting the military commissions. I wrote a law journal article. I stood on the steps of the old courthouse at Guantanamo and talked to journalists, back when I was the leading advocate for Guantanamo and for the military commissions.

A couple of years later, I resigned, and I became one of the leading critics. I went from standing on the courthouse steps at Guantanamo, defending the process, to standing outside the White House with protestors, arguing to close Guantanamo, and writing op-eds and giving talks to close it. And I'm often asked, "Well, which is the truth? You can't be on both sides of the equation. Which one is the truth?" The truth is they both are, because I believed when I took the job that we were committed to having full, fair, and open trials. I think there were people above me in the chain of command, particularly General John Altenburg (whom some of you may know), who really was committed to trying to do this right, in a credible way.

General Altenburg retired two years later and was replaced by Susan Crawford, a political appointee (Dick Cheney's former Inspector General at the Pentagon when he was Secretary of Defense) who became the head of the military commissions. In hindsight, to me, that was when the wheels began to come off the cart; by that summer, in response to my policy of not using any evidence that was obtained by torture, I was being told: "Look, President Bush said we don't torture, and if the President says we don't torture, who are you to say that we

do? This information that you haven't been using, you need to get it out and use it and get these guys convicted and get the show on the road." That was when I decided it was time to resign.

I had an article come out this summer on the United States and international humanitarian law—my view of what we did to build up international humanitarian law and what we have done since 9/11 to tear it down.<sup>3</sup> This is what I want to focus on today, and here is why it concerns me. The American Red Cross did a survey a couple of years ago, and the results (which ought to be alarming to everyone in this room) showed that six out of ten school-age kids say that torture is okay. More than half said that if the enemy kills American G.I.'s (like the enemies that we're facing today that behead people and don't abide by international humanitarian law) then it's okay for us to retaliate and do the same to them. During the Bush administration, a majority of Americans were opposed to torture, and they were opposed to Guantanamo and indefinite detention. It would have seemed that you'd expect the numbers to get even better during the Obama administration, but they've gotten worse.

The average age of my students is probably about twenty-five, and I have a daughter who is twenty-five years old. All they have known is a post-9/11 America. They don't remember a 9/10 America; they remember a 9/11 America. On the way here to Chautauqua, at the airport, I did the thing where you put your hands up, and the thing spins around you. Apparently I did something wrong, because when I came out, the guy put the gloves on and gave me a pat down. I'm old enough to remember when, if somebody felt you up at the airport, it was called a sexual assault, not pre-boarding. But this has become the new normal. It is all the younger generation has ever known. The

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<sup>3</sup> Morris Davis, *The United States and International Humanitarian Law: Building It Up, then Tearing It Down*, 39 N.C.J. INT'L L. & COMM. REG. 983 (2014); Howard Law Research Paper No. 14-4.

statistics from the Red Cross study are what I think we have to be concerned about.

We'll go back to Henry Dunant. While we were fighting the Civil War, Dunant was in Italy at the Battle of Solferino. He wrote his book, *A Memory of Solferino*,<sup>4</sup> which led to the creation of the International Committee of the Red Cross (ICRC), which led into World War II, which was a major life-changing event that reshaped the direction of our country and led to the Geneva Conventions.

Two notable anniversaries have happened over the past week: one was the 150th anniversary of the signing of the first Geneva Convention, thanks to Henry Dunant; the other anniversary was the 200th anniversary of the British burning down the White House. We've had two notable events in the last week. Next year, we have the 70th anniversary of Nuremberg coming up.

As to the Geneva Conventions, who led the effort to create this body of law, international humanitarian law, in the post-World War II era? The United States. We were the ones advocating for this body of law. In fact, in 1955, when it was submitted to the Senate for ratification, the State Department sent Robert Murphy over, and he talked about the Geneva Conventions and why it was in our interest as Americans for the Senate to ratify it. As he said, they were principles that we adhered to anyway, and by ratifying the Geneva Conventions we were bringing the rest of the world up to the higher standard that America represented. The Senate ratified it and it became law.

For those of us who served in the military, the Geneva Conventions were almost like the Bible. From the time you arrived at basic training until the day you retired, you were taught the Geneva Conventions. There is a really good book, if you're interested in Guantanamo, by

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<sup>4</sup> HENRY DUNANT, *A MEMORY OF SOLFERINO* (1862).

Karen Greenberg called *The Least Worst Place*. It's about the first hundred days at Guantanamo, the period reflected in the photos showing guys in orange jumpsuits kneeling in front of what look like dog cages. The military, in the absence of any other rules, applied the Geneva Conventions during those days. Actually, as bad as the pictures look, that was one of the more humane periods. Later on, those in the administration who weren't happy with the information that was coming out of Guantanamo said, "We've got to take off the gloves. It's a new day, new rules. We've got to get more information." But before that, the Geneva Conventions were applied. Does this matter?

Yes, it matters. I remember going over to the Middle East during the first Gulf War, and—if you watched it on television, you know—the Iraqis surrendered by the tens of thousands. The ground war was over in about one hundred hours, with minimal casualties, minimal cost, because our enemy put down their weapons and put up their hands and didn't fire a shot. For anyone in the military, I think you would prefer that the enemy put down their weapons and put up their hands and not fire a shot, rather than dig in and fight you. I know this is an oversimplification of why members of the Iraqi Army did what they did, but I think they did it in large part because they knew who we were, that we were Americans—that if they surrendered, they were going to get food, shelter, medical care, and humane treatment. Therefore, knowing who we were, they would rather surrender than dig in and fight.

I question today—given what's happened since then with Abu Ghraib, Guantanamo, water boarding, and everything that has happened since 9/11—would those Iraqi troops have put down their weapons and surrendered if they thought they were going to be sexually humiliated, water boarded, indefinitely detained, and all of the other things that America has come to symbolize around the world? Or would they have dug in and fought? I think many would choose to dig in and fight. It behooves us as Americans to get back to a state where people

around the world know who we are and what we stand for, where they would rather surrender than fight.

Before 9/11, we held ourselves out as being the land of the free and the home of the brave. After 9/11 happened, we became the constrained and cowardly; suddenly it was, “do whatever you’ve got to do to keep me safe, I don’t care if it infringes on my civil liberties or what it costs, just keep me safe.” Many have profited, and many have obtained power, by pandering to that fear that rightfully gripped the country after 9/11. Here we are almost thirteen years later, and we are still in the same mindset we were in immediately after 9/11.

Remember the Geneva Conventions that we led the effort to create in order to bring the world up to the high standard that we represented? After 9/11, they became an impediment, obsolete and quaint, and we decided to ignore the Geneva Conventions. The detainees at Guantanamo were called “unlawful enemy combatants.” Where does that term appear in the Geneva Conventions? It doesn’t. It was a term that was created in order to avoid the Geneva Conventions. For two hundred years, our strength had been our belief in the law. By using the term “unlawful enemy combatants,” we tried to avoid the law by coming up with a new classification that didn’t exist, in a place called Guantanamo that we thought was outside the reach of the law. In my view, we turned our back on what had been our strength for two hundred years. You hear about “American exceptionalism”—to me, what made us exceptional was our belief in the law.

Last week, the Obama administration issued a seven-page memo on the drone strike on Anwar al-Awlaki. It was interesting to me that it took forty-six pages to justify legally torturing a foreigner (in the Bybee memo) but only seven pages to justify legally killing an American citizen. Per the Bybee memo, for an act to constitute torture under our torture statute, it must produce pain that is the equivalent of death or major organ failure. This is language that I think would have



been shocking to Americans on 9/10. The memo further provides that, even if you could make an argument that an act constituted torture, there is no remedy, because the President has unfettered authority in his capacity as Commander in Chief to do whatever he determines is necessary in the interest of national security. Number one, it's not torture; number two, even if it is, "so what?" The President can do whatever he wants. The Obama administration has used similar rationales for some of their policies; this is not solely a Bush administration or Republican argument. Again, who led the effort in enacting the Convention Against Torture? We did. We were one of the leading proponents in drafting the language that says there is no exceptional circumstance whatsoever for torture, yet we created one.

A friend of mine, Mark Fallon, was the Deputy Commander of the Criminal Investigation Task Force. The Task Force was a group of military law enforcement personnel that had to try to collect information on the detainees and assemble it into some kind of coherent form so that we could assess whether there was potential for prosecuting a detainee. Mark was at Guantanamo. Remember, in the earliest period, the military applied the Geneva Conventions, but then the administration was upset that they weren't getting enough information from the detainees. In October of 2002, the Task Force met to decide what they could do to extract more information. In the meeting, it was stated, "Well, if the detainee dies, you're doing it wrong." So, anything short of that is okay, but if the detainee dies, then you're doing it wrong. Subsequently, Mark warned his chain of command about what was being discussed and done at Guantanamo. He emphasized the need to consider how history would reflect on this. That was in 2002. It is now a dozen years later. I'm hopeful that we will eventually look back and we won't be proud of what we did in fear after 9/11.

As I mentioned, the President recently said, "We tortured some folks." The Commander in Chief has acknowledged what many others have

already said: that we tortured some folks. Again, the Convention Against Torture, which we led the effort to create, says that there are obligations that come with being a signatory—it means holding people accountable for torture; it means providing alleged victims of torture an opportunity to pursue compensation. But we haven't done that. Rather than prosecuting anyone for torture, people are profiting from having participated in putting us on that path. Jose Rodriguez, for example, who was the Director of the Counterterrorism Center, now has a book out. If you recall, there were video tapes of detainees being waterboarded while in CIA custody, and Jose Rodriguez ordered the tapes destroyed. But he wasn't prosecuted; he's on his book tour and doing quite well.

Some of you may be familiar with the name Maher Arar. The movie *Rendition* is based on Maher's story. A dual Canadian-Syrian citizen who lived in Canada with his family, he was visiting Europe when the Canadian authorities developed information that suggested he was affiliated with terrorists. Canadian authorities notified U.S. authorities, who concocted a ruse to get him to come back. Upon Maher's arrival at JFK airport in New York, he was apprehended and detained in U.S. custody for about ten days. He was sent to Jordan, then Syria. Now, think about that for a minute. There is a lot of argument now over Syrian president Bashar al-Assad—whether he should be ousted, and whether he's going to be prosecuted. In 2003, we sent Maher Arar to Assad in Syria. Eventually, the Canadian authorities realized their information was bad. After torturing Maher for almost a year, Syrian authorities realized he was a nobody, took him home, and dropped him off at the end of the block (kind of like in the movie). Canada has since apologized to Maher and paid him \$10 million for their participation in facilitating our sending him to Syria where he was tortured. When Maher filed suit in the U.S., the Obama administration asserted the state secrets privilege, and his case was dismissed. To this day, we have not even apologized for sending the wrong guy to Syria to be tortured.

I asked Maher speak to my class at Howard law school last year (he is now Dr. Arar, because he has completed his PhD). I sent him an e-mail and said, “Hey, I’m teaching this class on national security law. Would you be willing to talk to my students?” He said, “Sure.” We had to hold the talk over Skype, because he is still on the no-fly list. I didn’t know if he was going to be nuts, if he was going to be mad, what he was going to be like, but he was a very articulate and reasonable guy who said, “Look, I can dwell on what happened in the past, or I can look forward with my family to the future.” He chose the latter.

I hope we are to the point where we can acknowledge that we engaged in torture. I would also argue that torture doesn’t work. The people I trust to say that torture doesn’t work are Ali Soufan, a career FBI agent who interviewed many of the high-value detainees, and Tony Camerino, an Air Force veteran who wrote a book under the pseudonym Matthew Alexander. Tony Camerino was a military intelligence officer who interrogated suspects in Iraq. Both Soufan and Camerino say torture doesn’t work. It’s a great tool to make people talk, but it’s not effective at making them tell the truth. They’ll say whatever you want to hear if you’ll just stop the torture. Soufan and Camerino will attest that there are better techniques that actually work to produce useful intelligence, without resorting to torture.

A second point is the drone program, which concerns me as well. I’m not necessarily opposed to drones; they are just another weapons system, like an F-16 with the pilot sitting in a lounge chair rather than the cockpit. It’s not the platform; it’s our policy on how we use it that concerns me, because we’ve used it quite often, particularly during the current administration. Ben Emerson did a review for the U.N. and concluded that it’s a violation of sovereignty when we fly a drone into someone else’s territory and launch an attack on people on their soil. Imagine this scenario from Mexico’s perspective: a drug lord flees

across the border into Arizona, the Mexican government sends a drone to attack him and, in the process, kills four or five American children. Would we just say, “eh, you know, stuff happens”? That is what we’re doing, and it’s a violation of the sovereignty of the countries where we launch drone attacks on their citizens.

It also concerns me that we don’t have just one drone program; we have drone programs, plural. We have a military drone program that hopefully operates in accordance with international humanitarian law. It appears that, when it’s convenient to use a drone program that complies with the laws of war, we use the military program. But when it’s inconvenient to use that drone program, we use the CIA, a civilian agency, to conduct what, in essence, is a military offensive operation that kills people. CIA personnel are civilian employees, the same as National Park Service tour guides, with the same legal authority to carry out lethal military operations. Park Service and CIA personnel enjoy the exact same legal status; they’re all civilians. They don’t have combatant immunity, yet we’re using the CIA to carry out many of the drone strikes.

Finally, Guantanamo. If you aren’t familiar with the history, it is an incredible place, with a rich history that goes back to the 1890s. It is the oldest U.S. military installation outside of the United States. We have been there since the Spanish-American War, and there are some remarkable tales about the place. One is, in the old days, the Americans (the G.I.’s) would go into the city of Guantanamo to the restaurants and bars. Many of the citizens of Guantanamo worked on the installation until the revolution happened. During the revolution, there were about two dozen G.I.’s that were walking back from Guantanamo to the base when they were kidnapped and held hostage in the hills outside of Guantanamo. They were held hostage by Raúl Castro, the current president of Cuba. Water to the base was cut off. The gates were closed. Some of the Cubans that worked on the base

chose to stay, and there's still a few that are there that chose to stay and work for the U.S. rather than go back home. It's a really interesting place, aside from its current life as a detention facility.

We have heard the argument that these men are the worst of the worst, the kind of people that would chew through the hydraulic lines on the airplane to kill Americans on the way to Guantanamo. That's true in some cases. I would put Khalid Sheikh Mohammed (mastermind of the 9/11 hijackings) and Abd al-Rahim al-Nashiri (of the *U.S.S. Cole* bombing) in that category. But for every one of those, there were hundreds of others that were like Salim Hamdan, Osama bin Laden's driver. Or David Hicks, who in my view was a knucklehead looking for a big adventure and got more than he bargained for. But we had a lot of people like that, who we held at Guantanamo and who we were told were the worst of the worst. There were 779 people that went through Guantanamo. Today, there are 149 that are still there. There are six that are about to go to Uruguay, which will take us down to 143. More than 80 percent of the people that we were told were the worst of the worst aren't at Guantanamo anymore, and half of the ones that are there now have been cleared by a unanimous vote of the CIA, the FBI, the Department of Justice, and the Department of Defense, who unanimously agreed they didn't commit an offense, they can't be prosecuted, and we don't need to detain them. Yet they're still there, at a cost of about \$2.5 million per person, per year.

I have asked people on the other side of the argument, "Give me one legitimate reason why Guantanamo makes sense." They will throw out the fear-mongering talking points—such as how we can't bring terrorists to the U.S., but we have. When I was chief prosecutor at Guantanamo, in September 2006 a plane landed and fourteen guys got off the plane, including Khalid Sheikh Mohammed. Of the fourteen guys that got off the plane that day, only one has been prosecuted, convicted, and sentenced. The case has been through appeals and it is over and done; in fact it was over and done years ago. That one case

was Ahmed Ghailani, who was prosecuted in federal court in New York City. The thirteen people who got off the airplane with him in 2006 are still sitting at Guantanamo, waiting for their day in court.

When the public hears “Guantanamo,” they think of its iconic image; the detainees dressed in orange kneeling in front of what look like dog cages. That was Camp X-Ray and it has been closed since March of 2002. I haven’t been back to Guantanamo in years, but last time I was there, Camp X-Ray was rusted and overgrown with weeds. The facilities aren’t the problem—I was a bail bondsman before I went to law school, so I’ve seen a lot of jails and a lot of prisons. I think there are a lot of incarcerated Americans who would gladly trade places if they saw the physical conditions at Guantanamo. Many of the *habeas* counsel would probably be sorely disappointed if their clients got what they are arguing for and were brought to the United States. The conditions in Guantanamo are about as decent as you’re going to find from a physical facilities standpoint. But it’s not the facilities. It’s the legal justification that we’ve used to detain people indefinitely in a place that we chose because we thought it was outside the reach of the law.

More recently, in May of 2013, President Obama gave a talk at the National Defense University, and he said, “We’re at a crossroads, and we’ve got to decide which way we’re going to go.” Again, the rhetoric is always outstanding, but the rhetoric has yet to match up with the reality. But I think we are at a crossroads, and we do have to make a decision. Why does it matter? This is deviating from the international environment, but some of you probably know Richard Haass at the Council on Foreign Relations, who said the world is watching not just what we do overseas but also what we’re doing here at home—like in Ferguson, where law enforcement rolled out in what looked like a military invasion to respond to that situation. The world is watching what we do here at home and what we’ve done abroad, and we’re at a crossroads on who we are and what we stand for. What is it that

we want to say about who we are as Americans? There are a lot of hotspots around the world where leadership and a commitment to the rule of law are imperatives.

On 9/11, we tripped and fell flat on our face, and no one can blame us for lying there. But we've got a choice: do we continue to lie there, or do we get up and run harder? I'd like to think that, as Americans, we would choose the Heather Dornan (a college runner who fell on the last lap of a race, got up, and won) route: jump back up on our feet and run harder to get out front again.

We talk about America being a shining city on a hill, a light unto the world. In my view, for the last twelve years, we have been a warning light, not a guiding light. So I'd like to see us recommit to our principles. I'd like to see us more engaged internationally. Rand Paul is running for president on a libertarian platform, and his approach is more isolationist, saying we need to pull back within our own borders. That's a mistake, in my view. We need to be more engaged. In Texas, they wanted more money in their budget because they were afraid of the Blue Helmet invasion, coming to take their guns away, so they needed to arm up in order to prevent the U.N. from coming to Texas and stealing their guns. We need to educate the public that we need to be engaged, we need to be recommitted to the U.N., we need to be out there as a guiding light, not as a warning light, and we need to regain our footing and our standing as Americans. If we do that, we can get headed back in the right direction.

It's been a real privilege being here with you. Thank you for having me, and thank you for the fight that you continue to battle, day in and day out, to keep the world heading in the right direction.

## **Commentary**





# International Criminal Law: Year in Review 2013–2014

Valerie Oosterveld\*

Two main themes emerged from the developments in international criminal law between August 2013 and August 2014, which I will examine in turn. First, I will discuss advances and difficulties still faced in prosecuting crimes of sexual and gender-based violence. Second, I will consider the complexities of state cooperation or lack of cooperation with international criminal justice institutions. In addition, I will survey interesting conceptual, procedural, and substantive legal developments in international criminal law falling outside of these themes, followed by my conclusions.

## I. Prosecuting Crimes of Sexual and Gender-based Violence

Co-hosted by then-U.K. Foreign Secretary William Hague and U.N. High Commissioner for Refugees Special Envoy Angelina Jolie, the Global Summit to End Sexual Violence in Conflict took place in London, England from June 10–13, 2014, with over one thousand experts, including representatives from the United Nations (U.N.), civil society organizations, faith leaders, and young people.<sup>1</sup> Representatives from over 120 countries also participated.<sup>2</sup>

I had the privilege of participating in the Global Summit as an expert and by chairing a panel on the experience of the Special Court for

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<sup>1</sup> U.K. Foreign and Commonwealth Office, *Chair's Summary—Global Summit to End Sexual Violence in Conflict* (June 13, 2014), <https://www.gov.uk/government/publications/chairs-summary-global-summit-to-end-sexual-violence-in-conflict/chairs-summary-global-summit-to-end-sexual-violence-in-conflict>.

<sup>2</sup> *Id.*

Sierra Leone in prosecuting sexual violence crimes. I feel that the Global Summit was important for international criminal law. No, it did not “end sexual violence in conflict” as its title ambitiously suggests. That would have required a miracle. Sexual violence is deeply rooted in gender discrimination and the elimination of sexual violence in war, as in peace, requires multilayered, multisectoral, societal, and cultural changes: a conference, no matter how large, cannot do that. The goal of the Summit was to come up with concrete, practical and forward-looking solutions to send the message to every corner of the globe that the era of impunity for wartime sexual violence was over. I am not sure that it accomplished this goal in total, but I do think the Summit did succeed in more modest ways. First, it launched the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict.<sup>3</sup> This document is meant to create a baseline of good practice for those involved in investigating and documenting sexual violence, whether they are from international criminal tribunals, the United Nations, nongovernmental organizations or states. The Protocol was created with the experiences of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone, the International Criminal Court (ICC), and U.N. Commissions of Inquiry in mind. The Protocol is, I feel, helpful in setting a baseline minimum, and due to critiques of the Protocol at the Global Summit that it does not capture enough of existing best practices, there are plans to expand and revise it into a second edition. I acknowledge the critiques, but also want to stress that the very fact that a large number of people actually turned their minds to gender-sensitive international criminal investigations was in itself a success—because gender sensitivity in investigative procedure often is overshadowed by attention to gender-

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<sup>3</sup> *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law* (June 2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319054/PSVI\\_protocol\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf).

sensitivity in analysis of substantive crimes. The trick is, of course, to ensure that the lessons from the Protocol are implemented, especially in places where gender-sensitive investigation capacity does not yet exist.

Second, the United Nations launched a Guidance Note of the Secretary-General on “Reparations for Conflict-Related Sexual Violence” at the Summit.<sup>4</sup> Relatively little attention has been paid within international criminal law to the issue of reparations, especially reparations for conflict-related sexual violence.<sup>5</sup> Officials from the ICTR in particular have been pointing this out for years,<sup>6</sup> and now there is helpful guidance in this respect available to all those involved in reparations discussions at the national and international levels.

Third, quite a bit of attention was paid at the Global Summit to how outside expert assistance could help states and international organizations to more quickly investigate crime scenes to secure evidence of sexual violence: This is often referred to as “surge capacity” to identify, collect, and preserve information essential to any accountability process (such as international or national criminal prosecutions). This discussion is not necessarily new—in 2004, states began referring, in the U.N. Security Council and the General Assembly, to expert rosters such as that of the Justice Rapid Response (JRR) mechanism; ICC Assembly

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<sup>4</sup> U.N. Secretary-General, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence* (June 2014), <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

<sup>5</sup> For a helpful discussion of the issue of gender-sensitive reparations stemming from situations of mass atrocity, see *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* (Ruth Rubio-Marín ed., 2009).

<sup>6</sup> *E.g.*, Address by Judge Erik Møse, President of the International Criminal Tribunal for Rwanda, to the United Nations General Assembly (Oct. 9, 2003), [http://ictr-archive09.library.cornell.edu/ENGLISH/speeches/mose\\_ga091003.html](http://ictr-archive09.library.cornell.edu/ENGLISH/speeches/mose_ga091003.html). He refers to discussion on this issue since 2000.

of States Parties resolutions began referring to such outside assistance in 2007; and the U.N. Secretary-General began including references in his reports in 2013.<sup>7</sup> Justice Rapid Response was established by states to create a roster of rapidly deployable experts specialized in the investigation of serious international violations such as genocide, crimes against humanity, and war crimes.<sup>8</sup> These experts from around the world are all trained to a common set of best practices, and are meant to assist states and international institutions. The reason for the attention to Justice Rapid Response at the Global Summit is because it has partnered with U.N. Women to create a sub-roster of over one hundred experts on the investigation and documentation of sexual and gender-based violence.<sup>9</sup> The JRR roster includes criminal and human rights investigators, legal advisers, prosecutors, forensic experts and witness protection specialists.<sup>10</sup> Members of the sexual and gender-based violence sub-roster were deployed in 2014 to assist, for example, International Commissions of Inquiry for the Central African Republic, Eritrea and Syria, as well as the African Union Commission of Inquiry on South Sudan, and national investigations in Colombia.<sup>11</sup> The result

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<sup>7</sup> E.g. U.N. SCOR, 59th Sess., 5052d mtg., U.N. Doc. S/PV.5052 (Oct. 6, 2004) at 8 (Germany); U.N. GAOR, 59th Sess., 6th comm., U.N. Doc. A/C.6/59/SR.4 (Jan. 31, 2005) at ¶ 39 (Sierra Leone); ICC Assembly of States Parties, 6th Sess., ICC Doc. ICC-ASP/6/21, 15, ¶ 58 (Oct. 19, 2007); U.N. Secretary-General, *Report of the U.N. Secretary-General: Strengthening and Coordinating United Nations Rule of Law Activities*, ¶ 24, U.N. Doc. A/68/213 (July 29, 2013).

<sup>8</sup> JUSTICE RAPID RESPONSE, ANNUAL REPORT 2014 2 (2015), [http://www.supportjustice.org/wp-content/uploads/2015/03/Annual\\_Report\\_Final\\_Email.pdf](http://www.supportjustice.org/wp-content/uploads/2015/03/Annual_Report_Final_Email.pdf).

<sup>9</sup> *Id.* at 8–9.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Investigating Sexual and Gender Based Violence in Conflict—International Trainings and Deployments of Experts Supported by U.N. Women*, U.N. ACTION AGAINST SEXUAL VIOLENCE IN CONFLICT—STOP RAPE NOW (2014), [http://www.unwomen.org/~media/headquarters/attachments/sections/news/stories/sgbv\\_investigations\\_infographic%20pdf.pdf](http://www.unwomen.org/~media/headquarters/attachments/sections/news/stories/sgbv_investigations_infographic%20pdf.pdf); JUSTICE RAPID RESPONSE, *supra* note 8, at 10–11. The JRR-U.N. Women subroster has also deployed experts to the International Commissions of Inquiry for Guinea, Côte d’Ivoire, North Korea, Libya, Syria and the Occupied Palestinian Territories.

has been this: crimes of sexual and gender-based violence have been “surfaced” (as the late Rhonda Copelon would call it), and where previously they may have been ignored, now they are being documented and discussed.<sup>12</sup>

The final point I would like to make about the Global Summit is that it connected people who did not necessarily know each other before, who then made plans for future collaborations—whether for projects on the ground in the Democratic Republic of Congo (DRC) or for projects like the one I am helping to launch—to document the lessons learned within the Special Court for Sierra Leone on sexual violence crimes, from the prosecution, defense, registry, victim/witness, and judicial perspectives.

Still on the same theme of sexual and gender-based violence, I would like to mention other developments: The ICTR’s “Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions” published in January 2014 is being used for domestic training by Interpol.<sup>13</sup> The ICTY will release its in-depth discussion of best practices and lessons learned in prosecuting crimes of sexual and gender-based violence in 2015. The ICC’s Office of the Prosecutor released its groundbreaking “Policy Paper on Sexual

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<sup>12</sup> Rhonda Copelon, *Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L.J. 243-266 (1994).

<sup>13</sup> *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions*, Office of the Prosecutor, Int’l Crim. Trib. For Rwanda, Jan. 30, 2014, <http://www.unict.org/sites/unict.org/files/publications/ICTR-Prosecution-of-Sexual-Violence.pdf>; Hassan B. Jallow, *Closing the Impunity Gap*, 6th INTERPOL International Expert Meeting on Genocide, War Crimes and Crimes Against Humanity (Kigali, Rwanda, Apr. 14–16, 2014), 5–6, [http://www.unmict.org/sites/default/files/statements-and-speeches/140414\\_prosecutor\\_jallow\\_interpol\\_en.pdf](http://www.unmict.org/sites/default/files/statements-and-speeches/140414_prosecutor_jallow_interpol_en.pdf).

and Gender-Based Crimes” in June 2014.<sup>14</sup> Both the ICTR and ICC documents helped to inform the discussion at the Global Summit, but not everyone there was aware of these incredible resources. Both publications should be required reading for domestic prosecutors, military and police involved in accountability for genocide, crimes against humanity, and war crimes.

The ICC prosecutor’s “Policy Paper on Sexual and Gender-Based Crimes” also helps to address an issue few people have paid close attention to, which is how to interpret the definition of “gender” found in the Rome Statute. That definition, which was the result of very contentious negotiations back in 1998, utilizes the diplomat’s concept of constructive ambiguity—in other words, the definition uses language ambiguous enough to satisfy two competing positions and does not resolve the competition.<sup>15</sup> Rather, the use of constructive ambiguity simply pushes the interpretation of the provision to another day and another set of people: In the case of the Rome Statute’s “gender” definition, to the ICC’s prosecutor and judges.<sup>16</sup> That definition says: “For the purposes of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”<sup>17</sup> Since the adoption of this definition, there has been confusion and debate over the meaning of it. Some have argued—I feel incorrectly—that this wording somehow excludes reference to sexual orientation, or to socially constructed norms of maleness and

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<sup>14</sup> *Policy Paper on Sexual and Gender-Based Crimes*, OFFICE OF THE PROSECUTOR, INT’L CRIM. CT., June 2014, <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [hereinafter ICC Policy Paper].

<sup>15</sup> Valerie Oosterveld, *Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court*, 16 INT’L FEMINIST J. POL. 563 (2014).

<sup>16</sup> Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55 (2005).

<sup>17</sup> Rome Statute art. 7(3).

femaleness.<sup>18</sup> Others—including me—have argued the opposite.<sup>19</sup> And many have just assumed that the terms “gender” and “women” are the same thing.<sup>20</sup> However, the ICC Office of the Prosecutor Position Paper brings clarity by interpreting the term and the definition to acknowledge the social construction of gender as involving the roles, behaviors, activities, and attributes assigned to women, men, girls, and boys.<sup>21</sup> This is important because the prosecutor is directing her investigators, lawyers, and other staff not to simply determine whether sexual violence took place against individuals in a conflict, but to look deeper—to understand how the underlying differences among inequalities between women, men, girls, and boys, and the resulting power dynamics, assumptions, and stereotypes, influenced the ways in which crimes were carried out. This understanding provides much-needed context to the prosecutor’s investigations and will hopefully help, in the future, to avoid problems we have seen in the prosecution of sexual violence crimes at the ICTY, ICTR, and ICC, including this past year.

The ICC issued its trial judgment in the case of *Prosecutor v. Katanga* in March 2014.<sup>22</sup> The charges arose out of an attack on a specific village in the Ituri district of the DRC in 2003. Katanga, alleged commander of the Patriotic Resistance Force in Ituri, was accused of three counts of crimes against humanity (murder, rape, and sexual slavery) and seven counts of war crimes (using children under the

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<sup>18</sup> For a discussion of these views, see Oosterveld, *The Definition of “Gender”*, *supra* note 16, at 55–56, 71–81; and Oosterveld, *Constructive Ambiguity*, *supra* note 15, at 568–570.

<sup>19</sup> Oosterveld, *The Definition of “Gender”*, *supra* note 16, at 71–84; and Oosterveld, *Constructive Ambiguity*, *supra* note 15, at 571.

<sup>20</sup> See Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1, 14–16 (2005).

<sup>21</sup> ICC Policy Paper, *supra* note 14 at 3.

<sup>22</sup> *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (Mar. 7, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1963464.pdf>.



age of fifteen to take active part in the hostilities, directing an attack against a civilian population, willful killing, destruction of property, pillaging, sexual slavery, and rape).<sup>23</sup>

Katanga was found guilty by the Trial Chamber as an accessory to the crime against humanity of murder and the war crimes of murder, attacking a civilian population, destruction of property, and pillaging.<sup>24</sup> The Trial Chamber found that Katanga was the intermediary of choice between the weapons and ammunition suppliers and those who physically committed the crimes using those munitions in the village.<sup>25</sup> He contributed to reinforcing the strike capability of the Ngiti militia who carried out the crimes committed in the village in 2003. His involvement allowed the militia to avail itself of logistical means which it did not possess itself, enabling it to secure military superiority over its adversary. In May 2014, he was sentenced to twelve years of imprisonment with credit for the time he spent in custody at the ICC since late 2007.<sup>26</sup>

Katanga, however, was acquitted of the charges relating to rape and sexual slavery and the use of child soldiers.<sup>27</sup> The Trial Chamber accepted that these crimes happened, but not that Katanga was responsible as an accessory.<sup>28</sup> The *Katanga* Trial Judgement marks the first ICC judgment in which the Rome Statute's provisions addressing sexual and gender-based crimes have been interpreted. This acquittal demonstrates certain weaknesses in the prosecution's approach to

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<sup>23</sup> *Id.* ¶¶ 7–10.

<sup>24</sup> *Id.* at 658–60.

<sup>25</sup> *Id.* ¶¶ 1269, 1278, 1291–92, 1297, 1306, 1334, 1343, 1359–62.

<sup>26</sup> *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Décision relative à la peine (article 76 du Statut), ¶ 170 (May 23, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1771079.pdf>.

<sup>27</sup> *Katanga*, Case No. ICC-01/04-01/07, Judgment, *supra* note 22, ¶ 1664.

<sup>28</sup> *Id.*

sexual and gender-based crimes, at least prior to the issuance of the June policy paper.

It appears that the Trial Chamber viewed the sexual violence aspects of the attack on the village in a different light than the other violence. A majority of the judges concluded that Katanga's contribution reinforced the militia's capacity to implement the attack (by helping them to stockpile weapons), and that it was foreseeable that the militia would murder and attack civilians but not to commit rape.<sup>29</sup> Why did the judges not consider that the civilians fleeing as a result of the attack would make them vulnerable to rape and sexual slavery?<sup>30</sup> What makes sexual violence different from murder? Kelly Askin of the Open Society Justice Initiative reacted, "While most judges seem to accept that leaders and others can be convicted of crimes such as killings, torture and pillage even when they are far from the crime scenes, there is great reluctance to hold individuals accountable for sex crimes unless they are the physical perpetrators, they were present when crimes were committed, or they can be linked to evidence encouraging the[se particular] crimes."<sup>31</sup> She concludes that the result is a double standard, perpetuating the view that rape is a byproduct of war, instead of also an instrument of warfare.<sup>32</sup> I tend to agree that it appears that some judges seem to require evidence of a

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<sup>29</sup> *Id.* ¶¶ 1656–58, 1662, 1664.

<sup>30</sup> The judgment is unclear on this, though the Trial Chamber seems to rely upon the numbers of sexual violence victims, the actions of the Ngiti combatants prior to the attack, and lack of proof that "the obliteration of the village of Bogoro perforce entailed the commission of such acts," *id.* ¶ 1663. For an analysis of this reasoning, see *ICC Partially Convicts Katanga in Third Trial Judgment, Acquitting Katanga of Rape and Sexual Slavery*, LEGAL EYE ON THE ICC, WOMEN'S INITIATIVES FOR GENDER JUSTICE, May 2014, <http://www.iccwomen.org/WI-LegalEye5-14/LegalEye5-14.html>.

<sup>31</sup> Kelly Askin, *Katanga Judgment Underlines Need for Stronger ICC Focus on Sexual Violence*, INT'L JUSTICE MONITOR, Mar. 10, 2014, <http://www.ijmonitor.org/2014/03/katanga-judgment-underlines-need-for-stronger-icc-focus-on-sexual-violence>.

<sup>32</sup> *Id.*

more deliberate intention to commit sexual violence than is required of other prohibited acts—a problem not only in the *Katanga* case. The prosecution initially appealed the *Katanga* acquittals, but later withdrew its appeal when Katanga withdrew his.<sup>33</sup>

I mentioned that similar sorts of assumptions about what is and what is not foreseeable when preparing an attack have occurred in ICTY and ICTR cases. One such case is that of *Prosecutor v. Đorđević*, from the ICTY. Đorđević was originally acquitted at trial of sexual violence charges (charged as forms of persecution), but in January 2014 the Appeals Chamber found: “[T]he Trial Chamber failed to evaluate the surrounding circumstances of . . . [the] sexual assaults . . . [that is,] that these crimes occurred in the course of the forcible displacement of the Kosovo Albanian populations.”<sup>34</sup> Considering the broader context, the Appeals Chamber ruled that the only reasonable inference that could be drawn from the evidence, was that the sexual assaults were committed with discriminatory intent, thus satisfying the requirements of the crime of persecution.<sup>35</sup> Because Đorđević was part of a joint criminal enterprise pursuing a common purpose in which these crimes could occur, he willingly accepted the risk of liability by participating in that joint criminal enterprise. In January 2014, the ICTY Appeals Chamber also similarly overturned acquittals

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<sup>33</sup> *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Public Defence Notice of Discontinuance of the Appeal against the *Jugement rendu en application de l'article 74 du Statut* rendered by Trial Chamber II on 7 April 2014 (June 25, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1794409.pdf>; *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Public Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga (June 25, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1794475.pdf>.

<sup>34</sup> *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Judgement, ¶ 877 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014), <http://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf>.

<sup>35</sup> *Id.* ¶ 901.

of persecution committed through sexual violence in the *Sainović* case.<sup>36</sup> In the ICTR's case of *Ngirabatware*, the defense appealed a conviction of rape, arguing, in June 2014, among other things that rape was not foreseeable, and the Prosecution responded that there were indicators of foreseeability: his position of authority, his anti-Tutsi speeches, and awareness of the circumstances rendering rape possible.<sup>37</sup>

As Michelle Jarvis, Senior Legal Adviser to the Prosecutor of the ICTY, said at the Global Summit, international tribunals need to focus on this issue with prosecutors proposing, and judges adopting, a clear list of indicators demonstrating that sexual violence is foreseeable.<sup>38</sup>

On a more positive note, the ICC made an interesting and progressive finding in the Confirmation of Charges decision in the case of Bosco Ntaganda, the former Deputy Chief of Staff and Commander of the Forces Patriotiques pour la Libération du Congo in the DRC.<sup>39</sup> Ntaganda is charged with several counts of war crimes and crimes against humanity.<sup>40</sup> In March 2013, with two arrest warrants out,

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<sup>36</sup> *Prosecutor v. Šainović*, Case No. IT-05-87-A, Public Judgement on Appeal, ¶ 1847 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014), <http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf>.

<sup>37</sup> *Prosecutor v. Ngirabatware*, Case No. MICT-12-29-A, Transcript of Appeals Hearing, 30–33, 48 (Mechanism for Int'l Crim. Trib. June 30, 2014), <http://www.unmict.org/sites/default/files/casedocuments/mict-12-29/transcripts/en/140630.pdf>.

<sup>38</sup> Author's notes, Global Summit to End Sexual Violence in Conflict, London, June 10–13, 2014.

<sup>39</sup> *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Public Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (June 9, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1783301.pdf>.

<sup>40</sup> *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Public Redacted Version, Decision on the Prosecutor's Application under Article 58 (July 13, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1441449.pdf>.

Ntaganda voluntarily surrendered himself into ICC custody.<sup>41</sup> The confirmation of charges hearing began in February 2014 and Ntaganda was committed to trial on June 9, 2014, when the Pre-Trial Chamber confirmed the charges against him.

The Prosecution alleges that Ntaganda is guilty of attacks on civilian populations in eight different assaults that resulted in forced displacement, the recruitment and use of child soldiers, the rape and sexual slavery of the child soldiers and civilians, attacks on protected objects, and pillaging.<sup>42</sup> The charge of sexual violence against child soldiers by members of their own group as a war crime is the first time Article 8(2)(e)(vi) of the Rome Statute has been used in this way.<sup>43</sup> In response, the defense submitted that international humanitarian law does not apply to the treatment of soldiers by their comrades.<sup>44</sup> The Pre-Trial Chamber ruled that, at the time the children (in this case, girl soldiers) were being exposed to sexual violence, they logically could not have been taking active part in hostilities, thus certain protections apply:

The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the

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<sup>41</sup> Press Release, “Bosco Ntaganda in the ICC’s custody” ICC Press Release ICC-CPI-20130322-PR888 (Mar. 22, 2013), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr888.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr888.aspx).

<sup>42</sup> *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Public Redacted Version of Prosecution’s Submissions on Issues that were Raised during the Confirmation of Charges Hearing, 7 March 2014, ICC-01/04-02/06-276-Conf, ¶¶ 11, 111, 144, 182, 194, 224 (Mar. 24, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1752380.pdf>.

<sup>43</sup> Rosemary Grey, *Controversial Issues in the International Criminal Court*, OPINIO JURIS, July 28, 2014, <http://opiniojuris.org/2014/07/28/emerging-voices-sexual-violence-war-crime-controversial-issues-international-criminal-court/#more-30929>.

<sup>44</sup> *Ntaganda*, Case No. ICC-01/04-02/06, Prosecution’s Submissions, *supra* note 42, ¶ 183. For the Prosecution’s response to this argument, see *id.* ¶¶ 187–93.

same time. . . . Accordingly, the Chamber finds that UPC/FPLC child soldiers under the age of 15 years continue to enjoy protection under IHL from acts of rape and sexual slavery, as reflected in article 8(2)(e)(vi) of the Statute. The Chamber is, therefore, not barred from exercising jurisdiction over the crimes.<sup>45</sup>

The defense applied for leave to appeal the confirmation of charges decision, but leave was denied in July 2014.<sup>46</sup>

I wish to mention two final developments on sexual and gender-based violence. In August 2014, the Extraordinary Chambers in the Courts of Cambodia (ECCC) delivered its judgment in what is known as Case 002 against high ranking officials of the Khmer Rouge. I will discuss the main findings in that case *infra*, but I wanted to point out that the Trial Chamber accepted the evidence that forced marriage—where men and women who did not necessarily even know each other were paired off and married by officials of the Khmer Rouge and were expected to procreate—was Khmer Rouge policy.<sup>47</sup> This finding will likely bolster the forthcoming arguments in Case 002/02, which covers charges of forced marriage and rape. However, this is complicated by a finding in the Closing Order in Case 002 that it was not a policy of the Khmer Rouge for rape to occur, implying it was also not foreseeable

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<sup>45</sup> *Ntaganda*, Case No. ICC-01/04-02/06, Public Decision Pursuant to Article 61(7)(a) and (b), *supra* note 39, ¶¶ 76–80.

<sup>46</sup> *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Public Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges date du 9 juin 2014,” 14 (July 14, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1796795.pdf>.

<sup>47</sup> *Prosecutor v. Nuon & Khieu*, Case No. 002/01, Judgement, ¶ 130 (Extraordinary Chambers in the Courts of Cambodia Aug. 7, 2014), [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%04/E313\\_Trial%20Chamber%20Judgement%20Case%20002\\_01\\_ENG.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf).



because of this assumption that a different level of evidence is needed to demonstrate the foreseeability link between the accused and the rape on the ground.<sup>53</sup> This does not change the problem, however, that a number of those convicted of international crimes in the conflict in the DRC ultimately escape prison.

## II. State and Other Cooperation

State cooperation is absolutely key to the effective functioning of international criminal law, and international criminal tribunals in particular. State cooperation happens every day, usually invisibly: whether it is states paying their portion of the ICC budget on time and without fanfare or supporting the ICC in U.N. Security Council resolutions. In other cases, we can see state cooperation when Sierra Leone assists the Residual Special Court for Sierra Leone carry out its mandate on a day-to-day basis, or in Tanzania and the Netherlands doing many things to ensure that the ICTR, ICTY, ICC, Special Tribunal for Lebanon, and the Residual Special Court for Sierra Leone can effectively operate on their territory. Earlier in this Dialog, Prosecutor Fatou Bensouda mentioned how other countries, like Belgium, have assisted the ICC and that, indeed, about half of ICC cooperation requests are to African countries and these countries largely respond positively.

What is very visible, however, are signs of state non-cooperation: In 2013–2014, unfortunately those signs were evident. More than half of ICC arrest warrants have not been implemented by states.<sup>54</sup> Chad and the Central African Republic—both ICC States Parties—purportedly allowed Sudanese indictee, Minister of National Defense Abdel

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<sup>53</sup> *DR Congo War Crimes Trial of Egangela “A Test Case of Justice”*, BBC, Aug. 14, 2014, <http://www.bbc.com/news/world-africa-28792436>.

<sup>54</sup> Taegin Reisman, *ICC Registrar Discusses Restructuring and the Need for Larger Budget*, INT’L JUSTICE MONITOR, July 23, 2014, <http://www.ijmonitor.org/2014/07/icc-registrar-discusses-restructuring-and-need-for-larger-budget>.



Raheem Muhammed Hussein, to visit their countries in November 2013.<sup>55</sup> Indictee Sudanese President Omar al-Bashir has visited, or is suspected of visiting, a mix of ICC States Parties and non-States Parties over this past year: Nigeria, Ethiopia, Saudi Arabia, Kuwait, the DRC, Qatar, and Chad.<sup>56</sup>

This is what we see on the surface: not many people see that much is going on below the surface. The ICC does not sit idly by when visits by indictees to ICC States Parties happen. The Pre-Trial Chamber reminds States Parties of their arrest obligations under the Rome Statute, and, after the fact, considers whether to refer the matter to the ICC Assembly of States Parties and/or the U.N. Security Council. As well, the President of the ICC Assembly of States Parties is deeply involved in informing stakeholders of these developments and in seeking cooperation to execute arrest warrants. Moreover, certain States Parties have been appointed as focal points for their regions on non-cooperation, and they are expected to work on the issue at high diplomatic and political levels. The Ambassador from Norway in The Hague is the facilitator on cooperation issues and The Hague Working Group is deeply involved in considering non-cooperation issues.

Apart from actually executing arrest warrants, ICC Registrar Herman von Hebel suggested in a July 2014 interview that States Parties

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<sup>55</sup> *Prosecutor v. Hussein*, Case No. ICC-02/05-01/12, Public Decision on the Cooperation of the Republic of Chad Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court (Nov. 13, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1681277.pdf>; *Prosecutor v. Hussein*, Case No. ICC-02/05-01/12, Public Decision on the Cooperation of the Central African Republic Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court (Nov. 13, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1681332.pdf>.

<sup>56</sup> See Public Court Records for The Prosecutor v. Omar Hassan Ahmad Al Bashir, INT'L CRIM' CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/Pages/index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/Pages/index.aspx).

could do much more to improve the functioning of the Court, such as freezing assets and assisting with witness relocation.<sup>57</sup> As well, the ICC's Kenya cases suffer from lack of cooperation on key matters by Kenya, such as provision of documents to the prosecution and assistance with witnesses, resulting in a Trial Chamber issuing the subpoena of eight witnesses.<sup>58</sup>

In a related development (as it occurs in response to the ICC's indictments of heads of state and other senior state officials), at its June summit meeting in Equatorial Guinea, the African Union formalized its decision to expand the jurisdiction of the African Court of Justice and Human Rights to include international crimes, such as genocide, crimes against humanity, and war crimes. At the same time, however, it agreed to grant heads of state and other senior officials immunity from prosecution for these very serious international crimes.<sup>59</sup>

The Special Tribunal for Lebanon has also experienced problems in securing cooperation from Lebanon. For example, the defense lawyer for one individual (Assad Sabra) has submitted at least 119 requests to the Lebanese government for documents and other materials relevant to the *Ayyash* case.<sup>60</sup>

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<sup>57</sup> Reisman, *supra* note 54.

<sup>58</sup> *Prosecutor v. Ruto & Sang*, Case No. ICC-01/09-01/11 OA 5, Public Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation (Apr. 17, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf>.

<sup>59</sup> Monica Mark, *African Leaders Vote Themselves Immunity from New Human Rights Court: Heads of State at African Union Summit Vote to Strip the African Court of Justice and Human Rights of Power to Prosecute Them*, *GUARDIAN*, July 3, 2014, <http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court>.

<sup>60</sup> *Prosecutor v. Ayyash*, Case No. STL-11/01/T/TC, Further Decision on Motions Under Rule 20(A) by Counsel for Assad Hassan Sabra and Four Orders to Lebanon to Cooperate with the Tribunal, ¶ 1 (Spec. Trib. for Lebanon Mar. 31, 2014), <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f1471>.

President Meron of the ICTY told the U.N. Security Council in June that state cooperation in relocating witnesses continues to be a main challenge, and this was reiterated by the President of the ICTR, who called for the immediate assistance and cooperation of states to relocate twelve individuals who have been acquitted or served their sentences, saying that the credibility of the ICTR is at stake. Prosecutor Jallow made the same point, also highlighting the need for cooperation to arrest the remaining nine fugitives.

On another form of cooperation, during this Dialog, the Prosecutor of the Residual Special Court for Sierra Leone, Brenda Hollis, urged states to provide financial support: that mechanism, which succeeded the Special Court for Sierra Leone and closed at the end of December, is entirely funded by voluntary contributions from states. The Residual Special Court assists in carrying out responsibilities that cannot simply be ended just because the original court has closed its doors, such as continuing protection and support of witnesses placed at risk because of their testimony, supervising prison sentences, and managing the court's archives. Her worry—and one that I feel is entirely warranted—is that states will assume that, with such a small budget, someone else will pay, or, I would add, switch their attention and funding from the Residual Special Court to “newer” or seemingly more “sexy” projects. This ongoing worry, which is one continually faced by the Special Court when it existed and carried over to the Residual Special Court, highlights the shortcomings inherent in the voluntary contribution model. The ECCC faces the same voluntary funding difficulties, having to resort to a subvention request to the U.N. General Assembly in April 2014.<sup>61</sup> On this note, the ICC's Prosecutor mentioned a different type of budgetary pressure: that her office is stretched to the limit using the resources it is provided by States, but it is not sustainable for the ICC's load to continue increasing and the

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<sup>61</sup> G.A. Res. 68/247, U.N. GAOR, 68th Sess, ¶ 1, U.N. Doc A/Res/68/247B (2014), <http://unakrt-online.org/sites/default/files/documents/N1429631.pdf>.

budget to remain the same—every year in the ASP, there are strong pressures from certain states (including my own) to keep the budget increase to zero.

The Special Tribunal for Lebanon is involved in some very interesting developments relating, unfortunately, to contempt of court. These cases arose out of the alleged publication of the names of several witnesses. Contempt cases were therefore brought against individuals and corporations. In January 2014, Judge Baragwanath, the Tribunals' contempt judge, held that the publication of witness names threatened the public's confidence in the Tribunal's ability to protect the confidentiality of the witnesses.<sup>62</sup> Further, the accused were aware of the risks of publishing the information and failed to remove the information pursuant to a court order.<sup>63</sup> While the Tribunal's Statute does not contain contempt provisions, the Judge found that these charges were permissible based on the Tribunal's "inherent jurisdiction to protect the integrity of the judicial process and to ensure the proper administration of justice."<sup>64</sup> He also considered that, while the Tribunal's main focus is on individual criminal responsibility, when corporations interfere with justice and the work of the Tribunal, they must be held accountable.<sup>65</sup> Not surprisingly, in the first

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<sup>62</sup> *NEW TV S.A.L. & Khayat*, Case No. STL-14-05/I/CJ, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of Indictment, ¶¶ 36–38 (Spec. Trib. for Lebanon Jan. 31, 2014), <http://www.stl-tsl.org/en/decision-in-proceedings-for-contempt-with-orders-in-lieu-of-an-indictment-in-the-case-stl-14-05>; *Akhbar Beirut S.A.L. & Amin*, Case No. STL-14-06/I/CJ, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of Indictment, ¶¶ 36–38 (Spec. Trib. for Lebanon Jan. 31, 2014), <http://www.stl-tsl.org/en/decision-in-proceedings-for-contempt-with-orders-in-lieu-of-an-indictment-in-the-case-stl-14-06>.

<sup>63</sup> *Khayat*, Case No. 005, Contempt Order, *supra* note 62, ¶¶ 36–38; *Amin*, Case No. 006, Contempt Order, *supra* note 62, ¶¶ 36–38.

<sup>64</sup> *Khayat*, Case No. 005, Contempt Order, *supra* note 62, ¶ 10; *Amin*, Case No. 006, Contempt Order, *supra* note 62, ¶ 10.

<sup>65</sup> *Khayat*, Case No. 005, Contempt Order, *supra* note 62, ¶ 28; *Amin*, Case No. 006, Contempt Order, *supra* note 62, ¶ 28.

contempt case, the defense challenged the Tribunal's jurisdiction over corporations and requested that the STL strike out all charges against the corporation.<sup>66</sup> The *Amicus* Prosecutor submitted that the defense ignored the "distinction between the substantive crimes envisaged in the Statute and the inherent contempt powers under Rule 60*bis*."<sup>67</sup> Using ICTY and ECCC jurisprudence, the prosecution demonstrated that other international tribunals have found that "[t]he inherent power of an international tribunal to hold persons in contempt has long existed without necessarily being codified."<sup>68</sup> Further, the prosecution submitted that it "is not sufficient to hold natural persons in contempt" and this case is an example of a time when it is more effective to charge both natural and non-natural persons.<sup>69</sup>

Judge Lettieri (newly appointed contempt judge) ruled in July 2014 that the STL does not have jurisdiction over legal persons. He concluded that, "Rule 60*bis* does not explicitly contemplate the possibility of holding legal persons liable."<sup>70</sup> Since "[a]ny ambiguity [is]. . . to be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect" . . . it [is] inappropriate to expand the interpretation of the term "person" to cover legal

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<sup>66</sup> *NEW TV S.A.L. & Khayat*, Case No. STL-14-05, Defence Preliminary Motion Challenging Jurisdiction, ¶¶ 11–16 (Spec. Trib. for Lebanon June 16, 2014), <http://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05/filings-stl-14-05/3276-f0037>.

<sup>67</sup> *NEW TV S.A.L. & Khayat*, Case No. STL-14-05, Response to Defence Preliminary Motion Challenging Jurisdiction, ¶ 5 (Spec. Trib. for Lebanon June 30, 2014), <http://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05/filings-stl-14-05/3314-f0047>.

<sup>68</sup> *Id.* ¶ 18.

<sup>69</sup> *Id.* ¶ 41.

<sup>70</sup> *NEW TV S.A.L. & Khayat*, Case No. STL-14-05, Response to Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, ¶ 69 (Spec. Trib. for Lebanon July 24, 2014), <http://www.stl-tsl.org/en/decision-on-the-ence-motion-challenging-jurisdiction-and-on-the-request-to-amend-the-order-in-lieu-of-an-indictment>.

persons.”<sup>71</sup> The interpretation also violates principles of statutory interpretation such as the requirement to interpret words to have the same meaning throughout a document.<sup>72</sup> Therefore, Judge Lettieri held that the Tribunal does not have jurisdiction over corporations and ordered the *amicus curiae* prosecutor to amend the order issued in lieu of an indictment and submit its pre-trial brief by September 1, 2014.<sup>73</sup> At the end of July 2014, the *amicus curiae* prosecutor filed an interlocutory appeal requesting that the Appeals Panel find the STL does have jurisdiction over corporations.<sup>74</sup>

On the other hand, there are signs of increasing state and international cooperation in certain areas, at least with respect to the ICC. For example, in April 2014, the ICC and Belgium signed an agreement on the interim release of prisoners.<sup>75</sup> In June, the ICC’s Prosecutor and the World Bank’s Anti-Corruption Unit (which investigates allegations of fraud and corruption in World Bank-financed projects) entered into a Memorandum of Understanding for cooperation in areas of mutual interest.<sup>76</sup> And, in August, the ICC concluded a

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<sup>71</sup> *Id.* ¶¶ 70–71.

<sup>72</sup> *Id.* ¶ 72.

<sup>73</sup> *Id.* ¶¶ 75, 76, 79.

<sup>74</sup> *NEW TV S.A.L. & Khayat*, Case No. STL-14-05, Interlocutory Appeal Against the Decision on Motion Challenging Jurisdiction (Spec. Trib. for Lebanon July 31, 2014), <http://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05/filings-stl-14-05/3392-f0001ar126-1>.

<sup>75</sup> Press Release, International Criminal Court, Belgium and ICC sign agreement on interim release of detainees, ICC Press Release, ICC-CPI-20140410-PR993 (Apr. 10, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/pages/pr993.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr993.aspx).

<sup>76</sup> Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court and the World Bank’s Anti-Corruption Unit, INT Strengthen Cooperation, ICC Press Release ICC-OTP-20140624-PR1020 (June 24, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1020.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1020.aspx).

Framework Cooperation Agreement with the Common Market of the South (MERCOSUR).<sup>77</sup>

Finally, I mentioned Justice Rapid Response (or JRR) earlier, when considering developments over the past year on sexual and gender-based violence. In 2014, the JRR facility, which was created by states, also launched a new program, to support states by providing surge capacity and domestic mentoring to identify, collect and preserve information that will be essential to support of post-conflict accountability processes.<sup>78</sup> With this program, JRR aims to address the gap between a state's wish to conduct domestic investigations in accordance with its primary responsibilities under international law, and its actual ability to do so. JRR plans to assist those states with some, but not sufficient, national capacity and undertook its first deployment, to Mali.<sup>79</sup> This could potentially enhance state cooperation in a manner which helps the ICC and its States Parties fulfill their complementarity mandate—as long as such efforts do not become politically motivated.

### **III. Interesting Conceptual, Procedural, and Substantive Legal Developments in ICL**

#### *Conceptual*

On July 18, 2014, the International Law Commission moved the development of a treaty on crimes against humanity treaty from its long-term agenda onto its active agenda and appointed Sean Murphy

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<sup>77</sup> Press Release, International Criminal Court, ICC Concludes Framework Cooperation Arrangement with the Parliament of MERCOSUR, ICC Press Release ICC-CPI-20140805-PR1035 (Aug. 5, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1035.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1035.aspx).

<sup>78</sup> JUSTICE RAPID RESPONSE, *supra* note 8, at 9 (complementarity programme).

<sup>79</sup> *Id.*

as the special rapporteur.<sup>80</sup> Leila Sadat and an international Steering Committee of the Crimes Against Humanity Initiative have pressed for a treaty on crimes against humanity for many years now.<sup>81</sup> The aim of this initiative is to close the impunity gap by obligating states to enact domestic legislation regarding crimes against humanity and by enabling “[s]tates to more effectively prosecute all perpetrators, even in situations not meeting the gravity threshold in the Rome Statute.”<sup>82</sup> Unlike the Rome Statute, this convention is meant to address *interstate* obligations with respect to the crime. I have no doubt that, for future years-in-review, this will become an important topic.

### *Procedural or Logistical Developments*

Radovan Karadžić is on trial at the ICTY for his part in a joint criminal enterprise allegedly responsible for committing genocide against Bosnian Muslims and Croats.<sup>83</sup> He is also charged with crimes against humanity and violations of the laws and customs of war.<sup>84</sup> The defense concluded its case on May 1, 2014, and closing arguments are expected to begin on September 29, 2014.<sup>85</sup> An interesting procedural

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<sup>80</sup> 66th Session, Daily Bulletin, International Law Commission (July 18, 2014), <http://legal.un.org/ilc/sessions/66/jourchr.htm>.

<sup>81</sup> See FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Sadat ed., 2011).

<sup>82</sup> Leila Nadya Sadat & Douglas J. Pivnichny, *Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity Report*, CRIMES AGAINST HUMANITY INITIATIVE, WASHINGTON UNIVERSITY IN ST. LOUIS & WHITNEY R. HARRIS WORLD LAW INSTITUTE ¶¶ 10, 11 (May 17, 2014), <http://law.wustl.edu/harris/documents/Final-CAHGenevaReport-071714.pdf>.

<sup>83</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Prosecution’s Marked-Up Indictment (Int’l Crim. Trib. for the Former Yugoslavia Oct. 19, 2009), [http://www.icty.org/x/cases/karadzic/ind/en/markedup\\_indictment\\_091019.pdf](http://www.icty.org/x/cases/karadzic/ind/en/markedup_indictment_091019.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Order on Closing Arguments (Int’l Crim. Trib. for the Former Yugoslavia, Apr. 7, 2014), <http://www.icty.org/x/cases/karadzic/tord/en/140407.pdf>.



development in that case was the Defense's motion to subpoena Ratko Mladić, a high-profiled accused in a different ongoing case.<sup>86</sup> Karadžić claims that Mladić refused to testify but has valuable information to rebut the Prosecutor's case.<sup>87</sup> Mladić submitted that the motion would violate Article 21(4)(g) and force him to testify against himself, as his indictment included essentially the same charges.<sup>88</sup> The Chamber issued the subpoena, concluding that protection against self-incrimination does not preclude the possibility of a subpoena for a case involving charges against someone else.<sup>89</sup>

In an interesting development bridging international criminal and refugee law, Trial Chamber II had to decide on the fate of three witnesses brought to the ICC for the *Katanga* and *Ngudjolo* cases. Before being transferred to testify at the ICC, the witnesses were imprisoned in the DRC pending charges and thus were held at the ICC Detention Center during their time in The Hague.<sup>90</sup> All three applied for asylum in the Netherlands on the basis that their testimonies "implicated the President of the DRC," which put them at risk of torture and/or death.<sup>91</sup>

While the asylum claims were being considered, the lawyers for the witnesses applied, in October 2013, to have the witnesses released

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<sup>86</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Ratko Mladić (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 11, 2013), <http://www.icty.org/x/cases/karadzic/tdec/en/131211a.pdf>.

<sup>87</sup> *Id.* ¶¶ 2–4.

<sup>88</sup> *Id.* ¶¶ 6, 8 (Mladić also resisted the motion on the grounds of judicial economy as he would object to answer the questions relating to his own indictment, thus making his testimony of little value, and on the grounds of his failing health, *see id.* ¶¶ 9, 10).

<sup>89</sup> *Id.* ¶ 27.

<sup>90</sup> Jennifer Easterday, *ICC Cannot Decide on Witnesses Release, Trial Chamber Majority Finds*, INT'L JUSTICE MONITOR, Oct. 21, 2013, <http://www.ijmonitor.org/2013/10/icc-cannot-decide-on-witnesses-release-trial-chamber-majority-finds>.

<sup>91</sup> *Id.*

from the ICC Detention Centre. The lawyers submitted that the witnesses had not been charged with anything in the DRC, thus the ICC was arbitrarily denying their liberty.<sup>92</sup> Consultations between the Netherlands and the DRC regarding where the witnesses should be held during the asylum application process failed.<sup>93</sup> This issue highlights the ICC's competing legal obligations arising from Article 93(7), which requires the continued detention of witnesses and return upon the completion of their testimony, and Article 21(3) requiring the ICC to uphold international human rights.

In this case, the international legal norm of *non-refoulement* was specifically at issue. The Majority concluded that if the asylum claims were denied, then the ICC would not violate its obligations regarding *non-refoulement* as the Netherlands would not deny claims for asylum if there was a credible risk of torture.<sup>94</sup> However, if the asylum claims were granted, then the witnesses would be released.<sup>95</sup> The Chamber ruled that if it were to decide the issue in any other way, it would jeopardize the relationship of the ICC with the Netherlands, as well as the notion of state sovereignty.<sup>96</sup>

This decision was appealed and, in January 2014, the Appeals Chamber ordered the immediate release of the witnesses back into the custody of the DRC.<sup>97</sup> The Chamber ruled that it had “no jurisdiction

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<sup>92</sup> *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Public Decision on the Application for the Interim Release of Detained Witnesses, DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Oct. 1, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1679507.pdf>.

<sup>93</sup> *Id.* ¶ 17.

<sup>94</sup> *Id.* ¶ 3.

<sup>95</sup> *Id.* ¶ 21.

<sup>96</sup> *Id.* ¶ 28.

<sup>97</sup> *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12 A, Public Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded Pursuant Article 93(7) of the Statute (Jan. 20, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1714058.pdf>.

over the Detained Witnesses' asylum claims" and that Article 21(3) "requires that article 93(7) of the Statute be applied and interpreted in conformity with internationally recognized human rights; it does not require the Court to *violate* its obligations pursuant to article 93(7)(b) of the Statute."<sup>98</sup> As the witnesses had served the purpose for which they were transferred to the ICC, they had to be returned to the DRC. As for the issue of *non-refoulement*, the Appeals Chamber cited a Trial Chamber decision dating back to August 2011, stating that no evidence had been presented to challenge that decisions' conclusion that there was no risk to the witnesses.<sup>99</sup>

Four months later, the witnesses were transferred from ICC custody to Dutch custody pending the resolution of their asylum claims.<sup>100</sup> In July, the Dutch High Administrative Court upheld the first-instance decision and ordered that the witnesses be returned to the DRC, which they were.<sup>101</sup> The Court concluded that the claimants failed to demonstrate any credible risk of harm upon return, and this was further supported by the assurances from the DRC given to the ICC Registry that the witnesses would be treated safely and not subjected to the death penalty.<sup>102</sup> The Dutch Court also suggested "the ICC Victims and Witnesses Unit should oversee the domestic proceedings against the witnesses and continue to assess their safety upon their

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<sup>98</sup> *Id.* ¶ 26 (emphasis in original).

<sup>99</sup> *Id.* ¶ 31. For the August 2011 decision, f *Prosecutor v. Katanga & Ngudjolo*, Case No. ICC-01/04-01/07, Public Decision on the Security Situation of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Aug. 24, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1209549.pdf>.

<sup>100</sup> Jennifer Easterday, *Witnesses Released from ICC Detention*, INT'L JUSTICE MONITOR, June 4, 2014, <http://www.ijmonitor.org/2014/06/ngudjolo-granted-asylum-witnesses-released-from-icc-detention>.

<sup>101</sup> Jennifer Easterday, *Dutch Court Upholds Rejection of Witnesses' Asylum Claims*, INT'L JUSTICE MONITOR, July 2, 2014, <http://www.ijmonitor.org/2014/07/dutch-court-upholds-rejection-of-witnesses-asylum-claims>.

<sup>102</sup> *Id.*

return.”<sup>103</sup> The lawyers for the claimants intend to bring the case before the European Court of Human Rights.<sup>104</sup>

### *Substantive Jurisprudential Legal Developments*

In August 2014, the trial judgment was issued by the ECCC in what is known as Case 002/01, involving two top surviving leaders of the Khmer Rouge, Nuon Chea and Khieu Samphan. The scope of this case examined the evacuation of Phnom Penh, the movement of the population to the countryside and certain executions at Tuol Po Chrey.<sup>105</sup> In a unanimous judgment, the accused were found guilty of crimes against humanity in the forms of murder, extermination, persecution on political grounds, and other inhumane acts in the forms of forced transfers, enforced disappearances and attacks against human dignity.<sup>106</sup> The Trial Chamber accepted that a joint criminal enterprise existed that had the common purpose of implementing a rapid socialist revolution know as the “great leap forward.”<sup>107</sup> The Trial Chamber ruled that Nuon Chea had oversight over Khmer Rouge activities, exercised ultimate decision-making power and shared the common purpose of the joint criminal enterprise.<sup>108</sup> The Trial Chamber ruled that “Samphan’s decision-making power was primarily limited to matters of economics and foreign trade” but that through his senior position, Samphan was in a position of authority and influence that allowed him to contribute significantly to the common plan and he had the intention to do so.<sup>109</sup> The accused were sentenced to life imprisonment.

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Nuon & Khieu*, Case No. 002/01, Judgement, *supra* note 47, ¶ 7.

<sup>106</sup> *Id.* at 622–23.

<sup>107</sup> *Id.* ¶ 777.

<sup>108</sup> *Id.* ¶ 348.

<sup>109</sup> *Id.* ¶ 409.

In sentencing, the Chamber considered the gravity of the crimes, as well as the “geographic and temporal scope of victimization.”<sup>110</sup> The severe conditions created by the accused, as well as the long-term impacts these crimes have had on the Cambodian people were also considered. Chea’s involvement was described as “pivotal, extensive and significant,” while Samphan’s role was held to be “extensive and substantial.”<sup>111</sup> The accused’s abuse of power and well-educated status were listed as aggravating factors.<sup>112</sup> Despite Chea’s apology, the Chamber did not consider this a mitigating factor because Chea failed “to accept responsibility for his own wrongdoing.” Lawyers for both accused have vowed to appeal the verdict.<sup>113</sup>

The Special Court for Sierra Leone closed in December 2013, completely transitioning to the Residual Special Court for Sierra Leone, becoming the first of the current international criminal tribunals to do so. However, before it closed, in September 2013 the Appeals Chamber issued its judgment in the *Charles Taylor* case.<sup>114</sup> In April 2012, the Trial Chamber had found Charles Taylor guilty of eleven counts ranging from crimes against humanity and war crimes of murder, rape, acts of terrorism and conscription of child soldiers under the age of fifteen.<sup>115</sup> Taylor was found to be individually criminally liable for aiding and abetting and planning the crimes with which he was charged and was sentenced to fifty years

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<sup>110</sup> *Nuon & Khieu*, Case No. 002/01, Judgement, *supra* note 47, ¶ 1075.

<sup>111</sup> *Id.* ¶¶ 1079–80.

<sup>112</sup> *Id.* ¶¶ 1084–86, 1087–89.

<sup>113</sup> Eben Saling, *Press Conferences Detail Triumphs, Defeats, and Plans in the Aftermath of Case 002/01*, CAMBODIA TRIB. MONITOR, Aug. 7, 2014, <http://www.cambodiatribunal.org/2014/08/07/press-conferences-detail-triumphs-defeats-and-plans-in-the-aftermath-of-case-00201>.

<sup>114</sup> *Prosecutor v. Taylor*, Case No. SCSL-03-01, Appeal Judgement (Sept. 26, 2013), <http://www.scsldocs.org/documents/view/6981-6981>.

<sup>115</sup> *Prosecutor v. Taylor*, Case No. SCSL-03-01-T-1283, Trial Chamber Judgement, ¶ 6994 (Apr. 26, 2012), <http://www.scsldocs.org/documents/view/6672-6672>.

of imprisonment.<sup>116</sup> The defense appealed the judgment on forty-five grounds (but later withdrew one ground) and the Prosecution appealed on four grounds.<sup>117</sup>

The Appeals Chamber reversed the conviction regarding planning liability for crimes committed in Kono and Makeni districts because the Trial Chamber did not find that any crimes were committed in these areas, but upheld all other instances of planning liability.<sup>118</sup> The other grounds of appeal raised by the Defense were dismissed in full.<sup>119</sup> The Appeals Chamber only allowed the Prosecution's ground of appeal that the Trial Chamber erred in law by concluding that aiding and abetting liability warrants a lesser sentence than other forms of liability.<sup>120</sup> The sentence of fifty years of imprisonment was upheld.<sup>121</sup> Taylor is serving his sentence in the United Kingdom; he had requested to serve his sentence in Rwanda alongside others convicted by the Special Court, but this request was denied.<sup>122</sup>

One of the grounds of defense was that the Trial Chamber erred in holding that the "specific direction" is not an element of the *actus reus* for aiding and abetting liability.<sup>123</sup> Relying on its Statute, customary

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<sup>116</sup> *Id.*; *Prosecutor v. Taylor*, Case No. SCSL-03-01-T-1285, Sentencing Judgement, at 40 (May 30, 2012), <http://www.scsldocs.org/documents/view/6674>.

<sup>117</sup> *Prosecutor v. Taylor*, Case No. SCSL-03-01-A-1301, Defence Leave for Appeal (July 19, 2012), <http://www.scsldocs.org/documents/view/6721>; *Prosecutor v. Taylor*, Case No. SCSL-03-01-A-1300, Prosecutor Leave for Appeal (July 19, 2012), <http://www.scsldocs.org/documents/view/6720>.

<sup>118</sup> *Taylor*, Case No. SCSL-03-01, Appeal Judgement, *supra* note 114, at 305.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* ¶ 716.

<sup>121</sup> *Id.* at 305.

<sup>122</sup> *Prosecutor v. Taylor*, Case No. SCSL-03-01-ES-1392, Sentencing Order (Oct. 4, 2013), <http://www.scsldocs.org/documents/view/9000>.

<sup>123</sup> *Taylor*, Case No. SCSL-03-01, Appeal Judgement, *supra* note 114, ¶ 348.

international law and post–World War II jurisprudence, the Appeals Chamber affirmed the Trial Chamber’s judgment: no particular manner of assistance is required to establish aiding and abetting liability.<sup>124</sup> The prosecution was not required to prove that Taylor provided assistance to any specific actor(s); rather, the prosecution simply had to prove that Taylor’s conduct had a “substantial effect” on the assistance of crimes for which he was charged.<sup>125</sup> The Appeals Chamber did consider the ICTY *Perišić* Appeals Chamber judgment, which suggests otherwise. However, the defense failed to demonstrate that this constituted customary international law or required the Special Court to depart from its Statute or previous jurisprudence.<sup>126</sup>

In January 2014, the ICTY released its appeals judgment in *Prosecutor v. Šainović, et al.*, which considered the issue of specific direction.<sup>127</sup> The Appeals Chamber took a similar route as in *Taylor*, looking at ICTY jurisprudence other than *Perišić*—specifically, the *Mrkšić & Šljivančanin* and *Lukić & Lukić* appeal judgments—which stated that specific direction is not essential for establishing aiding and abetting liability.<sup>128</sup> The Appeals Chamber “unequivocally reject[ed] the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence . . . and customary international law.”<sup>129</sup>

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<sup>124</sup> *Id.* ¶¶ 482–86.

<sup>125</sup> *Id.* ¶ 482.

<sup>126</sup> *Id.* ¶¶ 473–80. See also Marko Milanovic, *SCSL Appeals Chamber Affirms Charles Taylor’s Conviction*, EJIL: TALK!, Sept. 26, 2013, <http://www.ejiltalk.org/scsl-appeals-chamber-affirms-charles-taylors-conviction>; Alex Fielding, *Charles Taylor Appeal: Why Its Rejection of “Specific Direction” Doesn’t Matter*, BEYOND THE HAGUE, Sept. 30, 2013, <http://beyondthehague.com/2013/09/30/charles-taylor-appeal-why-its-rejection-of-specific-direction-doesnt-matter>.

<sup>127</sup> *Šainović*, Judgement on Appeal, *supra* note 36.

<sup>128</sup> *Id.* ¶ 1619.

<sup>129</sup> *Id.* ¶ 1650.

Academics have commented on the fragmentation of jurisprudence at the ICTY Appeals Chamber on this issue, noting that some of the judges in *Šainović* were also on the bench in the *Perišić* case.<sup>130</sup> This fragmentation may have an impact on the upcoming *Stanišić & Simatović* case, which the accused were acquitted for aiding and abetting liability at trial because of a lack of specific direction.<sup>131</sup> The bench in that case is composed of three judges who have already ruled on specific direction (with one supporting it and the other two not).<sup>132</sup>

In February 2014, the prosecution filed a motion for reconsideration in the *Perišić* case because of the appeal ruling in the *Šainović* case, arguing that the original *Perišić* appeals judgment in this respect was “based on a clearly erroneous legal standard which misconstrued the prevailing law.”<sup>133</sup> The Appeals Chamber denied the motion on the grounds that the ICTY’s Statute does not grant it the power to reconsider a final judgment of the Appeals Chamber.<sup>134</sup>

#### IV. Conclusion

What conclusions have I drawn from this necessarily incomplete overview of international criminal legal developments from August

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<sup>130</sup> E.g. Marko Milanovic, *The Self-Fragmentation of the ICTY Appeal Chamber*, EJIL TALK!, Jan. 23, 2014, <http://www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber>.

<sup>131</sup> *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-T, Judgement, ¶¶ 2362–63 (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2013), [http://www.icty.org/x/cases/stanistic\\_simatovic/tjug/en/130530\\_judgement\\_p2.pdf](http://www.icty.org/x/cases/stanistic_simatovic/tjug/en/130530_judgement_p2.pdf).

<sup>132</sup> *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-A, Public Order Replacing a Judge in a Case Before the Appeals Chamber (Int’l Crim. Trib. for the Former Yugoslavia Dec. 16, 2013), [http://www.icty.org/x/cases/stanistic\\_simatovic/presord/en/131216.pdf](http://www.icty.org/x/cases/stanistic_simatovic/presord/en/131216.pdf).

<sup>133</sup> *Prosecutor v. Perišić*, Case No. IT-04-81-A, Decision on Motion for Reconsideration, ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 20, 2014), <http://www.icty.org/x/cases/perisic/acdec/en/140320.pdf>.

<sup>134</sup> *Id.*



2013 to August 2014? On the issue of state cooperation, I feel that two trends are evident. First, the Ukraine and Syrian crises have highlighted the fact over the past year that the ICC does not have universal jurisdiction. There are still key zones of impunity in the world which include the actions of Permanent Members of the U.N. Security Council and countries protected by those Permanent Members. I mentioned in a positive manner the action going on under the surface in all of the tribunals to ensure and encourage state cooperation, but this does not have an effect on the Russias, Chinas, and Syrias of the world.

As well—and I thank Richard Dicker of Human Rights Watch for also pointing this out—the issue of how to ensure cooperation of those states that *are* States Parties to the ICC is very complicated. We need to continue to think deeply about what the Assembly of States Parties *can and should not do* with ICC States Parties which are not cooperating, as isolation and sanction may not necessarily be beneficial, especially when a non-cooperating country, like the DRC, is also a situation country which has been cooperating in other ways. And yet we cannot forget that investigations are carried out at substantial cost, under difficult circumstances and often in ongoing conflict situations, entailing great sacrifices by witnesses, victims and staff of the Court. Failure to arrest individuals under arrest warrants emboldens them and potential future perpetrators, and fuels the perception that they can remain beyond the reach of the Court and perpetrators can continue to commit crimes with impunity.

This brings me to my final points. The outputs of the international criminal tribunals and the residual mechanisms illustrate that international criminal legal development is certainly past its infancy. There have been missteps—such as the negative sexual violence jurisprudence I mentioned, or the legal fragmentation created by the ICTY’s Appeals Chamber in *Perišić* on aiding and abetting. But there has also been thoughtful development—such as the issuance of the

“Policy Paper on Sexual and Gender-Based Violence” by the ICC’s Office of the Prosecutor, and certain case law—allowing the tribunals to come closer to an understanding of how “gender” is much more than just “women” and how socially constructed norms of discrimination inform and drive genocide, crimes against humanity and war crimes. That demonstrates much-needed legal maturity.



## **Panels**



## Reflections by the Current Prosecutors

*This roundtable was convened at 10:30 a.m., Monday, August 25, 2014 by its moderator, Jennifer Trahan, of New York University's Center for Global Affairs, who introduced the panelists: Fatou Bensouda of the International Criminal Court (ICC), Serge Brammertz of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Hassan Jallow of the International Criminal Tribunal for Rwanda (ICTR), Brenda J. Hollis of the Special Court for Sierra Leone (SCSL), and Nicholas Koumjian of the Extraordinary Chambers in the Courts of Cambodia (ECCC).*

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**JENNIFER TRAHAN:** It is a tremendous pleasure for me to be moderating this panel, and thank you to David for asking me to moderate. I, too, am very saddened by the passing of Hans-Peter Kaul, as I was honored to get to know him and work with him a little bit.

We have an amazingly distinguished set of panelists. I think most of the audience knows who they are, so I will only briefly mention their positions. We have for the International Criminal Court, Fatou Bensouda; for the Yugoslav Tribunal, Serge Brammertz; for the International Criminal Tribunal for Rwanda, Hassan Jallow; for the Special Court for Sierra Leone, Brenda Hollis; and for the Extraordinary Chambers in the Courts of Cambodia, Nicholas Koumjian.

These truly are leaders in the field of international justice to whom the international community owes a tremendous debt of gratitude for their hard work and dedication, not to mention the hard work and dedication of the prosecutors who preceded them, many of whom we have here today, including David Crane, Sir Desmond de Silva, Stephen Rapp, Andrew Cayley, and we are also honored to have the deputy prosecutor of the ICC with us as well.

I will have specific questions for each prosecutor, but I would like each prosecutor to start by briefly summarizing, if you can possibly stick to about five minutes, the key accomplishments of your tribunal over the past year. We will go in roughly the order in which we are seated, and then I will come back to questions. Let me start with Serge Brammertz.

**SERGE BRAMMERTZ:** Thank you very much. Good morning, everybody. Pleasure to see all of you. I have the impression that every year, we have more and more participants. I hope this will be reflected in the support for international justice in general.

I will very briefly try to say a few words about where we are at the Tribunal for the Former Yugoslavia. I have had the pleasure of being at those meetings for the last six, seven years, and the first years, I was mainly complaining about the non-arrest of the key fugitives, Karadžić and Mladić. Now, a few years later, I am in the privileged situation to say that we are almost there, that we are almost at the end of those two trials, which are probably the most important trials in the history of the tribunal. Interestingly, they are taking place not at the beginning when the tribunal was created, but at the end.—one of the reasons being that it has been so difficult to have the fugitives arrested. This is one of the big problems, unfortunately, the other tribunals still have and we do not have to deal with anymore.

We are in the final phase for the *Karadžić* trial. The defense case rested in May. The final briefs will be submitted this week, final arguments presented in four weeks' time, and then we hope to have a judgment somewhere before summer next year. So I hope that I will be able to announce conviction next year.

The *Mladić* trial is a little bit more complicated in the sense that there are a number of health issues. The trial is now in the defense phase. Thirty witnesses already testified for the defense, with 150 to go. We

hope that the trials there also will be over by summer next year. It takes time.

There have been a number of developments and decisions in relation to those cases. For example, in relation to the reopening of the prosecution's case, we are asking today in the *Mladić* trial in relation to a mass grave, which has been discovered in September. For those who are not so familiar with the context, the crimes were committed between mainly 1992 and 1995, and still today, every year, a number of mass graves are discovered. In September, a new mass grave was found with more than 400 remains. We have identified more than 285 individuals so far, and we have asked for a reopening. Why? Because we think those are key elements to the ethnic cleansing and genocide in relation to the municipalities.

Those who are familiar with our jurisprudence know that in relation to Srebrenica, we have a number of convictions for genocide because, within three weeks, up to 8,000 men and boys were executed. But in relation to the ethnic cleansing campaign in more than fifty municipalities, we have a number of convictions for persecution and for crimes against humanity, but never for genocide because the judges were of the opinion that the organized and systematic corrector was not established enough to speak about genocide.

We think we have one last chance to support the genocide charges. Why? Because the *modus operandi*, which is becoming clear, shows that those mass graves had been prepared days and weeks before the executions took place; so much more organized character for those killings in a number of municipalities. We will see what will happen there.

But the important thing here is really that even twenty years after the conflict, in a region that is relatively peaceful nowadays, with a big international presence, and countries that are getting close with the



European Union, even there we are finding, twenty years after the crimes, mass graves, which shows one of those big, big problems, all of us are confronting.

In relation to the jurisprudence, I want to mention two elements very briefly, and I understand we will have, perhaps, a discussion afterwards. One, in relation to specific direction, remember that we went through a very big frustration in the Office of the Prosecutor and, larger than that, after an acquittal for General Perišić at the Appeals Chamber at the ICTY. To make a long story short, he was the chief of staff of the Serbian army in Belgrade. He had been prosecuted and indicted for aiding and abetting, providing substantial support to the military forces in Bosnia, knowing that they were committing massive crimes. He was first convicted by a majority of judges, but was later acquitted in an appeal because the majority of the Appeals Chamber was of the opinion that although it was established that he had provided substantial support in terms of logistic financial support and that he was aware of the commission of crimes, he had not specifically directed this support towards the commission of crimes. And because he was considered a remote perpetrator, because he was in Belgrade and not on the crime scene, a higher threshold was applied by the Appeals Chamber. We were very surprised to say the least when he was acquitted.

In the meantime, there has been the *Charles Taylor* trial and the *Šainović* trial, two trials in appeal with a similar legal situation where we were very pleased in the interest of international justice and in the interest of the victims, but also of our own office to see that the specific direction was not maintained where a large majority of judges has decided that the specific direction notion is not in line with international humanitarian law. It is not supported by all jurisprudence, and it is, in fact, creating more confusion than helping anybody else. I can say more about it later on.

The last element is in relation to sexual violence-related jurisprudence. It is an issue we are discussing very, very often, and I hope that when I come next time, I will have a study with me that we are now finalizing at the ITCY about our good and bad experiences over the last twenty years in conducting sexual violence investigations—what have we done well, what could we have done better. We are preparing quite an ambitious publication for next year. I hope you will be interested in it.

We had an interesting jurisprudence, which, unfortunately, was not often reflected in the media, and it is the following. We had a few acquittals when we prosecuted for killings, for extermination, for looting, and for sexual violence. We appealed successfully several acquittals for sexual violence related crimes. The appeals judges followed our argumentation in accepting that in the given context of an ethnic cleansing campaign sexual violence related crimes were foreseeable and should therefore be treated exactly as the other foreseeable crimes like killings and looting.

And lastly, we are still very much working with the prosecution offices in the former Yugoslavia. We are in our final phase where we will probably close within two, three years' time. Next week, I will be in Sarajevo again. There are still two thousand cases to be conducted. We are trying to support capacity-building initiatives and training in the former Yugoslavia to make sure that those cases will continue, because I am absolutely convinced that the success or failure of our tribunal will very much depend on how those cases will continue in the former Yugoslavia and how much pressure the international community will maintain to make sure those cases are moving forward.

Thank you very much.

**JENNIFER TRAHAN:** Thank you. Hassan?

**HASSAN JALLOW:** Thank you. As you may be aware, this was the twentieth anniversary of the genocide in April of this year, and later on in the year in November, we will be commemorating the twentieth anniversary of the establishment of the Rwanda Tribunal. It has taken some twenty years of work to try and bring justice and accountability to what happened in Rwanda during those dreadful one hundred days in 1994.

The Tribunal is at a stage where we have now completed all our trials at first instance, and we are now focused on finishing the appeals and on legacy work. We have argued all of our appeals now, except for one case, which is what we call the *Butare* case. The *Butare* case involves six accused persons who had been convicted by the trial chamber and sentenced to various times, life imprisonment or the fixed times. The case has the dubious distinction also of including the only female who has been indicted for international crimes—Nyiramasuhuko, who was the minister responsible for women’s affairs and who was indicted and convicted of rape along with her son, who was also involved in this case. We expect that the hearing in that case will take place in December, as scheduled by the Appeals Chamber, and that it will be the last case for the ICTR. The estimation is that by September of next year, the decision will come from the Appeals Chamber and the Rwanda Tribunal will close down within twelve months from now.

We have argued other appeals and the judgments are scheduled to be delivered at the end of September, next month. That is where we are. With regard to the past twelve months, we have had some good news. We have also had some disappointments in relation to some of our cases, especially high-level people who had been convicted by trial chambers. We had two senior government ministers—former government ministers—who have been convicted by the trial chamber and were released on appeal. We have also had two former senior military officers convicted by the Trial Chambers who were released on appeal. Basically the reasoning of the Appeals Chamber

was insufficiency of evidence or the Appeals Chamber coming to a different appreciation, drawing different inferences on the facts than the Trial Chambers did.

Fortunately, we were able to maintain the conviction against Augustin Bizimungu, who was the former chief of staff of the armed forces, and if you had watched *Hotel Rwanda*, you may know about who Bizimungu was. He was featured in that particular movie, or somebody representing him was featured in that movie. It was a very welcome decision, both in terms of maintaining the conviction and also maintaining the sentence of thirty years. There was a disappointing part of the Appeals Chamber judgment, though, which was not to disturb the current legal position regarding the responsibility of a successive commander to punish a subordinate for offenses committed when he was not the commander. What had happened in this particular case was that Bizimungu had taken over command for days after being aware that some of his soldiers had committed serious crimes, and when he took over, he was aware of this, and he failed to punish them. He could not have prevented because he was not the commander at the time, but we argued that, once he became the commander, he could have punished them. The Appeals Chamber came to a different conclusion on the basis that effective control was required on both instances for the successive commander to be responsible. In our view, that creates certain gaps that allow people to slip through and not be punished. The past year was a bit of a mixed bag, but there were the good sides and the disappointing sides.

We have been focused also on the legacy aspect of our work, trying to identify and publish some of the lessons which we think need to be learned from the work that has gone on over the past twenty years. We have published a manual of best practices for the tracking and arrest of fugitives. We have also published a manual on the investigation and prosecution of sexual violence in situations of conflict. Both documents, I am happy to note, are now being used by the Interpol as

training material for national jurisdictions. This is really the essence of this best practice project: to identify ways in which the job could be done better, based on some of the difficulties we faced, so that other international courts and national jurisdictions can learn from these experiences.

We are still working on other aspects of best practice. We hope to publish, later this year, a manual on the empowerment of national jurisdictions to enable them to investigate and prosecute international crimes based on our experience in the referral of cases to national jurisdictions. We think this manual would be relevant to the implementation of the complementarity principle on which the ICC itself is based. The manual would show, in our view, what needs to be done in order to empower national jurisdictions to live up to this, which is now their own primary responsibility.

We anticipate we will finish these projects before the ICTR closes in September of next year, but it is clear that the tribunal will close within the next twelve months. There is a little bit of work left over, of course. We still have nine fugitives. Six of them have had their cases referred to Rwanda for trial, and so Rwanda bears the primary responsibility of tracking them. The other three have had their cases referred to the Successor Mechanism, which now takes over responsibility for their tracking and for their prosecution in the event of arrest.

We have sent out invitations to the events, which will mark the twentieth anniversary of the tribunal this year, and I look forward to seeing many, if not all, of those invitees participate in the proceedings.

Thank you very much, Jennifer.

**JENNIFER TRAHAN:** Thank you.

**FATOU BENSOUDA:** Thank you very much, and good morning to you all. I am always very happy to be here with you. My colleagues keep talking about winding down and closing, so I am getting worried that maybe in a couple of years, I will be the only one sitting here and that the dialogs will be monologues. We joke about that.

But for the ICC, this past year has actually been very challenging, very hectic, but also very dynamic, and the work at the ICC has been not only incredibly demanding, but also unrelenting. I think with everything that is going on around the world, this is understandable.

I do believe that this second decade of the Court's operational existence is a very critical period in the life of the institution, and that it is incumbent upon us, those who are there, to ensure that we do our best to advance the mandate of the court and to also strengthen the public confidence in the activities, in our crucial activities.

And to this end, as far as my office is concerned, we have instituted a number of significant changes, and I thought it would be important for you to take note of these changes that have taken place not only at the organizational level, but also at the policy level. We are doing all of this with the aim of enhancing efficiencies and especially our deliverables. We have engaged in a very serious and committed manner to improve the quality and also the effectiveness of our key preliminary examinations work, investigations and prosecutions activities, but at the same time to also develop policies and the operating procedures. As this is done, we need to hone performances.

We had the strategic plan of 2012 to 2015 adopted last year and this is a concrete example of such efforts that reflect an entirely new approach to our core activities. Let me start with the strategic plan and the preliminary examinations. We have realized the importance of preliminary examinations, and the strategic plan ensures that we place a stronger emphasis on this aspect of the office's work. In

addition to establishing whether reasonable grounds exist to proceed to investigations, the aim of the preliminary examinations is also to promote genuine national proceedings and the prevention of crimes.

The office's investigative and prosecutorial strategies have also undergone tectonic changes. Let me cite a few examples of what we have done. We are now increasingly diversifying the forms of evidence on which we rely, and we are moving away from the previous position of relying heavily on witness evidence. In particular, we are looking to enhance our capabilities and also make sure that we are looking into this diversified form of evidence, such as forensic evidence and analysis.

We are also shifting away from focused investigations, which was a policy in the office, and moving towards in-depth and open-ended investigations to ensure that our cases are built on a more solid basis. And I should mention that as a matter of practice now, what we do in the office: We undertake comprehensive case reviews throughout the life cycle of a case to test a hypothesis against the evidence that we have on hand. I am afraid we were not doing that in this systematic manner before, but now this is done consistently.

Additionally, where it is appropriate, we will look to prosecute lower and midlevel perpetrators and then move up, building a case against those most responsible. We are not moving away from those responsible, but we thought that it would be good to start from midlevel and then move up.

We will also try to be as trial-ready as possible at the initiation of the judicial process, such that by the time we request for an arrest warrant or, at the latest, at the confirmation stages of the proceedings, we will be as trial-ready as possible.

And ever since assuming my mandates as the prosecutor of the ICC, we have engaged in a robust recruitment campaign to be able

to hire more experienced and talented people in the investigations divisions and the prosecution division, but also other divisions, including my immediate office. We are ensuring that the joint teams we have in place now are headed by the senior trial lawyer, who has vast domestic and/or international criminal experience. Previously, the leadership, maybe some of you will know, was a three-man leadership of each division, and I think that has been difficult to manage.

Policy developments have also been taking place in the office, culminating in the adoption of a code of conduct for the office. This is a detailed code that provides very clear guidelines for the office of the prosecutor staff to uphold an impeccable standard of professionalism, efficiency, and independence, and to integrate this in the performance of their duty. This is particularly important for me. It is a code that applies equally to myself and my deputy, James, and I have already ensured that all the staff member in the office have undergone mandatory training on the code, and James and I have also undergone training on this code.

Another policy is the sexual- and gender-based crimes policy, which I launched in June of this year. It is a very comprehensive document, and there were a lot of consultations before it was finally adopted, both internally and externally. I think it is a demonstration of the office's and my personal commitment to enhancing the integration of a gender perspective in all of the areas of the work of the office and to being innovative in our investigations and prosecutions of these very serious crimes. I believe that this document will also serve as a reference guide for states and other relevant actors. We are also looking to do an official launch, probably within the margins of the assembly of states parties that will take place in New York this year.

There is also the children's policy. We have just embarked on a consultation process for the development of a children's policy,



and my office will soon again be seeking external input. I will be pleased to benefit from your contributions in this upcoming policy, the policy on the prohibition against attacks on cultural, religious, and educational buildings and monuments. I am similarly developing this comprehensive policy to assist the office in the methodological investigations and the prosecutions of these crimes, which are crimes of directly attacking buildings that are dedicated to religion, education, art, science, or charitable purposes or historic monuments.

With respect to the office restructuring, we have done some ad hoc organizational changes. They have already taken place, but I am also considering a division of the structure and the organization of the office. This will come soon.

With respect to the preliminary examinations, activities, and the cases, another important development that relates to the office's core activities is opening of new preliminary examinations, which we have undertaken recently in Ukraine, in the Central African Republic in response to a self-referral from the Central African Republic, and also in Iraq. But this has brought the number of preliminary examinations that we have had to ten, and much progress has also been made in moving some of these preliminary examinations to the next phase, culminating, for instance, with the closure of the situation in the Republic of Korea.

With respect to investigations, we are at different stages, and it is continuing in eight situation countries. Regarding the courtroom proceedings, in March, Germain Katanga was convicted of war crimes and a crime against humanity. In May, he was sentenced to twelve years' imprisonment. The judgment in that case is now final, following the withdrawals of appeals by the parties and the discontinuance of the respective appeals by the parties.

In June of this year, thirteen charges of war crimes and five charges of crimes against humanity were confirmed against Bosco Ntaganda, and the trial in that case will start later this year.

Four charges of crimes against humanity were confirmed against Laurent Gbagbo, former president of Côte d'Ivoire, and we are preparing to go to trial now. Charles Blé Goudé, who was also charged in the events that took place in Côte d'Ivoire, was surrendered to the court this year in March, and the confirmation of charges for Charles Blé Goudé is scheduled to take place in September.

I believe that some of these positive developments demonstrate in part that we are heading in the right direction with the implementation of the office's new strategic plan, and this is also good news for the victims who have suffered so much at the hands of these perpetrators and who have yearned for justice for so long.

A more troubling phenomenon that we have seen last year and this year, is the increase in the number of cases involving witness interference and witness intimidation, in particular, in the context of the Kenya cases. This is a new challenge that the office faces, and I believe it directly threatens the integrity of the Court's proceedings to which we have had to pay particular attention, with no option but to devote existing resources to investigating these Article 70 investigations, as we call them. It has put additional constraints on the resources of the office.

In the context of the case against Jean-Pierre Bemba, for instance, five arrest warrants have been issued, including for Jean-Pierre Bemba himself, for the offenses against the administration of justice, which I just mentioned, the Article 70 offenses of the Rome Statute. We have had good cooperation, thanks to the Netherlands, Belgium,

and the Democratic Republic of Congo. These individuals were simultaneously arrested in three countries while the other one was subsequently surrendered to the Court by France. We are grateful to the state parties for that. We are preparing now for the confirmation of charges for these cases.

And in the Kenya situation, an arrest warrant has been issued against Barasa, a national of Kenya, but the warrant is still pending execution. What the Kenya situation or these Article 70 cases involve is putting in place teams that would have investigated our core crimes, which pulls away resources we need to investigate and prosecute crimes under the Rome Statute. But it remains vital with regards to cooperation and the challenges that we face. We have to continue to have cooperation from state parties and partners, but this cooperation, we keep emphasizing, has to be timely and it has to be tangible. This is what we keep asking states, that this cooperation be timely when we need it, and it has to be substantive when it is given.

Arresting the individuals against whom the warrants have been issued continues to be a major challenge, and to date, we have ten individuals that are yet to be arrested. Warrants have been issued against them.

Another challenge that the court faces is the misperception and the lack of knowledge about the court. It is a big challenge. It continues to be a big challenge, and we can only explain so much as a court, as officials of the court to the world. We can only explain so much, but unfortunately, what happens is that a vacuum is created by our inability to reach out to all corners of the world, and that vacuum is fueled by the skeptics. It is fueled by the critics, and they continue to foil the misperceptions about the Court and the work of the Court. There is much that supporters of the Court—from academia, the media, the civil society, the legal profession, just to name a few—can do in this regard to help continue to raise awareness about the Court and about the crucial mandate that the Court faces.

I could go on. I really could go on and on about the court and elaborate, but I think I will stop. I thank you for this opportunity.

**JENNIFER TRAHAN:** Brenda.

**BRENDA J. HOLLIS:** Thank you. Now we will talk about the little engine that could and did: the Special Court for Sierra Leone. I am very pleased to be here again this year, and this year in my capacity as the Prosecutor of the Residual Special Court for Sierra Leone. In the past year, I believe that the Office of the Prosecutor has been very gainfully employed and, I believe, has given good value for each dollar in the budget. But I think there are two events of primary importance since the last Dialogs which I would like to discuss.

The first of these events occurred in September of last year when the Special Court Appeals Chamber delivered its unanimous judgment in the appeal of the *Charles Taylor* case, in which the Appeals Chamber affirmed all convictions and the fifty-year sentence of Charles Taylor.

In addition to its historic value, there were really two aspects of this judgment that I would like to bring to your attention today. The first aspect deals with the proof requirements of aiding and abetting. Serge has talked to you about the *Perišić* case. Last year when I was here, I noted our concern about that majority decision, which we believed was inconsistent with customary international law, the jurisprudence of the two ad hoc tribunals, and also was a very confused majority decision. Our Appeals Chamber found that specific direction is not an element of aiding and abetting under customary international law and reaffirmed that what the prosecution must prove is that the accused's acts substantially contributed to the commission of the crime, and that the mental state that is required is the mental state of knowledge or an awareness of the substantial likelihood that the accused's acts would assist the commission of crimes. We believe this is a very important decision for the jurisprudence of aiding and abetting. We believe that

the specific direction jurisprudence is one that would, in essence, allow top-level perpetrators to basically have impunity for their actions, so we were very happy to have received that decision from the Appeals Chamber.

The second aspect of this case that I believe is worthy of note was of particular significance to me, because it is a position I have been arguing since I began at the Yugoslav Tribunal in 1994: the Appeals Chamber found that there is no hierarchy among the forms of liability set out in Article 6(1) of our statute. That is to say, there is no hierarchy among the forms of liability of planning, ordering, instigating, committing, or aiding and abetting. Rather, when determining a sentence, it is individualized sentencing. The court must look at the gravity of the crimes, the extent and consequence of the totality of the accused's criminal misconduct, and the personal circumstances of the accused. I believe this also is a very important jurisprudential decision by this Appeals Chamber.

In addition to the Appeals Chamber decision in the *Taylor* case, the other significant event that occurred at the Special Court for Sierra Leone was that in December of last year, the Special Court became the first international criminal court since Nuremberg to close its doors. The Special Court was replaced by the Residual Special Court, which has the responsibility of carrying out the continuing functions of the Special Court, including dealing with enforcement of sentences, dealing with issues raised by prisoners, continuing the protection and support of witnesses and victims, the maintenance of the court archives, and responding to state requests for information.

When the Special Court closed its doors, we had one outstanding indictment, and that was against the chairman of the *junta* that had overthrown the elected government of Sierra Leone in 1997. We have conflicting information about this man, Johnny Paul Koroma. We have information that he is dead, indeed, killed on the order of

Charles Taylor, but we also have continuing reports that, like Elvis Presley, he has been seen in various places throughout the world. So he may be alive. If he is located and turned over to the Residual Court, and if we are unable to refer his case to a state for prosecution, then the Residual Court would have the ability and the mandate to try this one outstanding indictment.

The Residual Court is a very lean mechanism. We share an administrative platform with the Yugoslav Tribunal, and we owe great thanks to the Yugoslav Tribunal and to Serge's office for their continuing support, which has been substantial throughout the life of our court. We have a permanent seat in Freetown, Sierra Leone, but we have an interim seat in The Hague, The Netherlands, and that is where we carry out our duties and where our archives are located.

Since the Residual Court has stood up, my primary job has been to put our prosecutorial functions in place and to recruit the one full-time position that I have, that is, the prosecution legal advisor and evidence officer. We have also been very engaged in completing our archiving, so that we can do comprehensive searches, as needed; responding to five state requests for information, three of them very complex requests, and filing two submissions, giving our perspectives on—and our opposition to—two prisoners' requests for early release. We were unsuccessful in both of those situations. They will be released early with conditions. We also asked the President of the Court if we would be allowed to make submissions on Mr. Taylor's motion to the court that he be allowed to serve his sentence in Rwanda instead of in the United Kingdom, where he is currently serving his sentence. Our request was granted. The disposition of his motion is pending.

On reflection, I think the Special Court was able to close its mandate, in large part, because of the leadership of the principals of the Court—several of them are here with us today, the former prosecutors—but also because of the very, very hard work and dedication of many

people who worked throughout the years in the Court. I would like to extend my thanks to all of them for a job truly well done and to a Court whose work will add significantly to the fight against impunity.

Thank you.

**NICHOLAS KOUMJIAN:** Two and a half weeks ago, on the seventh of August, the Extraordinary Chambers in the Courts of Cambodia delivered judgment against the two most senior surviving members of the Khmer Rouge regime. This was a judgment on a severed portion of the indictment in that case, so it dealt with the limited charges related to the initial transfers of the population in April 1975 from Phnom Penh—approximately two million people were forced out immediately when the Khmer Rouge occupied the city and in transfers later that year between rural areas of Cambodia—and a single massacre of hundreds of officials and officers of the former regime at a place called Tuol Po Chrey..

The Court convicted the two accused of the various crimes that they were charged with, including murders and exterminations related to those transfers, including the deaths of many unknown numbers during the transfer from Phnom Penh. So we are very pleased with that, and now we will be moving on towards an appeal in that case, which undoubtedly will be quite complex and will take some time. But at the same time, we are preparing for the trial of the remaining charges in that case. We call this the case against Khieu Samphan and Nuon Chea, the two most senior surviving members, or Case 002. So this next phase of the trial which we refer to as Case 002/02 will deal with all the remaining legal charges in the indictment of Nuon Chea and Khieu Samphan. These include the persecution of religion of Buddhists and Muslims throughout the country. It includes all of the security centers, including S-21 or Tuol Sleng, the famous museum that some of you who have been in Phnom Penh undoubtedly have visited, where about sixteen thousand individuals were taken, tortured,

and killed. It will also include forced marriages that occurred during the Khmer Rouge regime, where at times dozens, even hundreds, of couples were forced to get married often to people they had never met; and it will include the rapes that occurred when these individuals were forced to consummate their marriage.

Also remaining are the genocide charges. As all of you know, the Genocide Convention does not include political groups but includes racial, ethnic, national, or religious groups. There are two genocide charges pending, the genocide of the Vietnamese in Cambodia and the genocide of the Cham Muslims. So I think one of the things that is probably not well appreciated around the world, but I think is of great significance in modern times, is that we have a case pending where the U.N.-funded and supported court is engaged in prosecuting people for genocide against individuals because of their belief in Islam. I think that is going to be a very significant part of this case.

While this is going on, we also have investigations continuing in two other cases, about which many of you know the history. They were proposed by the international side of the Court. The Cambodian Court is a mixed tribunal where there are a national prosecutor and an international prosecutor, a national investigative judge and an international investigative judge. And, the judges of the Trial Chambers are mixed. There was a disagreement between the internationals and the nationals as to whether or not these individuals qualified under the statute as senior and most responsible for the crimes, but in the last years, these investigations have been fully proceeding but only conducted by the international side. The investigations have not been impeded in the ten months that I have been there.

Over three hundred interviews have taken place in the last year. In one of the cases, Case 004, the prosecution made an additional submission to the judges asking them to expand the investigation to include forced marriages in the particular areas that are the subject of that



case, and the rapes that occurred from the forced consummation of the marriage and also rapes that occurred outside of forced marriage. This relates to what someone, I believe it was Serge, talked about some recent cases at the ICTY and the issue when leaders give orders for things like the torture and execution of young women, is rape really a foreseeable result, or is it a surprise? Is it something they cannot be held responsible for if those women are also raped? In the initial investigation of Case 002, the closing order said that it was not a policy of the leadership of the Khmer Rouge for sexual violence to occur. They were rather puritanical in their attitudes about sex, but clearly, in our view, when you take young men, often teenage soldiers, give them complete control over women and girls, even to the point that they are allowed to torture and execute them, then we believe that sexual assaults are certainly foreseeable results of those orders and that the senior leaders who gave these orders can be held responsible for the rapes and sexual violence that occur.

There is much work that remains to be done in the Extraordinary Chambers. We are operating, like all of the courts, under extreme budgetary constraints and much uncertainty, but we hope that the funding will continue, and we will be able to bring the court to a conclusion that will serve the interests of the victims in Cambodia, which are really the entire population. Anyone born before 1979 was affected. Anyone born after 1979, their parents, and their grandparents were affected and undoubtedly the post-traumatic stress of the parents has impacted their relationships with their children. It has affected everyone. We think a court that is dealing with the killing of an estimated 1.7 million people deserves to continue and to reach a just verdict in those cases. Thank you.

**JENNIFER TRAHAN:** Thank you to our panelists. Let me start with some specific questions. David Crane said I could play a bit of a devil's advocate, so I am going to try to do that.

**DAVID CRANE:** [*Jokingly:*] I did not say that.

**JENNIFER TRAHAN:** [*Jokingly:*] Yes, you did. . . . Serge Brammertz already discussed the problems of the *Perišić* decision, which clearly Brenda agrees with, which seems to add a third prong to what is aiding and abetting, namely, specific direction. In other words, for example, if you do not specifically direct arms to criminal uses, you get acquitted. So what they have effectively done is eviscerate aiding and abetting in *Perišić*. But as much as we agree with the fallacy of the reasoning, the unfortunate consequence is that it has resulted in a really high-level acquittal, and that is going to stand.

And there has been an acquittal as well in the *Gotovina* case, and we probably would also agree with the criticism that the logic in *Gotovina* seems a bit puzzling; again, this has resulted in another high-level acquittal. Hasn't this controversy been harmful for the overall legacy of the Yugoslav Tribunal and an unfortunate day for international justice?

**SERGE BRAMMERTZ:** This is a question?

**JENNIFER TRAHAN:** Yes. Have these high-level acquittals been harmful to the legacy of the ICTY.

**SERGE BRAMMERTZ:** Well, I think it will be for others to decide what has been helpful and not helpful in the reputation of the Tribunal. As a prosecutor, I am absolutely convinced that what will be important to our success with the two remaining cases, if we are successful until the end with the *Karadžić* and *Mladić* trials having serious convictions, I hope that will be what is remembered. Of course, we were very frustrated with those two acquittals, but as a prosecutor, it is always a little bit delicate to publicly criticize decisions coming from appeals judges. As I said, we were unhappy with those two decisions.

And I admit very easily—and I think I said it last year—that in my twenty-five year career, it has never been so difficult for me to not publicly react stronger than I have already done in relation to those two decisions because not only do I not think that they are reflecting the reality of the evidence, but also because of the way they came out. Both decisions are very short appeals decisions that came out of very short appeals hearings. The frustration is that for both cases, there was a two- or three-year trial with two hundred, three hundred witnesses, with thousands of artifacts presented as evidence in court, securing convictions, and then—after one or two hour appeals hearings—having a thirty-page decision, which is absolutely not convincing, with very strong dissenting opinions, using language like “this is a mockery of justice, this has nothing to do with justice,” it makes it very difficult.

I think that I would not discuss the rumors and the merits of the case, but the perception at least that things were not going the way they should have gone, I think this has been negative, but I hope it will have no long-term impact.

In relation to the *Perišić* decision—when the *Charles Taylor* decision came out and the *Šainović* decision came out, where in a very long explanation analyzing international law and national law and jurisprudence, the ICTY Appeals Chamber, differently composed, came up with a totally different decision, really saying that there was no support anywhere for specific direction—we went with a motion for reconsideration because we went to the same Appeals Chamber presided by President Meron to say that obviously, there is an error. Obviously, the theory that has been applied is not supported by other tribunals. We wanted the Appeals Chamber to reconsider the decision because we had also a lot of victims organizations and callers asking: how can it be that a tribunal, two Appeals Chambers, which are at the same level, are coming up with two totally different decisions? In a national system, you would have a supreme court, which would

make sure that you have one final decision. So in terms of the interest of the good administration of justice, we are in for a motion for reconsideration, where one can argue that there is not sufficient legal basis to put a motion of this nature forward. But we had to put it forward before the same appeals chamber, and the president rejected our motion.

But as I said, this is now the past. We cannot change it anymore. It is extremely frustrating, but I really hope that at the end of the day, people will look at the larger picture, the 161 indictments, some major decisions in relation to command responsibility, some major developments in the jurisprudence. At the end of the day, it will be positive.

**JENNIFER TRAHAN:** Thank you. Prosecutor Jallow, there are a number of transfer cases now in Kigali, Uwinkindi, and Munyagishari, and as you mentioned, there are nine fugitives, and six would have their trials also transferred to Kigali. Given that the ICTR as well as Gacaca, and domestic trials in Rwanda, have basically achieved only one-sided justice—that is justice for the crimes perpetrated during the genocide but with no look at counter-killings—what is the legacy of this one-sided justice? Does it leave a stable Rwanda, and what are the key challenges to the Rwandan judiciary in adjudicating these upcoming cases?

**HASSAN JALLOW:** Well, in relation to the ICTR, to the Rwanda Tribunal itself, I think we have to recognize that all international tribunals have limitations. They cannot prosecute everybody. They are not meant to prosecute everybody. They prosecute a limited number of accused, and so a selection has to be made by the prosecutor based on certain considerations of gravity, on whether there are other options for dealing with those cases other than prosecution at the international tribunal and are now a part at the ICTR looking at all those considerations. We recognize that genocide is the main crime

base of what happened in 1994. We have not been able to prosecute every person who played a leading role in the genocide itself. There are many other people still walking around who need to be dealt with.

We looked at the allegations against the Rwandan Patriotic Front, which is this issue of one-sided justice. We did our investigations, and there was one case that we decided could go to court, and I did decide that that case would be prosecuted in Rwanda because I believed that it was important that the Rwandan authorities are seen to be prosecuting their own senior military officers within the country in order to try and dispel this criticism of one-sided justice. That is why you then had four senior officers, Rwandan senior officers, two generals, and I believe a major and a captain, who were prosecuted in Rwanda at our request. Two of them were convicted of these offenses.

So we have, on our parts, done some work in this particular area. We are aware also that the Rwandans did some work in this particular area. We have transferred cases to Rwanda. It is true. But I did receive information that the Rwandans also prosecuted before their military courts, a number of soldiers ranging between thirty and forty actual military officers who were accused of what they called “revenge killings,” and so Rwanda itself has done some work in this particular area.

Regarding what needs to be done there in the legal system, we had to carry out a lot of capacity building in working with the Rwandans, encourage them to reform their legal system, which eventually helped in convincing our courts to transfer these cases to that jurisdiction. There is a continuing need for capacity building, and the ICTR is up to now engaged in providing training support for investigators, for prosecutors, for different counsel, and for judges in Rwanda in order to make sure that they are familiar with the principles of international criminal justice, and that they can carry out fair trials in that country

for the cases we referred to them and for the other cases that arise locally as well.

**JENNIFER TRAHAN:** To Prosecutor Bensouda: You spoke a good deal about your strategic plan. It is apparent that you certainly have a tremendous amount on your hands with eight situations (for the audience who may not be aware, those included the Democratic Republic of the Congo, Uganda, Central African Republic, Darfur, Kenya, Libya, Côte d’Ivoire, Mali) and ten preliminary examinations (Afghanistan, Central African Republic, Colombia, Comoros, Nigeria, Georgia, Guinea, Honduras, Iraq, Ukraine). In addition to the work you have summarized in formulating the strategic plan, what other principal challenges do you see in handling this tremendous docket? I think Ambassador Intelmann’s remarks suggested you may even have more situations and more preliminary examinations headed your way. Do you have any way to strategize your priorities of the situations, and do you have criteria for prioritizing within situations?

**FATOU BENSOU DA:** I want to talk at length about the strategic plan of the office, and it is within the context of this plan that the office is also adjusting the organizational structure, the capabilities, in order for us to optimize the performance and also organize our work and activities as efficiently as possible. I believe that, through this enhanced coordination, having clear reporting lines and more effective managerial oversight by myself as head of the organ—and in addition to also having very dedicated, integrated joint teams (I think I spoke briefly about the joint team)—per situation, also led by a very serious, very experienced senior trial lawyer, we are hoping that we would be able to manage this situation in the best way possible for us and also within the confines of the resources that we have at our disposal.

But I think that even as we make progress, we continue to require the support of states. This is absolutely important, particularly for

adequate funding of the court and our activities. I think for us to be able to achieve our goals, we simply need these resources to enable us to execute the mandate very efficiently and effectively in accordance with the Rome Statute's legal framework. We can do much, but there is so much that we can do for us to be effective and to be able to deliver high-quality cases. And what we need for that, really, is a budget that mirrors these efforts.

**JENNIFER TRAHAN:** To Prosecutor Hollis: the *Charles Taylor* conviction was a key accomplishment of the Court. I know this was not really your responsibility, but the fact remains that the court prosecuted a total of nine individuals. Yet, this was a conflict where trademark crimes included the hacking off of limbs or ears or lips, and these firsthand perpetrators basically do not end up getting prosecuted because your mandate was to prosecute those who bore the greatest responsibility. Because of the Lomé Amnesty, the Sierra Leone domestic courts basically have not tackled this impunity gap. How do you see the Court's legacy and impact? Does it leave a lasting foundation of peace and respect for the rule of law? Can this occur where justice is successful, yet it is also so limited?

**BRENDA HOLLIS:** That is a very good point, and it is perhaps the greatest challenge for states and the international community: that is that, no matter how hard you work, no matter how generous the funding, international courts really cannot carry out their mandate with the lowest level direct perpetrators. You simply cannot. You do achieve stability and justice in a country by removing those who bore the greatest responsibility for these crimes through their leadership because you remove them from continuing involvement and destabilization in these countries. So I think that is the benefit as well as providing some measure of justice for victims. That is a benefit of international courts, and I think that will be the legacy of the Special Court for Sierra Leone, as indeed, to a greater or lesser extent, I think it will be the legacy of all of these international courts. But whom we leave behind are the people

who very often still live in communities with their victims, who very often flaunt their crimes and what they have gained from those crimes, and who taunt their victims.

What happened in Sierra Leone reinforces my very strongly held belief that amnesties and immunities are not good for lasting peace, and they are certainly not good for accountability because people yearn for some measure of accountability for wrongs done to them. And when you basically give blanket immunity, then you deprive the state of the ability to do what is a basic tenet of the ICC, and that is to try these crimes yourself. And how do people live together when there is no accountability? I think it is a flawed idea that if we give immunity, somehow we will promote peace. Maybe the international community can move on to another crisis, but the victims remain behind with their perpetrators in place and no real remedy for that.

But I think the international courts, their legacy—first of all, for all of these courts, how well did you carry out your judicial mandate? That is your job. So how well did you do that? Do not judge them by other measures. Judge them by that. And to what extent did they promote stability by removing those who are most likely to destabilize the country by pursuing their private greed and lust for power after peace agreements? And quite honestly, in Sierra Leone, there was an independent survey, and most people in Sierra Leone believe that the Special Court had carried out its mandate. It had promoted justice and reconciliation in that country.

**JENNIFER TRAHAN:** Thank you. To Prosecutor Koumjian, you referred to the recent verdict, which I guess you call Case 002/01, and you are about to reach Case 002/02. So for 002/01, as to the convictions, you received life sentences for individuals in their eighties. How significant is it to reach Case 002/02, and why? And what are the difficulties? We have all seen the Yugoslav Tribunal, and Milošević died in the course of his trial, and then there is very



little you can do with any of the results of that trial. What are your concerns here? How significant is it to complete Case 00/02 in this situation?

**NICHOLAS KOUMJIAN:** We are sitting here in—I guess this event is associated with the Jackson Center. The event last night was associated with the Jackson Center, and I think if you look back on Nuremberg and the tremendous legacy that that Court had, the effect it still has today, was it because—I forget how many—seven men were hung or twenty men were convicted? Was the significance of Nuremberg solely based on the fact that these men spent X number of years in prison? I don't think that is the principle legacy of Nuremberg. The legacy of Nuremberg is about the process of finding justice and it is about the recognition to the victims about what happened to them.

In all of these cases, when we are dealing with senior leaders, it is very rarely the direct perpetrator, the person that killed someone's mother or son or sister, but victims, I find—and I think academic surveys that talk to victims find—those who suffered want to live in a society that has recognized what has happened to them, and if there was a court that actually brings justice and recognition for this conduct by senior leaders was criminal and they should be held responsible, I believe it has a subtle effect on the whole society. People then will believe they live in a world where some justice is possible, where it is not just simply a matter of who has the most money or political power or guns in order to control or ruin the lives of others. So I think it has a tremendous effect.

Now, in this case, the two accused are eighty-three and eighty-eight years old now. Obviously, their health is a concern. We are trying to accelerate this second trial that deals with the most serious charges of the regime. One of the important ways we are doing that is we ask the judges—and they agreed—that all of the evidence from the first trial is considered on the record for this second trial. This is already evidence

that has been tested by the accused, their counsel. They have already had the opportunity to participate in it, and that evidence includes the key linkage. And those of us, all of us, who have worked on war crimes trials know that the most difficult part of proving any case against senior leadership is not proving that the crimes happened, but proving how are those crimes linked to the leadership. The evidence about how decisions were made in the Khmer Rouge regime, how they were communicated from the center to the zones, how reports came back to the senior leadership, all that is already in existence from Case 001. So we hope that we can then complete the trial in the second case.

There have been surveys where people have gone out and spoken to the victims and asked them, “Is it important to you that these cases go on?” and they pretty much, the great, great majority, say it is very important. I myself have spoken to victim groups, and they have expressed their strong desire to see these cases completed in the lifetime of the accused and in their own lifetime because many of the victims are elderly also.

**JENNIFER TRAHAN:** Thank you. I might hop around a little bit in the second round of questions. Let me stick with Prosecutor Koumjian: The international community seems very much to endorse the notion of a hybrid tribunal as the way of the future, yet I think the ECCC’s experience has shown that when the international community couples with the domestic judiciary, they inherit it, warts and all. So for a domestic judiciary that has struggled with problems of independence from the executive, that poses certain challenges for a hybrid in those situations. How would you assess the ECCC’s legacy and impact, given the problems of executive interference?

**NICHOLAS KOUMJIAN:** Well, if you are talking about the cooperation of states with an international tribunal, I think we can go down the line, and each one of the prosecutors here can talk about

experiences at each of these international courts where there were great difficulties obtaining full cooperation from states involved. That is simply a reality of the system now. There still are sovereign states, and international courts, international justice is something that is separate from that. There is no super sovereign United Nations that rules over states.

The way to deal with it individually is to be true to yourself and the integrity of your own decisions, and I think all of those actors that I find, whom I know at the ECCC now, have done that. They will make their decisions on their own. There are disagreements between the national and international co-prosecutors on certain issues, between the co-investigating judges, and among the judges of the trial chamber, but what I have found is that at least in the time I have been there, they have been expressed rationally by all actors. And there are mechanisms in the statute to hopefully resolve in some way those disputes. I certainly see no advantage for the government to interfere in these cases—on the contrary, my impression given the strong public support in Cambodia for these cases to proceed is that any non-judicial actor who interferes only risks damage to their own political popularity and historical legacy. So it is still my hope that the cases will proceed and their ultimate fate will be decided on their merits by the national and international judges at the court. We will have to wait and see.

**JENNIFER TRAHAN:** Hassan, if I can ask you: I was recently traveling in Rwanda, and I was very disappointed to find that most Rwandans did not have a favorable impression of the ICTR. For some, it seemed driven by distrust of the international community going back to the failure to intervene in 1994. Many expressed a certain preference for Rwanda doing trials, whether it is Gacaca or domestic trials (at least those I spoke to), and not the ICTR. Has the ICTR's outreach made missteps? I realize that Rwanda has at times created a

very difficult relationship. Could outreach have done better? Is there more work still to do to reach the people in Rwanda?

**HASSAN JALLOW:** Thank you. Rwanda has contributed to a misunderstanding on the part of many Rwandans about the ICTR—in the initial years, I must admit that our outreach program was not very effective in bridging this gap we created by the distance. Things have improved considerably. There is a very active outreach program. We have developed many centers now of information, ICTR centers of information within Rwanda itself, which are accessible to all Rwandans. We have a major center in Kigali, Umusanzu Centre, and ten other centers scattered around the country, which provide information on what we are trying to do. I think the gap is being bridged much more effectively now.

But, regarding certain things that happened in Arusha, the ICTR also does contribute to this hostility on the part of some Rwandans towards the Tribunal, especially the acquittals. When acquittals of senior people occur, it causes quite a fury in Rwanda, but we try to explain to them that it is the nature of the judicial process. We cannot end up with convictions of everybody. The judges are independent. We have to take their decisions on the basis of their appreciation of the evidence and the law, and if that leads to an acquittal, we have to respect those decisions, because after all, within Rwanda itself, in the Gacaca system, they have higher acquittal rates than we do even in Arusha. I think they have about 40 percent acquittal rate within the Gacaca system. That has been a bone of contention that has created difficulties between the Tribunal and the public in Rwanda.

**JENNIFER TRAHAN:** To Prosecutor Bensouda, we do not have too much time left. I know this is a big question, but the ICC has had a very contentious relationship with the African Union (AU)—or maybe I should say that the AU has had a contentious relationship

with the ICC, as a result of the *Kenyatta* case. Can the ICC repair this relationship going forward?

**FATOU BENSOUDA:** Certainly, the relationship between the ICC and the African Union is critically important, and certainly, we are hoping and aspiring to have even stronger ties with the AU. In fact, what we are doing at the Court now is we are trying to engage with the AU at all levels, at different levels, and engage with them as much as possible. We hope that by doing this, we will be able to clarify, we will be able to give information, and we will be able to correct, as much as we can, the misunderstandings that have deliberately been created by those who have an interest in doing so at the African Union.

And just to give you an example of this interaction, we are organizing—or we have actually just finished in a series of seminars, joint seminars between the ICC and the African Union, at the technical level. We are working very closely with the legal counsel, the African Union’s legal counsel, and this seminar took place in July of this year at Addis Ababa itself, and it provided a very useful forum to constructively discuss with the African Union, the work of the ICC.

And what I have been doing personally at my level trying to reach out as much as possible to the highest level, the heads of states, in a forum like the General Assembly. I would come to New York where most of them would be attending, and I would meet many of them and discuss the issues of the ICC, but also undertake personal missions to their capitals to discuss and talk to them about the work of the ICC. I recall last year when there was this threat of mass withdrawal of African states from the ICC, and somehow I received very positive reassurances personally from them and also got messages of commitment from the head of states.

But I think we should note that at the operational level with individual African states, we make a lot of requests to them. As you can see, most

of our cases, if not all of our cases, are there, and over 50 percent of these requests are made to African governments, African states, and they respond positively, contrary to the belief that there is a complete shutdown of cooperation with the African states from the side of the ICC and also from the side of the African Union to be able to improve our relations and cooperation.

I think the truth is that accountability from mass claims and the deterrence are very vital for the stability. They are vital for the security and the prosperity of the African continent, of all continents, whether it is accepted as such or not. And I think this recognition was very much alive when Africa played a very prominent role in the establishment of the International Criminal Court, and I believe this is a truism that really needs to be embraced again. For me, for the office, as far as we are concerned, we are certainly ready, and we will continue to engage with the African states. We will continue to engage with the African Union.

But let me conclude by answering the question that you have said. I think that through the very principled, professional, and consistent conduct of our affairs as an office, as an institution, to be able to execute our mandate to fight against impunity wherever we have jurisdiction and to do so without fear and without favor is absolutely crucial for the continued credibility of the Court. I am hoping that, as a prosecutor, by the time I complete my mandate, which has just started, I hope that not only the African continent, but also the whole international community will look to the institution with great respect, with great admiration, and with hope that it will continue to be the important component of the fight against impunity, and for the international rule of law and also to deter, especially to deter the commission of these very, very serious crimes against humanity.

**JENNIFER TRAHAN:** One last question, to Prosecutor Brammertz. As with all international tribunals, you could not try the vast bulk of the

crimes at the ICTY, but have to now rely on national judiciaries, even though the ICTY did issue indictments in 161 cases, I think the ICTY is the most fulsome example of an international justice mechanism. Can you describe your work with the domestic prosecutors' offices, the different ones in the region? Also, your tribunal has no fugitives, and this was achieved through a long process of conditionality; are there lessons learned from this? When states want to get serious about arrests of high level fugitives, do you have any suggestions?

**SERGE BRAMMERTZ:** These are a lot of questions. Let me start with the second one in relation to fugitives. Indeed, very often in conferences, we are the proud one saying we are the international tribunal with no fugitives at large, and sometimes it is also used by diplomats, by politicians, to say nobody at the end of the day can escape international justice. But the fact is that it has taken eighteen years. It has taken much too long before fugitives were arrested, and, as we know, the arrest warrants against Karadžić and Mladić were issued in 1995, and we know that between 1995 and 2000, they were moving freely around. They were going to football matches, getting standing ovations in football stadiums. The international community failed during a number of years to have those persons arrested. Even at the end of the day, they were arrested. It is indeed, as you said, the conditionality policy where, in fact, the European Union said to those countries—Serbia, Croatia, Bosnia—“You want to join the European Union? There are a number of conditions to be fulfilled, one of them being full cooperation with the Tribunal.”

For example, the three weeks before General Mladić was arrested, three years ago, there was a survey done by the OSCE in Serbia where 60 percent of the people interviewed were against the arrest of General Mladić, still considering him a hero, but 75 percent were in favor of joining the European Union. Politicians in Serbia are not different than in all our countries. They do what they think will please

the majority of the population. It was this stick/carrot policy from the European Union that played an important role.

What are the lessons learned? It is that if there is a clear international political agenda going in the same direction as the judicial one, it can be successful, and this, I think is the big problem for the ICC. We had the European Union with a clear message towards future EU member states, but if you look at Sudan or other countries that do not think that there is a clear international agenda pushing for his arrest.

In relation to cooperation with the countries of the former Yugoslavia, we were somehow forced to engage in these cooperations with the Security Council resolution in 2004 asking us to enter the completion strategy, and as I discussed with Fatou on a number of occasions, the ICC is there forever, but at the end of the day, the ICC will need a completion strategy for each individual situation because the ICC cannot stay forever in each situation. So something similar to what we have done over the last ten years with the former Yugoslavia needs to be done by the ICC, or somebody has to invest in capacity building. And there, I think with the support of the European Union putting a lot of money into capacity building in the region, a lot of training organized by ourselves, it was quite successful.

Only to take as a last example, one of the most successful initiatives we have taken, seven years ago, was to integrate one Serbian, one Croatian, and one Bosnian prosecutor into our structure, and today, we are providing much more assistance to the countries of former Yugoslavia than the other way around. Over the last year, more than 250,000 pages of documents have been taken out of our databases to be used in national proceedings, and I think that is the right development—investing as soon as possible in capacity building to make sure that the impunity gap is kept as closed as possible.



**JENNIFER TRAHAN:** Thank you. Maybe one last question to Prosecutor Hollis. What are your key concerns as to the residual function, your main worries, and things that keep you up late at night as you are entering this wind-down phase? Additionally, maybe as a close to this panel, do you predict future tribunals for the future, or will the ICC be the only shop in town as we hold these dialogs in the future?

**BRENDA HOLLIS:** You know, the Residual Court, like the Special Court, is a voluntary-funded court, and it is sort of counterintuitive, but we are a very lean court. So we have a very small budget, but the smaller the budget, it seems the more reluctant each country is to give because they think, “Well, this other country can handle that. It is only a few million dollars.” Fundraising is a significant concern, and residual courts will stay in place as long as you have people in prison. I hope there is not pressure to let people out of prison, so you do not have to pay for residual courts because the people in prison ought to serve every day of what they were given as a sentence because they committed crimes against humanity, war crimes, genocide, not a single or even a double homicide. So budgeting is a big concern.

My other big concern is that we have three people in Sierra Leone, no one in Liberia, but we have a lot of witnesses there whose testimony put a lot of important people with a lot of important supporters in jail, and I am concerned that we are going to be able to ensure that these witnesses are not punished for having the courage to come forward and tell us what they know about the events because courts cannot succeed without witnesses. They should not have to come forward at the risk of their physical security or their family’s physical security. So I worry about that.

I think the whole idea of the International Criminal Court was that we wouldn’t have to spend a lot of money and effort creating new courts

because we can have the International Criminal Court, but now I hear a lot of talk about other hybrid courts. So I do not know the dynamic of that. I do not know if it is because they do not think the International Criminal Court has sufficient reach or if they are thinking that perhaps hybrid courts would be more efficient, but from what I have heard, I think there will be hybrid courts in the future. I am not quite sure what motivates that because, as I said, the whole thinking about the ICC was it would be one court, a permanent court that could deal with all these situations.

**JENNIFER TRAHAN:** Well, I think we are over time, so we will have to stop here and thank our prosecutors.



## **Roundtable: Relevance of International Humanitarian Law in 2014**

*This roundtable was convened at 2:30 p.m. on Monday, August 25, 2014 by its moderator, Professor Leila Sadat of Washington School of Law, who introduced the panelists: Professor William Schabas of Middlesex University School of Law, Hans Corell, former U.N. Under-Secretary-General for Legal Affairs, and Professor David Scheffer of Northwestern University School of Law and former U.S. Ambassador at Large for War Crimes Issues. An edited transcript of their remarks follows.*

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**LEILA SADAT:** Good afternoon. I am really grateful for your presence at this afternoon's panel. It has been a very, very rich morning, and I know that there is probably some pent-up demand for audience intervention. So my panelists have graciously suggested that we will use less of our time than allotted and open up the floor to dialog sooner.

I want to say that yesterday, as I was flying here from St. Louis, I had the opportunity to read the Sunday *New York Times* from cover to cover, which is an unusual event in my house with three children, and I found Tom Friedman's column, which was unbelievably timely vis-à-vis the subject of this panel. It was called "Order vs. Disorder, Part Three." I will just read a little bit from the column. He says: "The United States is swamped by refugee children from collapsing Central American countries; efforts to contain the major Ebola outbreak in West Africa are straining governments there; jihadists have carved out a bloodthirsty caliphate inside Iraq and Syria; after having already eaten Crimea, Russia keeps taking bites out of Ukraine; and the United Nation's refugee agency just announced," and as we heard earlier, "that the number of refugees, asylum-seekers, and internally

displaced people worldwide has, for the first time exceeded fifty million people.” He adds: “If you are feeling like there is disorder, it is because there is,” and he posits in the column that one of the causes is that many of the institutions that were containing these activities have collapsed, and no institutions and legal rules that would flow from those institutions with the force of authority have come to replace them.

That, in a sense, is the subject of our panel today, which is: What is the relevance of international humanitarian law in addressing disorder in the world? And I hope that we will not just be pessimistic and say things like, “Well, it is not relevant because nobody is using it,” but talk a little bit about the ways in which international humanitarian law can help, even if not completely contain disorder, add some dimension or at least some objective elements to our conversations about it. After all, if national systems are collapsing, one hope for international law is that international law can actually sort of transcend the collapse of the national systems and hold some space for national systems as they rebuild themselves.

So here to discuss—and we have decided to use a question format rather than formal presentations—here to discuss some of the issues now regarding international humanitarian law and its relevance in an increasingly disordered world are three extraordinarily qualified individuals who need no formal introduction, I will however, just say a couple words about each of them, each is a friend and a colleague and a tremendous expert.

To my left, your right, is Ambassador Hans Corell, former Under Secretary-General for Legal Affairs and the Legal Counsel of the United Nations for ten years, a judge in Sweden, a member of my Crimes Against Humanity Initiative steering committee. He also served as the Secretary-General’s representative to the diplomatic conference in Rome that established the International Criminal Court.

On my right, Professor William Schabas, formerly director of the Irish Center for Human Rights, Queen's Council in Canada, now a professor at Middlesex College in London, and one of his many, many accomplishments was being a member of the Truth Commission for Sierra Leone, and now most recently, he has been appointed head of the U.N. committee investigating the Israeli-Gaza conflict.

And finally, to my right, Ambassador David Scheffer, the first U.S. ambassador for war crimes—really, you created that position, David—now a professor at Northwestern University School of Law where he also directs an astonishing and amazing human rights clinic that does some fantastic work, the U.N. secretary-general's special rapporteur in Cambodia, and an expert on humanitarian law.

We are going to proceed by way of questions, and we have about five or six questions to which one of the panelists will respond first, then the other panelist will respond to the first speaker. After an initial round of questioning, which hopefully will get everyone's intellectual juices flowing, we are going to open it up to the audience and have a fuller dialog.

Our first question, which I will direct to Ambassador Hans Corell, is: How relevant is international humanitarian law to the work of the Security Council today?

**AMB. HANS CORELL:** Thank you. Well, as a matter of fact, this is one of the most important questions, in my view. I have followed the Council for ten years at very close range at the United Nations, and after that, I followed them at close range, as close as I could.

As a matter of fact, the U.N. Security Council is the main actor in this field. Why? Because, first of all, we have the question of how they behave when we come to international humanitarian law, and the other

element is how they deal with situations where there are problems in this field. The Security Council, which has been mandated by the members of the United Nations to have the primary responsibility for the maintenance of international peace and security, has an obligation, actually, under the Charter of the United Nations, to deal with these issues. How do they perform? In my view, they very often fail and fail miserably, and to me, it is mind boggling that these five permanent members, in particular, do not understand that they have a responsibility that means that they have to learn to define their national interests in a more broad perspective than one would usually do at the national level. They have to reach out.

Of course, the whole purpose of what we are dealing with here, international humanitarian law and international criminal law and so forth, is not only to punish those who commit crimes, but primarily, as with all criminal law, to prevent crimes. And this is where the Council could do formidable work if they performed under the Charter, as they should.

As a matter of fact, I was so frustrated when I heard all the talks about reforming the Security Council, and the only aspect of that was to extend the membership of the Council. I think that this would be one of the most effective means of shooting a torpedo into the collective security system under the U.N. Charter. The Security Council can never be democratic in the sense that everybody sits on it. The Security Council is an executive organ, and by definition, an executive organ has to be rather small. If you ask the business community, they would say already fifteen members is a lot for a board. Now, if we could stay at fifteen members and then have these fifteen members actually performing in accordance with the laws that we are discussing here and bowing their heads in particular to the very law they are said to supervise, namely the U.N. Charter, I think the world would be literally a world of difference.

What I would hope is that the Council realizes that they cannot continue behaving as they do, and I am not accusing all the members. We have Prince Zeid here, who is now one of the members of the Council representing his country here, but basically, the permanent five are calling the shots.

Now, I suggested to them back then in 2008 that they should adopt a resolution under which they should do four things. Number one, from now on, we are actually going to bow to the law that we are supervising, namely the U.N. Charter. Number two, we are not going to use our veto unless our inner most national security concerns are at hand, and that disqualifies almost everything that is going on today. Number three, we are not going to use force unless in the two situations allowed by the Charter, namely in self-defense or after a clear and unambiguous resolution by the Security Council. And number four, responsibility to protect: if a country or state is unable to protect their citizens from genocide, war crimes, crimes against humanity, or ethnic cleansing, then they should act.

And, as a matter of fact, I think that what the Council has to do is to draw a line and demonstrate to the world that if anyone passes this line, the Council has an obligation to intervene and will do so. If the Council did this, I think it would send a signal around the globe that would reverberate, that would make a difference. And the warlords would look at themselves and say: "Maybe they will come after me if I commit violations here."

It is extraordinary that almost exactly five years ago, Richard Goldstone did his report on the Middle East. I knew that the matter would be discussed also in the Security Council, and the report was criticized even before this was tabled. I wrote a letter to the Council and said that this is a matter between the rapporteur and the Human Rights Council, but you as the Security Council have a responsibility of your own; you should take the initiative. As for the accusations



crossing the lines in the Middle East, there is only one way to find out what is criminal and what is not criminal, and that is to have a court look at it. I suggested the Council should appoint or ask the International Criminal Court to address the situation to defend the humanitarian law element here. Of course, nothing happened. Maybe some of the actors that orchestrated the violence here had been, shall we say, not at large today, if the Council had acted. I think this is where the Council has such an extremely important responsibility.

Shortly, on the second element, we see that sometimes members of the Council violate the Charter. We had the attack on Iraq back in 2003 when I was still at the United Nations. Our hearts sank on the thirty-eighth floor when we saw what was happening, and then the attack on Georgia in 2008 and now Ukraine, the latest. Do we live in the nineteenth century? A permanent member of the Security Council is actually violating the most fundamental elements, not only of the U.N. Charter, but also of the Helsinki Accords where the then-Soviet Union, now Russia, was one of the main actors in introducing the system, which was so beneficial for Europe.

So I am going to say: it lacks statesmanship! And let me end on the note: Why is it so difficult to transfer wisdom from one generation to another? Already Sophocles understood this. Let me end by quoting the final choir in his tragedy, *Antigone*: “Wisdom is the supreme part of happiness, and reverence for the gods is a must. But mighty men with mighty words in their mouths, the gods will strike with mighty blows and teach in old age the chastened to be wise.” Why do they not understand their responsibility? Thank you.

**LEILA SADAT:** Thank you, Hans. David or Bill, do you have anything to add, particularly maybe on areas in which the Council could do better or specific examples? David?

**AMB. DAVID SCHEFFER:** First of all, it is great to be back at Chautauqua and seeing so many familiar faces. I think Hans has pointed out the perils of inaction by the Security Council as well as actions in violation of international law by certain permanent members of the Security Council. I want to just add to that, two additional points, and then turn the coin around a little bit.

First, the inaction continues to be one of the Security Council not being willing to incentivize the General Assembly to fund International Criminal Court situations which have been referred by the Security Council to the Court but without—well, frankly, with provisions within those referral resolutions that member states are not obligated through the United Nations to provide any financing for these particular investigations. That has become now a lodestone of irresponsibility by the Security Council with respect to its referrals, and it is simply becoming an implausible strategy for referrals to the Court. The Court obviously needs funding in order to undertake a massive investigation, whether it be in Darfur or Libya, but once again, we saw the paragraph crop up in the Syria referral that was defeated by two vetoes. Nonetheless, there it was. So that was a distinct failure by the Security Council.

Second is the failure to take tough enforcement action to actually incentivize cooperation with the International Criminal Court, which needs it, as we heard this morning from Prosecutor Bensouda. There has to be timely and effective cooperation by states that are parties to the request by the International Criminal Court. The Security Council never really takes up the challenge of bonding with the Court to incentivize nations to implement those cooperative measures, including, in particular, those situations that actually have been referred by the Security Council to the Court.

I want to flip the coin very briefly and just say, yes, there is a lot of bad news here, but there also needs to be recognition that the Security

Council does not completely ignore international humanitarian law. It has been on deck with international humanitarian law in a very real way for twenty years now with the creation of the Yugoslav and Rwanda Tribunals; the participation in and creation of the Special Court for Sierra Leone and the Special Tribunal for Lebanon; and the engagement it has, off and on, with the Extraordinary Chambers in the Courts of Cambodia (mostly in terms of letting the process move forward without obstruction). These are all signals from the Security Council that international humanitarian law is certainly something that they have put considerable focus on in certain situations to achieve some degree of accountability, and we can credit the Security Council for at least having the political will to do that.

It is also interesting to look at the resolutions that have come out of the Security Council as they relate to the Court since 2005, because that, too, is an indication of whether the Security Council is on top of international humanitarian law issues as they are being addressed by the Court. And it is interesting that, in addition to the two referral resolutions, Darfur and Libya, there have been twenty-nine resolutions since 2005 where the Security Council positively notes the ICC and, in some cases, supports the Court's work and its objectives in the language of those resolutions. And, since 2007, there have been twenty-six presidential statements by the Security Council, which are unanimous statements—they are nonbinding, but they are still unanimous—in which, again, the International Criminal Court has been referred to favorably by the Security Council.

And I will end on this note: In 2014, we have seen three resolutions now in the spring relating to the Democratic Republic of the Congo, the Central African Republic in Mali, and the peacekeeping operations in those countries by the United Nations, whereby the Security Council actually has language that authorizes the peacekeeping forces to work cooperatively with the national governments on arrest operations of

individuals who are implicated in war crimes, but who also might be indicted fugitives from the International Criminal Court.

So that is kind of a large step for the Security Council. It is a mini step, and of course, they have the opportunity after the first of these resolutions to do it for Darfur, and they did not take it. They left Darfur alone on that issue of arrest, but it nonetheless shows some movement that I think we should try to build on in the future.

**LEILA SADAT:** Very interesting. Bill, anything to add?

**WILLIAM SCHABAS:** You know, it's interesting to reflect on the origins of the International Criminal Court and how our vision of the role of the Security Council has evolved or our understanding of how it contributes to the International Criminal Court. Twenty years ago, when the International Law Commission was crafting the first draft of the statute, the view was that this would be a court, more or less, a permanent version of the Yugoslavia or Rwanda Tribunal, something created by the Security Council and controlled and ultimately put to an end by the Security Council, as is the case with the ad hoc tribunals at least with Yugoslavia and Rwanda.

Then as the idea of the independent prosecutor emerged, we had this idea there would be different ways of triggering the jurisdiction of the Court, but many people believed that the Security Council would remain the main part of it, and that the Court really was unlikely to be able to operate without referrals from the Security Council, that that would be the only way to give real meat to its activity.

And I remember the first president of the Court, Philippe Kirsch, when the resolution of the Security Council, the first resolution referring a situation—this is the Darfur situation, March 31, 2005—and he was troubled, as we all were, by these perverse clauses that were in the resolution about the denial of funding from the United Nations and

the carve-out of jurisdiction which, although probably insignificant in terms of its practical consequences, still was just rather disgusting to have put into a resolution. Philippe's attitude was: "You know, we need this to get the Court working. Let's just hold our noses and get on with it."

So here we are, nine years later, finally. We do not need the Security Council referrals at all. If we were to remove them from Fatou Bensouda's list of files on top of her desk, she would probably heave a sigh of relief and say: "I've got enough work to keep me busy without them." In any case, they haven't really delivered a great deal in terms of work. And what's interesting is the Court seems to work just fine if we have referrals by states parties and the *proprio motu* activity of the prosecutor. We couldn't have known that ten or fifteen years ago, but it seems to be the case today. And give them back to the Security Council and say: "Create your own damn tribunal." At least then—I mean, I am haunted by the vision of poor Fatou sitting here alone at future Dialogs.

And then we are going to ensure that we have a panel here with several people if we have insisted the Security Council create new tribunals if it wants to set up criminal prosecution. I am being a bit mischievous, as you know me well enough. Thank you.

**LEILASADAT:** Thank you. I am going to turn to my second question, but as you can see, when we talk about international humanitarian law, for the non-specialists in the audience, we're not only talking about the legal principles codified in treaties, Geneva Conventions and Genocide Convention and my imagined future Crimes Against Humanity Convention, but we're also talking about the courts that enforce international humanitarian law and the relationship of those courts to various other actors.

My second question is: How relevant are this law and these courts to foreign policymaking today? David Scheffer, you have the first bite at this question.

**AMB. DAVID SCHEFFER:** Well, I enter this with trepidation because you have so many individuals in this room—including my good colleagues, Steve Rapp, Jane Stromseth, and others who are in the middle of policy circles right now—so, who am I to speak on this issue?

But certainly, from my experience and from my observations in more recent years, I want to make a few points. First, we do need, when we look at this issue of foreign policymaking, to distinguish between international law, *per se*, and international humanitarian law. They are two overlapping but also distinct bodies of law. When you're at the policy table in governments, you're typically talking about compliance with or violation of international law—namely territorial issues and trade issues and things of that nature—where you're making tough decisions in policymaking circles about state responsibility for governmental action that can be military. But if it is military, it is more in the vein of violating the sovereignty of another nation, confronting issues, self-defense issues, *et cetera*.

If we're focusing this on the relevance of foreign policymaking with respect to international humanitarian law, which deals with armed conflicts and generally the protection of, noncombatant individuals, prisoners of war, *et cetera*—that is a different calculus at the policy table. I would argue that there are three categories of government to help us get our grips around this.

One category of government would comprise those that come to the policy table on this more narrow issue of international humanitarian law with a view of complete compliance. How could anyone imagine

violating the Geneva Conventions, *et cetera*, in the performance of our military forces overseas? Or, even if you are not performing it militarily, we are going to hold everyone else to complete compliance with the treaties of international humanitarian law. Just think of the Nordic countries, and you know exactly where I am.

Secondly would be those countries that view this issue with a sense of partial compliance—or, shall we say, complete compliance unless circumstance require otherwise, and there, you can get into all sorts of situations. You can go all the way back to India and East Pakistan. You can go back to the Vietnamese invasion of Cambodia to stop the Pol Pot atrocities. You can go back, of course, to 2003 and the U.S. and British invasion of Iraq and what was going through everyone's mind about, "Well, wait a minute. We're going to make some compromises on international humanitarian law because . . ."—and that is a whole debate. And so those are sort of partial compliance situations, and I think at the policy table, there is some discussion about that. But also, there are discussions that take place more in the shadows than in terms of real policymaking.

In my mind, on partial compliance, I divide the whole issue between those countries with good faith that are executing humanitarian interventions or responsibility to protect actions, and whether that has any IHL implications, and those who are in a totally different sphere of thinking, the so-called war on terror where you have a rogue element that takes control of the situation.

Then you have this third category, which I think is one of the most interesting and, frankly, is the hot subject of our times: the no compliance category. These are a lot of non-state actors, but they dominate the situation: ISIS or ISIL, al-Qaeda, Boko Haram in Nigeria. And, even on the state level, you can start talking about North Korea or even Zimbabwe. These are countries where, at the policy table, you probably have to imagine that international humanitarian

law is one of the last things they are thinking about complying with. They have other objectives in mind.

As we talk about this, I posit those sort of categories of countries and how policymaking might evolve within them.

**LEILA SADAT:** Lovely. Bill, anything to add?

**WILLIAM SCHABAS:** I do not think so, not on this.

**LEILA SADAT:** Hans?

**AMB. HANS CORELL:** Well, just a reflection here, listening to David. I think he is right. Certainly, in areas, for example, of development assistance, the governments would look very carefully at the situation of other states. I see also the political debate that governments are faced with when they see that the country they assist continues to have connections with another state and the reports are coming in that these states are violating international humanitarian law standards. In a sense, it is always present in some way, and sometimes it is transformed into articles in the newspapers and challenges to ministers in the parliament to answer questions and so forth. So, definitely, people are aware of the existence of international humanitarian law.

**LEILA SADAT:** And I think this goes to our overall point: Countries with strong institutions and strong formal procedures to get international humanitarian law into the conversation are more likely to consider it, as opposed to countries that do not, or where there are non-state actors.

Third question, which we will ask Bill: What is the relationship between international humanitarian law and international human rights law in times of armed conflict? This is a biggie.



**WILLIAM SCHABAS:** I was thinking that if Robert Jackson were here today and he heard us use the term “international humanitarian law,” he would be puzzled by what it means. It would not be familiar to him. I think it has been established that the term started being used in the early 1950s, and it was an attempt to inject human rights content into the law of armed conflict. That was the context in which this expression started being used, and it is being used in a variety of contexts. I suspect also that many people here in this room who are not specialists in the field are even a little puzzled that we even ask what the relationship between human rights law and international humanitarian law is, because they probably think they are much of the same. And in many ways, they are—that is not an unreasonable observation or conclusion.

But, in a technical sense, it is not entirely accurate. We muddy the waters as well with the term in institutions like the ad hoc tribunals, which claim that their jurisdiction is to deal with serious violations of international humanitarian law, and then we give them jurisdiction over crimes against humanity and genocide, which can be committed in time of peace, so there is no requirement there. It is not really humanitarian law in the sense that it deals with armed conflict at all, and if we get to the International Criminal Court, the war crimes part of it, international humanitarian law in the strict sense is, in a way, a small piece. It takes a lot of space in the Rome Statute because the definition is very long, but really, the core crimes and most of the prosecutions at all of these institutions are about crimes against humanity, a little bit about genocide, a little bit about pure war crimes, and eventually, the crime of aggression.

There is a debate that has been going on for many years about the relationship between the law of armed conflict or international humanitarian law and the associated body of human rights law, which certainly applies in peacetime. It was argued that it also applies in wartime, but the opponents of that view said: “When it is wartime,

we just look at international humanitarian law.” That was a view that many defended twenty years ago, but I think it has now been clearly rejected by authoritative bodies like the International Court of Justice. They have said that there is a relationship between the two bodies of law, and that they both can apply in times of armed conflict.

The challenge is to figure out exactly how they interact. I wrote something on this some years ago where I talked about what I called the “belt and suspenders approach.” It is the idea that the two mutually reinforce each other and provide added layers. If one fails, the other one is there. And it blurs the point that there may be areas where, depending on the body of law you apply, you get a slightly different answer. And that is something that has troubled me from the beginning of this debate, mainly because I come originally from the human rights law side of the equation, and I was nervous that maybe in going through this exercise, we were going to weaken human rights law, that we were going to carve off little pieces of it.

Let me explain a couple of ways in which the problems manifest themselves, without providing a clear answer—because I’m not sure that I have one. This is more a reflection; we’ve been told this is what Chautauqua is for. The first is whether we need the law of armed conflict, international humanitarian law, in order to fill gaps in human rights law or whether human rights law, in and of itself, does a perfectly adequate job of addressing the problems that arise in international humanitarian law. In other words, do we need this specialized body of law, or would human rights law do the trick entirely?

Well, the law of armed conflict could be divided into two broad categories. One is dealing with the protection of noncombatants and, above all, civilians (principally in occupied territories). The other is dealing with the sort of combat-related or battlefield-type of issues—choice of weapons, targeting, proportionality, and so on.

As for the first part, the treatment of civilians and noncombatants, I think we can all see that human rights law already largely does that. This is the part of international humanitarian law that looks the most like human rights law, and most of the provisions are quite similar. We have to make few exceptions, but there is space within human rights law to provide for that.

When we get to the battlefield stuff, the issues of targeting and so on, what is interesting is that a body like the European Court of Human Rights—the premier institution in terms of the interpretation of modern human rights law, with sophisticated case law—has been in operation for fifty years. It has thousands of judgments, and it has had to address many of these issues, like targeting and proportionality. Even issues concerning prohibitive weapons have arisen. My impression is that they do quite a good job of resolving those problems of armed conflict using only the lens of international human rights law. In fact, they studiously avoid referring to international humanitarian law. Critics have said they should be digging into the international humanitarian law, but they seem to find that in terms of the use of force by governments in particular, they can address these issues quite well with notions of proportionalities that are already part of human rights.

One last, related remark: International humanitarian law specialists will say that it is a law that governs the behavior of combatants but doesn't address the lawfulness of the conflict, and when we try to merge human rights law and international humanitarian law, the distinction sometimes gets imported into human rights law. People say human rights law is not concerned about who is responsible for the conflict; it's only concerned with the conduct of people in the conflict, and that's always posed a big problem for me.

I will give just one example, and then I will stop. If you think of the right—not the right to life, but another right that is often threatened in armed conflict—to property. Someone's property is destroyed

in a conflict. Their human rights are violated. If their property was destroyed in peacetime, we would say that they have a claim to compensation and to justice for this deprivation of their right to enjoy and use their property.

If it's in an armed conflict, international humanitarian law will say: "Was it a military objective that was targeted?" If the answer is yes, then we will say: "Was the collateral damage disproportionate in comparison with the military objective?" And if we come to the conclusion that it was proportionate, we are going to say to the victim of the right to property: "Too bad. That is lawful. You don't have a claim." You get to two different answers. I prefer the human rights answer to the international humanitarian law answer, but the human rights answer will say: "We do care. There is no justification for causing the damage because the war itself was unlawful. You were using force unlawfully, and you weren't entitled to do it." The question may be different when you're acting in defense, and you can claim that you were defending yourself. But I think these issues require more explanation, and that we have to avoid a simplistic forced marriage of humanitarian law and human rights law. I think there are complications that we have to resolve largely with the view of protecting the integrity of human rights law and expanding the protection of the individual.

**LEILA SADAT:** Thank you, Bill. That was very fascinating. There is also a temporal issue there, which is that in peacetime, we would not be talking at all about international humanitarian law, and so in the war on terror context, we see that blending happening sort of excessively.

**AMB. HANS CORELL:** Did you say "war on terror"? Did you say "war on terror"?

**LEILA SADAT:** Sorry.

**AMB. HANS CORELL:** The so-called war on terror.

**LEILA SADAT:** The so-called.

**AMB. HANS CORELL:** That is a very dangerous misnomer, you know.

The analysis by Bill here, I agree very much with. These two areas are complementary, and if you go in depth in a particular situation, you will see that there is one very interesting distinction here. In a time of war, it is sometimes permitted for a state to make some derogations from human rights, whilst international humanitarian law applies lock, stock, and barrel.

I was confronted with this in the United States in the late nineties because the issue came up: What applies to U.N. troops in the field? In the discussion I took as a point of departure: Is it legal at all to raise your gun and point it at a blue helmet? But when I discussed this further with the military in particular, they were adamant that they wanted international humanitarian law to apply because this is known among soldiers. This is known in the field. So ultimately, not to make a long story of this, we ended up by introducing (through a Secretary-General's Bulletin) international humanitarian law for the blue helmets. That is what applies in the field.

Then, I was confronted with the situation in East Timor and Kosovo, and we were there in the field. We applied humanitarian law in the field, but at the same time, we were legislating, and we were administering these two provinces. I applied the same system as I did back home. Before a proposal of legislation went to parliament, I had an officer reviewing that proposal with "human rights spectacles", and he would blow the whistle as soon as he saw there was something problematic in the law in relation to human rights obligations. And I said to Secretary-General Kofi Annan that it would be extremely

embarrassing if the United Nations would issue legislation or, as we called it, “regulations” (I didn’t want to call them “laws” because they are enacted by elected bodies, so they were called “regulations”) without having been vetted from a human rights perspective.

So I was very much aware of the inter-linkage between these two systems—I think they are complementary—and we were very careful to preserve the integrity of the two. But in the particular case, as Bill pointed out, you have to sit down and look very carefully at the situation and find the solution in that particular case. Thank you.

**LEILA SADAT:** David?

**AMB. DAVID SCHEFFER:** Well, I thought I would point out that once you start talking about human rights compliance in an armed conflict situation where international humanitarian law is being applied, so much of human rights law is a state responsibility issue. It is not as if you can suddenly associate responsibilities that could lead to criminal accountability with those soldiers and combatants, because somehow they are violating someone’s human rights as opposed to a strict violation of international humanitarian law in that armed conflict. It gets complicated, because suddenly, you are dealing with individual criminal responsibility in one field of law and generally state responsibility in another. And, even in international humanitarian law, you have states that have ratified the Geneva Conventions and have state responsibilities as well. So that complexity grows as you bring these two fields together.

I would note that I had the opportunity right after the invasion of Iraq in 2003 to write an article for the *American Journal on International Law* on what was happening to the law of military occupation, because both the United Kingdom and the United States acknowledged that they were military occupiers of Iraq for a certain period of time into 2004. Under the Geneva Conventions, a military occupier has considerable

responsibilities as an occupying force, and my thesis was essentially that these particular armed forces were not necessarily living up to their obligations under the Geneva Conventions as occupying forces. Part of the analysis led me to see how you cannot avoid, as a military occupying force, deep emersion in human rights law, because you are in control of that society. The population depends upon you to maintain a certain environment within that society, and it is not just complying with Geneva Convention requirements for military occupation. Those requirements give rise, in my view, particularly in more recent times, a considerable number of human rights obligations that flow into being a military occupier. It is not like fifty or sixty years ago. It is in a new century with an expectation that a military-occupying force will go far beyond the Geneva Conventions in terms of their responsibilities, and that is what I found so interesting in what I saw unfold in Iraq in 2003 and 2004.

**LEILA SADAT:** Very interesting. David, the next question is for you, and it ties into this nicely because one of the provisions in the Geneva Conventions is that the parties to the conventions have to instruct—they have to use the provisions and instruct their military as to what’s in the convention, so that they can comply. But the question arises: How much is that being done? And how much is international humanitarian law being transmitted or being taught in law schools today? Because that is also a relevant consideration.

**AMB. DAVID SCHEFFER:** I will take a crack at this, but we have a lot of professors in the audience, so I’ll humbly submit a couple of views.

I have witnessed over a twenty-year period (because I was adjunct teaching in the nineties and then I went full-time after the Clinton administration) a real evolution in the teaching of—well, I call it “atrocious law,” but—international humanitarian law, in the sense that it is a growth industry in law schools. We call it “international

criminal law” as a course title, and you would be hard-pressed twenty years ago to find a large number of schools that taught the subject. Today, there are a large number of law schools—and all the top law schools—teaching international criminal law. There is a constituency for it among the law students. There are law students who come into my office and say: “I want a career doing precisely this. I want to be a prosecutor or a defense counsel before the tribunals or a judge, one day,” *et cetera*. So the demand is clearly there. By the way, I teach international human rights law, as well, and in the casebooks for international human rights law, you now have these massive chapters that we did not have ten years ago. They didn’t exist. In fact, the chapter was self-determination. The self-determination chapter has been ripped out of the casebook, and now it is international humanitarian law. It is the law of war crimes tribunals. That is the chapter that replaces self-determination now, and guess what? Self-determination is on the way back (I still have my old lecture notes on it).

While it is definitely a growth industry and students want to learn the subject, they want to go out and have experiences with the tribunals. There is an interesting sector of the student body that actually wants to become JAG officers because they find that very interesting, the war crimes part of the equation.

It still remains a relatively limited segment of the school body. Don’t think that all students are crazy about this. They aren’t. They are heading for law firms and business law and litigation and U.S. Attorney’s offices on domestic law. I think we have reached a plateau where we know we have a fairly steady number of students every year that will take these courses and express deep interest in them, but I have not seen a huge explosion beyond that plateau for the last four years or so.

**LEILA SADAT:** Interesting. Bill?



**WILLIAM SCHABAS:** I have always wanted to try and teach the law of armed conflict through films and to show films—fiction films, not documentary films—about war and about conflict because I think that is actually—maybe not university students, but that is how most people learn about how you are supposed to behave in a war. Very few of us today actually go to war. It is not like it was generations ago, the generations of our parents and grandparents who were often put into uniform for a few years and sent off to war. It does not happen every much, at least in this part of the world, anymore. So where do we learn about it? Watching Tom Hanks in the cinema. I'm always intrigued by how the message gets communicated. Apparently, there is a new film out with—is it Brad Pitt?—about an American platoon in Germany at the end of the war.

**AMB. DAVID SCHEFFER:** Yes. Yes.

**WILLIAM SCHABAS:** It is apparently very harsh, and I am looking forward to seeing it, not because I want to see the harsh parts, but I'm intrigued by how they will portray what the soldiers think they can and cannot do. I am convinced that there are some things they think they cannot do, and there are other things that they do that they think they should not do. And then there are other things that they think they are entitled to do, but I don't know what that is until I've seen the film.

I still remember the scene in *Saving Private Ryan* where Tom Hanks and his group are behind the lines, and they can't take prisoners because it will threaten their mission. They encounter a German who is shooting at them.—he is not a sniper exactly, but he is in a bunker and is shooting at them—and they manage to catch him. Then some of the guys with Tom Hanks try to beat him up, they want to kill him, and Tom Hanks says they can't do it. They have a fight. He's clearly in the minority, but since he is the commander, he says, "No." They disarm him, and he says, "Walk a thousand paces in the other direction without looking around, and then you're on your own." Probably, in

the textbooks, that is the right answer, and it's nice that they show it in the film—except the guy that he frees up comes back at the end of the film, and he is the guy who kills him. So, what is the moral of the story?

That's the message that is difficult, but the cinema is loaded with all of these lessons. They raise more difficult questions than Alec Guinness standing there in the Japanese prison camps saying, "But this is the Geneva Convention," and then the Japanese commander says, "I spit on your Geneva Convention."

**LEILA SADAT:** Hans?

**AMB. HANS CORELL:** Thank you. Let me echo the importance of teaching international humanitarian law. Those students who say, "I'm going to the business community," and so forth, should be told the following: If you go into the business community and become a general counsel of a company, and you have no idea of what human rights and humanitarian law are, you are an unguided missile because this belongs also to the area of corporate social responsibility.

I had the privilege of discussing this with the general counsels of ExxonMobil, General Motors, and Wal-Mart, who actually had recruited the former legal general counsel of the U.S. Navy, Alberto Mora, to raise the standards in their company. When I asked them about corporate social responsibility, they unanimously answered that this is very high on the agenda in the boardrooms these days, and it belongs to the area of risk management. If they make a mistake here, it can cost the company tremendously. I think there should be an interest for lawyers who intend to go into the business community to be as familiar as they can with international humanitarian law and human rights law. Thank you.

**AMB. DAVID SCHEFFER:** Let me just add, Leila, that the course on corporate social responsibility has now become quite a popular course in many of the top law schools in the country, I agree with Hans. I teach it, and I find this is exactly where I can take the student in the only time they'll get exposed to international humanitarian law. Why? Because oftentimes, corporations will find themselves complicit in the commission of these crimes. So it is one slice of opportunity to take the student into this field and press them with it.

**LEILA SADAT:** I might add, just a one-finger, at least in the United States, international humanitarian law has come up a lot in the courts because of questions involving the detention of prisoners at Guantánamo Bay, and because of the government's actions after the 9/11 attacks. We have had many major Supreme Court decisions looking at the Geneva Conventions. I remember Justice O'Connor speaking in front of the members of the American Society of International Law a few years ago and saying: "We need law clerks who are actually trained in this because this area of the law is really difficult." If you are a country using force, knowing how that force should be used has major implications.

Let's turn to our next question, for Hans. Should we continue to press hard for further codification of international humanitarian law that is the adoption of new treaties, new specific rules, or are we better off pressing for customary international law compliance by all nations, regardless of ratification status? And here, you might talk about some of the new initiatives on autonomous weapons or on crimes against humanity, as well.

**AMB. HANS CORELL:** Thank you. I think one should do both, actually. The development of international law is a dynamic process, often starting with what is referred to as soft law that then takes on the role of customary international law and binding rules. For example, the Universal Declaration of Human Rights from 1948

was just a declaration, not binding in those days. Today, I would say that this declaration has assumed the status of customary international law.

Looking back on my experience from national legislation—I served for many years in the Ministry of Justice responsible for assisting the cabinet in preparing proposals for legislation to the Parliament—all the time, new things happen. And you have to look at the existing law and realize that this is not really up to standards: something has happened in the technical field or in the legal field, and then you have to review the legislation. You have to have this under constant review.

My suggestion here would be that we are very careful to defend the law that is. But if there is a need to reform it, we should enter into an exercise to do precisely that. We have seen that in some fields of international law already; in the human rights field, there has been a tremendous development over the years.

In international humanitarian law, we see new aspects. We have the new techniques—for example, drones. I must say that I am extremely worried about drones. I am working a lot in the Arctic, where we are using drones all the time for peaceful purposes to see how the ice is developing, as well as to monitor temperature, water quality, and so forth. Drones are used extensively for these purposes. There is no way we are going to stop the use of drones. It is a perfectly legitimate instrument. And all of a sudden, you put a weapon in it, and it becomes something different. As far as I understand it, if you use a drone in the battlefield, that would be permitted. Then you can strike at combatants. But if you use a drone somewhere else and you have identified an individual who is suspected of having committed a crime, maybe a terrorist crime, and you then decide to send a drone and use a missile to kill that person, I have difficulties coming around the provision (as far as I know in criminal law) called murder. If you identify a bank robber, sitting at 48th Street, crossing that avenue, and you decide to

kill him. That would be murder. What is the difference here if you identify people in another country and send off a drone? I think it is extremely important that we follow up here. Maybe the existing international humanitarian law is sufficient to solve the problem.

So my answer to your question is that it is very important, and if you look at history and see what happened in the nineteenth century when we had the first conventions on protection of the wounded and then came the laws on occupation—we have the expanding bullets in 1899, and then came the First World War. What came after that?

**LEILA SADAT:** Asphyxiating gases.

**AMB. HANS CORELL:** Yes, yes. Gases. And then we have the Second World War when we had the Genocide Convention because of what happened in the nineteen-thirties and -forties. We have the Geneva Conventions and so forth. And then came cultural property, and then land mines. I think the realities will, in a sense, give the answer to the question. If it is considered necessary to regulate a particular element, then we will do that. But for the rest, I would go back to what I said from the beginning: allow the customs to develop and stress what is already there.

**WILLIAM SCHABAS:** I think we should not be deceived into thinking that the law is going to advance and develop quickly by more codification. I think that, actually, one of the curious features of this body of law, both international humanitarian law but also international human rights law, is that it moves faster when you hand it over to judges in courts than when you get a group of diplomats together in a room and ask them to negotiate a text. The most spectacular legal development in the last twenty years is the famous *Tadić* decision of the International Criminal Tribunal for the Former Yugoslavia. They completely moved the goal posts on international law in a way that

would have been fiercely resisted had you had a diplomatic conference at the time, I suspect.

And you see the same thing with human rights tribunals, like the European Court of Human Rights, where you give judges vague texts, not too precise, and they run with them and develop them in unexpected and sometimes quite brilliant ways. Whereas, if you try to codify it, it seems to tighten up.

We have a great example in Article 8 of the Rome Statute, which deals with war crimes and is the longest provision. I think it is about fifteen-hundred words long, and I remember when it was being negotiated at the Rome Conference. People thought that the more words you put in a provision, the more effective it was, and the more you could do with it. Of course, the opposite is true. If you think about it, in international criminal law, certainly in the modern period—leaving Nuremberg aside—the broadest and most advanced provision for war crimes is Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (the first one), because it deals with all serious violations of international humanitarian law committed in international or non-international armed conflict. It is huge, and everything else subsequent is actually smaller, including the Rome Statute of the International Criminal Court.

**AMB. DAVID SCHEFFER:** Just a brief comment that since we are here in the United States, we must recognize that within the U.S. government, there is a reality of some codification, some ratification by the United States of some major treaties, obviously the Geneva Conventions, but not the protocols to them, and yet we have developed a practice within the U.S. government of quite sophisticated analysis and then reliance upon customary international laws, the basis for our country's performance overseas. That is extremely important because, frankly, the U.S. Senate is not going to be ratifying relevant human

rights and international criminal law treaties for the foreseeable future (if anyone has better information, please let me know).

We rely increasingly on our analysis of customary international law and what we regard as binding on the United States through customary international law. I need only mention the Law of the Sea Convention as well as Protocol II and even Protocol I of the Geneva Conventions where our government speaks quite often about the customary international law obligations that are reflected in those conventions, but we are not ratified parties of those conventions. So it is a very important issue for the U.S. government to continue to grapple with because, unless we can start to ratify some of these conventions, we are going to be tested in the international community on whether, in fact, we stick to these conventions as emblematic of customary international law.

**LEILA SADAT:** The other thing is it might depend on what you want to use the law for because, if it is a crime or a criminal prosecution, you need codification because it hurts the rights of the accused, essentially. You cannot prosecute under customary international law. If you want to prosecute, you need criminal law, and for that, usually if it comes from the international arena, you need a treaty. But if it is about state behavior, customary international law is much more appropriate.

**WILLIAM SCHABAS:** Well, just a reflection on David's comment and on the position of the United States, internationally. Of course, the United States has ratified a patchwork of international treaties, particularly in the field of human rights and international humanitarian law. One of the big pieces that has always been missing here is the International Covenant on Economic, Social, and Cultural Rights, which the United States has not ratified. And until recently, there was no accounting by the United States internationally for the respect of economic, social, and cultural rights, but now there is. When the United States comes to the Human Rights Council under the universal

periodic review process, it reports on education, health care, and housing to the U.N. Human Rights Council, and it is doing so under the provisions of the Universal Declaration of Human Rights and not the International Covenant on Economic, Social, and Cultural Rights, which it still has yet to accept. It is perhaps another example of where, when we move out of the strict frame of treaty law, we find these sort of surprising new ways that the law expands and develops, and we did not have to get the Senate's approval to make that reporting. That was a decision by the administration, and it makes very interesting reading.

**LEILA SADAT:** This is our final question formally for our panelists, and then we are going to open it up to the floor. This one is for you, Bill. How relevant is international humanitarian law in domestic codification of law today?

**WILLIAM SCHABAS:** Well, there is certainly a lot more of it. I think the Rome Statute has been a huge impetus because it has created a kind of a gold standard for the definitions of crimes but also obligations of cooperation on states that they then turn their attention to implementing. We now have more than 120 states parties to the Rome Statute. There will be more. There may even be echoes of this in states that have not ratified the Rome Statute but that are caught up in this wave of giving more attention to the incorporation of international humanitarian law in their domestic legal system. So it is definitely a phenomenon.

Whether it translates into action is a question I think that is not so clear. The states have shown considerable interest in using this body of law in their own domestic prosecutions under traditional forms of jurisdiction. The universal jurisdiction idea, the idea that they would also prosecute international crimes with which they do not have a significant connection (in terms of where the crime was committed or the nationality) still generates a lot more heat than light. It is a favorite subject of doctoral students, and NGOs write materials on



it all the time. But, finally, over the last twenty years, if we were to look at the tribunals that our prosecutors represent, we are probably talking about three hundred to four hundred people who have been prosecuted by those tribunals in the last twenty years. And under universal jurisdiction, if we added up the total, I think—who did it? Máximo Langer did it in an article in the *American Journal of International Law* about five years ago. It is about 35 people, and most of those cases were just echoes of the ad hoc tribunal prosecutions—Yugoslavia, Rwanda, and Nazis. Not such a big deal, but in the legislative changes, sure, lots of it.

**LEILA SADAT:** We had our first case under the Torture Convention in the United States.

**AMB. DAVID SCHEFFER:** Just a brief point: The Rome Statute has incentivized states through their ratification processes to convert much of international humanitarian law and domestic law. But here in the United States, interestingly, although we have not gone through that exercise of ratifying the Rome Statute, we nonetheless are trying to achieve a principle (at least I would hope we are) that the United States will not be a sanctuary for anyone who has committed the atrocity crimes that are embodied in the Rome Statute. And in order to ensure that, we have to have domestic laws that enable our government either to deport these individuals when they reach the border of the United States or to prosecute them if they firmly set foot within the United States. There has been progress in that respect. We do not have the complete panoply of Rome Statute crimes now subject to federal prosecution, but there are efforts under way to achieve that objective.

And so I think it is a very hopeful sign that there is movement within the legal communities and within our government to look at this issue and say there is no plausible argument that anyone in this room can make for the United States to be a sanctuary for someone who has committed genocide, crimes against humanity, or serious war crimes

elsewhere in the world. It is just not a plausible argument to say that this country is a sanctuary for those individuals, that they can buy their property in New Mexico and Florida and live happily ever after. That is wrong.

I favor the idea that we have legislation and laws on the book to prevent that, and that, indeed, would then be bringing all of that into U.S. law.

**AMB. HANS CORELL:** Yes. I think it is relevant, to answer that question briefly, and I hope that it will be more relevant. Indeed, in a few years' time, we will have a new convention on crimes against humanity.

**AMB. DAVID SCHEFFER:** Hear, hear.

**LEILA SADAT:** Hear, hear. So we started at the highest level of abstraction, in a sense, of international humanitarian law at the international level, at the Security Council. You heard about it, application at the ad hoc tribunals and the International Criminal Court this morning, and now we have come all the way back down to national courts, national legislation, trying to implement this law and do something about deterrence prevention and prosecution. Now it is your turn to ask questions of our panelists.

**ATTENDEE:** I wonder if you can explain what you mean by the former Yugoslavia, what that includes and who all is involved. When I think of Yugoslavia, I think Tito and a country that involved many, many states, and then I hear Serbia and Bosnia and countries like that, that are a focus on your tribunals.

**LEILA SADAT:** Maybe let's answer that one quickly, and then we will take a couple more.

**AMB. DAVID SCHEFFER:** Just quickly: it is Tito's Yugoslavia. It is Serbia. It is Montenegro. It is Bosnia-Herzegovina, Slovenia, Croatia, and, well, we will call it Macedonia for the moment. We will not get into FYROM.

**LEILA SADAT:** And Kosovo.

**AMB. DAVID SCHEFFER:** Well, Kosovo, yes, Kosovo, formerly part of Serbia and of the former Yugoslavia. That is the area we are speaking about. The Cold War Yugoslavia is what we mean by former Yugoslavia.

**LEILA SADAT:** So the tribunal was established to cover the territory of the former Yugoslavia. Next?

**ATTENDEE:** The U.S. government announced at the Human Rights Council in the past year that it does not intend to apply the ICTR extraterritorially. How has that changed your analysis of the interface between IHL and IHRL abroad?

**LEILA SADAT:** Oh, great question. Maybe we should take two or three. Did I see another question in the front? Yes, the young lady with the glasses.

**ATTENDEE:** [Inaudible]

**LEILA SADAT:** Great question. And maybe one more?

**ATTENDEE:** Hi. My question is, absent the Security Council consensus, how should the international community encourage or accommodate states projecting forth over long distances under the guise of responsibility for that?

**LEILA SADAT:** Okay. Three great questions. Who wants to take the first one? Bill, I think—

**WILLIAM SCHABAS:** Me. Yes, that is my area. Well, the question that was asked was about this problem of the extraterritorial reach of human rights conventions, and this is a controversial issue in international law. There is a good argument that at the time that the conventions were initially adopted in the late 1940s and early 1950s or when they were being negotiated that states believed that they only applied to their metropolitan territory. In other words, for the United Kingdom, it meant the British Isles, and it did not mean the colonies. And that is why they put in provisions in these treaties saying that they could also make a declaration extending the application to the colonies.

More recently—and it is an example again that this creative role of judges and similar quasi-judicial bodies has been changed. More and more, the prevailing view is that the obligations under the human rights treaties extend also to your conduct outside of your territory. The scope of that is still, also, a matter of much debate. If you occupy a territory, I think there is a very strong case that it applies, that your human rights obligations apply to you. And then the question is going further afield when we are talking about armed conflict: Does it deal with the conduct of your forces when you do not control the territory? There, I think the debate is still raging.

I have another take on this as well, and it is partly my great enthusiasm for customary law for the Universal Declaration of Human Rights. This is where there is an interesting comparison with international humanitarian law. When international humanitarian law is involved we tend not to be too obsessed about the treaties because we say it is all customary law anyway, and it applies to everybody, not just to the states, but also to the non-state actors and to the individuals. It is my belief that that is the same with human rights law. With respect

to human rights obligations, if you read the Universal Declaration of Human Rights, it speaks to everybody. It does not just speak to the state. It is very clear. You can read it. It is a short document, and it speaks to all of us. It speaks to organizations. It speaks to institutions. It speaks to people, as well as to states.

So that a country, regardless of what the treaty says—that is a problem of treaty interpretation. Maybe there is a treaty, maybe there is not a treaty, but it does not mean that the state isn't required to respect these broader human rights obligations that flow from customary international law and the Universal Declaration of Human Rights. This is a very radical answer to the question, in a way, but I think that is where the answer lies.

If the United States said, for example, before the Human Rights Committee (which is the body to which it reports under the Covenant on Civil and Political Rights), “We do not have to report on anything that happens outside of our territory,” the Human Rights Committee would throw a temper tantrum and tell them they're wrong on everything; but there will be a standoff and that will be the end of it. But when they go to the Human Rights Council where they're reporting under the Universal Declaration of Human Rights, I do not think they have that argument about the scope of the treaty, the interpretation of the treaty, the intent of the drafters. I think there, they have to say: “When our soldiers go abroad, they have to respect the Universal Declaration of Human Rights.”

**LEILA SADAT:** So we will thank René Cassin and Eleanor Roosevelt.

**WILLIAM SCHABAS:** And Eleanor Roosevelt.

**LEILA SADAT:** Okay. Hans, did you want to jump in on that or on the Security Council question?

**AMB. HANS CORELL:** Yes. Well, the responsibility to protect, here, I am very sensitive to this question, and I have heard suggestions even in my own country that if the Security Council is not up to standards here, somebody else has to intervene—many people think about NATO. I warn against that.

Certainly, I recognize that there could be a system of shared necessity, and I have thought of the arguments here about Kosovo in 1999. But I was very concerned when the intervention in Kosovo occurred because two things will happen. First of all, there is a tendency, at least in western countries, they believe that it will be NATO or some sort of ordinary organized troops that would do the thing, but who can be sure? And the second thing is that you lift the burden from the shoulders of the Security Council. They should be set against the wall—held accountable: “You have to do something about it.”

I have warned the Council also that if they continue not to perform in a situation where the whole world sees that something should be done, maybe they undermine the United Nations in a manner that perhaps the organization risks becoming irrelevant. Now, they would say, “Well, if the United Nations was not there, we would have to invent it.” This is a very sloppy argument. The U.N. Charter is the heritage of a generation that experienced two world wars. We should be very careful to honor that heritage. Because if a new organization is set up—I have said to the five permanent members—“You will never, ever in a new organization be given the legal power you have under U.N. Charter to sit permanently on an organ with the legal power to adopt resolutions that the whole membership of the organization is obliged to follow.” I wish I could be present when the permanent five sit down to discuss and make them understand that they have a tremendous privilege to actually contribute to peace and security in the world.

And the second element here in the responsibility to protect. If you open the doors and the Council says, “well, somebody will deal with it,” then we are back before 1914 again because it is not only NATO that will say, “well, we can do this or that.” Anybody can do it, and then we have destroyed the whole idea behind the U.N. Charter.

Finally, on the human rights, I agree with what Bill said here, and I would say for my country—I defended Sweden for eleven years during my time Legal Adviser of the Foreign Office in Stockholm, before the European Court of Human Rights in Strasbourg—it was an extremely useful learning experience for my country. And when I had to explain a lost case, this was done in a sitting cabinet meeting in those days. I then found myself assuming the role of the defender of the Court: “We have analyzed the judgment. There is nothing wrong with it, and the only thing we can do here is now to fulfill our obligation and execute the judgment.” But more importantly, if we lost a case, why did we do so? Often, the analysis leads to the conclusion that the legislation is at fault, and you have to review the legislation in that particular field. This was a very, very important learning experience for us.

Finally, in the United Nations, when we govern Kosovo and East Timor, the United Nations is not formally bound by the human rights treaties, but I was adamant—Kofi Annan was completely in the picture here—that under no circumstances should the United Nations be committing or doing things in these territories or regions that would violate international human rights standards. That would be an anomaly. We simply cannot do that. So we considered ourselves bound by the treaties in those regions.

Thank you.

**LEILASADAT:** David, did you want to add to any of those responses?

**AMB. DAVID SCHEFFER:** Well, I want to add on R2P but let you go with the crimes against humanity convention question. I think that was asked to you. Is that correct?

**LEILA SADAT:** Yes. I mean, it really goes to the same thing we have been talking about. There are different levels at which international humanitarian law or international criminal law are being applied. Sometimes it is being applied at the international level by an international court, and in that case, that international court is taking a piece of law in its own treaty, in the case of the ICC, because the ICC statute has the criminal law and all the rules for establishing the court in one treaty. And then the court takes the piece of law that says crimes against humanity and applies it to the situations in which it has jurisdiction.

There are lots of states now parties to the ICC, and of course, what the ICC can do has nothing to do with what national states should be actually doing, which is prosecuting crimes against humanity cases. And for them to do that effectively at the international level in terms of transnational cooperation, international cooperation with each other, the kind of situation Ambassador Scheffer was talking about where you have a state that is actually sort of a sanctuary for an individual who may have committed the crime in another state or you have a person at large, you need interstate modalities, extradition, *aut dedere aut judicare*. You need provisions on statute of limitation. You need provisions on modes of liability and superior orders. It is really an interstate process, and that is when it sounds like an alphabet soup, but international law has these subsets—international humanitarian law, international human rights law—and then international criminal law. And so the model in international criminal law, which also applies to hostage-taking, terrorism, corruption, money laundering, I might suggest should also apply to crimes against humanity, which is one of the most serious crimes that can be committed. So that is the difference.



**AMB. DAVID SCHEFFER:** Just a further point on R2P. We certainly aspire to what Hans has wisely counseled about, the Security Council rising to the occasion, accepting its own responsibility to use its charter authorities to do the right thing, and particularly to protect civilian populations at risk. The responsibility to protect principle vests that authority in the Security Council. It does not vest it in anyone else other than in the first instance. The country itself where the problem arises has a responsibility, but then if it fails, you go to the Security Council. And there is a very clear procedure for that.

The problem is—and I think we have to address the problem, we cannot ignore it—is if the Security Council fails to step up to the plate, if the responsibility to protect principle is too narrowly constructed now to achieve its objective of saving human lives, we have to find some other solution. Now, we want to find it under international law, but I do not think we want to argue that there is a gap in international law we cannot fill here. And I increasingly find myself going back to more traditional principles of international law which have not been wiped away at all yet, whether it be under the doctrine of humanitarian intervention, under principles of collective self-defense. There are ways to look to international law to achieve an objective that I think most civilized nations would say, “We must achieve that objective,” namely save thousands of lives, if possible, from senseless and frankly criminal elimination or extermination.

I think there is more out there than is technically on the books right now and what we are talking about; our governments in Europe and in the United States, in particular, need to be very, very constructive and cooperative in how they look at international law and try to find solutions rather than obstacles.

**AMB. HANS CORELL:** Could I just fill in there that I agree, David. I did not have time to develop it too much, but I think that what one would first require is that the Council analyzes the situation, and they

should do that by using the five criteria that the commission (chaired by Gareth Evans) set up. And there they have the last criterion, which I think is so important: if in the analysis the answer is that if we intervene with force, with military force, we may create a situation that is worse than if we do not intervene, then I think the whole world would understand if the Council stepped back. But if the Council could take the step and doesn't do it, yes, one has to look very carefully at it. And I said I would not exclude a situation of necessity, but as you know well, the General Assembly and the Council has said that we are the ones who are intervening and if necessary by force under Chapter VII, paragraphs 138 and 139—is it?—in the resolution.

**AMB. DAVID SCHEFFER:** Yes.

**AMB. HANS CORELL:** Yes. I agree that we have to look carefully at this, but the first step is really to ask the five permanent members to sit down, look at each other, and ask the question, “What are we doing? If we continue like this, we are actually feeding conflicts in the world instead of reaching out to each other and demonstrating to the world that if somebody passed a line here, we will come after you.”

**LEILA SADAT:** We have two minutes remaining. Is there one more question, very quickly? And then each one of the panelists perhaps has one final thought to leave us with. Maybe we will broaden it to: “What can I do?” and have each one of the panelists conclude with their positive, hopeful statement about what we can do.

**AMB. DAVID SCHEFFER:** I answer this question fairly often, and it has so many different avenues you can go down that it is not a simplistic answer. There are so many ways to get involved with nongovernmental organizations as a student while you are either in class or during the summer. I mean, there are all sorts of ways to get intersected with NGOs. So that is a long discussion. With any student,

you want to know what their interests are, *et cetera*, and then you start walking them down that path.

But I also tell other students, particularly my corporate law types who are just kind of tolerating me a little bit: “Look, the least I want you to do is I want you to read about this stuff every day in the newspaper this term. I want you to sensitize yourself because when you get out there in the professional world, by God, if you are in a law firm, I want you doing pro bono work, and I want you aware of this, and I want you energized by it.” So there are different ways with different types of students to try to energize them.

**LEILA SADAT:** Bill?

**WILLIAM SCHABAS:** I do these days most of my teaching in England and France, and I have been reminding my students in recent months that if it were 100 years ago, about half of the students in the class within the next 12 to 18 months would be dead.

You know, that that was what it was like one hundred years ago in a university classroom, and the universities of Europe—but it is the case here as well—all have plaques to those who died in the wars. And we do not have so much anymore. As Steven Pinker says, “It has never been safer to be a young man in the United States today than in the history of the country.” I think this is the thing we have to cherish.

I wanted to jump in on the discussion about the responsibility to protect before because I think that we often too quickly reduce it down to a discussion about the use of force, whereas so much of it is about other types of initiatives, and that that is really what is so rich about that doctrine. The solution rarely, as Hans said—most of what we have seen in terms of intervention allegedly to prevent human rights in the last decade or two appears to have done a lot more harm than good.

Actually, it has just made more people miserable, and so I think we should be very careful about that.

The last thing for students is to remember what Eleanor Roosevelt said: that human rights begin in small places, close to home.

**AMB. HANS CORELL:** What I would like to say is that the human rights issues are taken in small steps, and what I see as very important in any society are the nongovernmental organizations. I will never forget my meeting with the nongovernmental organizations in Cambodia when I was negotiating the agreement on the Extraordinary Chambers there. A very humble crowd who said that they were not so interested in the Court as they were interested in finding out the truth about what had happened to their near and dear. And I have seen this in other places, too, in the world. And what I fear now is that young people—how can we make them look up from their cell phones? When I look at them in the streets in my own country, they do not see other people. If somebody, an old lady, comes onto the bus, I am the one who will leave my seat open. The others are sitting, like this [*speaker mimics someone looking at a cell phone*]. It is very important to engage young people in this, that they form organizations, join organizations, and also try to influence the leadership.

Finally, let me close on another poem, which I used when I was invited to give a keynote speech in the American Society of International Law with then-Attorney General Janet Reno in the first row. I had been informed that members of Congress were boasting about not having passports, so I came to think of a verse from the Sayings of the Vikings written more than a thousand years ago. In translation from the beautiful Icelandic, it goes “Wise is the man who has traveled far and knows the ways of the world. He who has traveled can tell what spirit governs the men he meets.” Today, of course, it would have to be “men and women”! And the only protection when they went

around in their open longboats against the wrath of the elements was the dragon's head at the bow of the ship.

**LEILA SADAT:** Thank you. With that, I think we will close this wonderful and very rich panel. Thank you all for your participation.

**The First International Court in Africa:  
A Conversation with Sir Desmond de Silva, Fatou  
Bensouda, and Hassan Jallow**

*This roundtable discussion was convened at 5:30 p.m. on Sunday, August 24, 2014, by its moderator, Gregory L. Peterson an attorney in Jamestown, NY who introduced the panelists: Sir Desmond de Silva, former chief prosecutor of the Special Court for Sierra Leone; Fatou Bensouda of the International Criminal Court, and Hassan Jallow of the International Criminal Tribunal for Rwanda.*

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**GREGORY L. PETERSON:** It's a thrill to have this amazing assemblage of folks who are involved in the international criminal law community, and kudos for all that you do on behalf of mankind.

It goes without saying that the Robert H. Jackson Center is here with this mission to advance the legacy of Justice Robert H. Jackson, who not only is the answer to the *Jeopardy!* question, "Name the only person in the history of the United States to be a solicitor general, attorney general, and a Justice of the Supreme Court," but also, for our purposes, the chief American prosecutor at the Nuremberg Trial. And we like to believe that there is a direct linkage from the accomplishments of Justice Jackson at Nuremberg to that which you are all involved in today.

This is the third time we have conducted this type of evening activity. The first one was gathering together the four chief prosecutors of the Sierra Leone tribunal to talk about Charles Taylor. Last year, we had the opportunity to interview His Royal Highness Prince Zeid. Today, we're going to have a chance to talk about something that most people don't know about, something that occurred in the lineage from Nuremberg to Yugoslavia or Rwanda.

First, let me introduce this amazing group: Fatou Bensouda of the International Criminal Court; Andrew Cayley from the Extraordinary Chambers in the Courts of Cambodia; David Crane from the Sierra Leone tribunal; Sir Desmond de Silva of the Sierra Leone tribunal; Brenda Hollis from the Sierra Leone tribunal; Hassan Jallow from the Rwanda Tribunal; Nick Koumjian, Extraordinary Chambers in the Courts of Cambodia; Ambassador Stephen Rapp from the Sierra Leone Tribunal; and James Stewart from the International Criminal Court.

To help put into perspective why we're doing this today: two years ago, Sir Desmond came here a day early, and we had an opportunity to have him be interviewed by me in front of a larger number of University of Buffalo law students. During the course of that interview, he talked about the Gambia Trial, in which he was involved in 1981. It was theretofore, to me, an unknown trial. Later on during that course, I said, "You know, there's a story here. There really is a story."

Today, we will start with Hassan. Hassan wrote a book, and within the book, there is a chapter entitled "An Unconstitutional Challenge: 30th July 1981 Attempted *Coup d'État*." The chapter begins with the following from Hassan:

July 30th, 1981, half-awake and still in bed, I tuned into Radio Gambia for the 7 a.m. early morning news. Instead of the news, there was a strident voice announcing the overthrow of the government, the establishment of a Supreme Revolutionary Council, and the adoption of a Marxist-Leninist ideology [in the Gambia].

Hassan, did you know it was coming?

**HASSAN JALLOW:** There was hardly any warning it was coming. I wasn't aware it was coming at all. The first time I learned of this

attempt to establish a communist government in my country was that morning of 30th July at seven o'clock. Before that, of course, the Gambia, being an open democratic country at that time, there were all kinds of dissident groups. There were the opposition parties and other dissident groups, which sometimes espoused left-wing or communist ideologies, but this was quite a surprise.

**GREGORY L. PETERSON:** The timing was very specific. What was going on in your country at that time?

**HASSAN JALLOW:** Well, the president was away. It was sort of very well-timed. The president had taken holiday and he had traveled to London to attend the wedding of Charles and Diana. The whole mission was not for the purpose of the wedding, but he was on leave, and he went to London and was attending the wedding. Then this attempt took place in his absence. It lasted for a week or so and was put down with the help of Senegalese forces and forces from other countries. I can't name some of them because clandestine operations took place. Within a week, it was put down but at great cost to the country.

When the rebels took over the country, they opened the prisons, they armed prisoners, they armed young men, and there was a lot of shooting. Amnesty International estimated that between five hundred and one thousand people lost their lives, and this was in a small country of just over a million people, a very small country. So that was really a big loss. There was a lot of destruction and damage to property as well. Shops were looted, vehicles burned out, and so on. So it cost the country a great deal.

**GREGORY L. PETERSON:** During that time period, ten days or so, before the *coup d'état* was foiled, you were in the State Attorney's office, right?



**HASSAN JALLOW:** Yes, I was principal state attorney then in the attorney general's office at the time. Yes.

**GREGORY L. PETERSON:** What was it like during those ten days?

**HASSAN JALLOW:** Very difficult. I mean, for somebody especially like me, knowing all these prisoners were out on the loose and armed, it was difficult.

As a matter of fact, on the first day, I had ventured out, taking a walk in the town. And when some of them started waving and shouting my name from the trucks, waving their arms, I decided to retreat as well. So it was very dangerous. Most people stayed at home. Most people stayed at home, because of the indiscriminate shooting and looting and burning.

**GREGORY L. PETERSON:** Fatou, you were twenty years old, not quite an attorney at that time.

**FATOU BENSOUDA:** Yes.

**GREGORY L. PETERSON:** What was your sense of that time period?

**FATOU BENSOUDA:** As Hassan said, it was a time when, in a relatively very peaceful country, the Gambia, we've never experienced anything like that before. So it was a time of much insecurity, very unsafe to be out in the streets. There was a lot of looting. There was a lot of shooting. And there was not the structure, as such, of this group of people who decided to stage the *coup*. So there were those who just joined, not receiving directives from anybody but settling scores. So it was really a time that was very, very insecure in the Gambia.

I had just finished school and started working at the law courts as what we would call a clerk of court. It's like a registrar. I would make the announcements of the cases, and keep the files, *et cetera*. As I was still waiting to go abroad for my studies, it was a period when this tribunal was set up, and I had the opportunity to work there.

**GREGORY L. PETERSON:** Again, the ten days. What was it like in the courtroom at the time? Were you wondering whether somebody was going to storm the court? Because everything was fair game.

**FATOU BENSOU DA:** No. During those ten days, of course, the Special Division had not yet been set up. And I think it was also ten days that nobody was working. It was a time of great insecurity in the country. Looting, shootings going on, so most of us stayed at home.

**GREGORY L. PETERSON:** When did the President come back? He was in England—how did he come back?

**HASSAN JALLOW:** Well, the President came back very, very quickly to Senegal, to Dakar. I think by the second day of the takeover by this communist group, he was back in Dakar, Senegal, the neighboring country, because we had a defense pact with Senegal at the time. When he arrived in Dakar, he invoked the provisions of that pact with Senegal, and they agreed to intervene in order to put it down. It didn't take long. And then he came back into the country, during that week itself, and was involved in trying to put it down.

**GREGORY L. PETERSON:** So, really, was it the Senegalese army that came in under this pact?

**HASSAN JALLOW:** Yes.

**FATOU BENSOU DA:** Yes.

**GREGORY L. PETERSON:** Then what happened? You foiled the *coup*. I suspect a few of the leaders probably left.

**HASSAN JALLOW:** Yes, most of the leaders left. Kukoi Samba Sanyang, who was the leader, fled to Guinea-Bissau. Then there were reports he went to Libya, because Libya and Russia were alleged to have been involved in the attempt to overthrow the government. As a matter of fact, in one of their first broadcasts, the rebels called on Russia, at the time, to come to their help, when they learned that the President had invoked the defense treaty with Senegal. They called publicly, on the radio, for the Russians to intervene. So, it became also part of this conflict during the Cold War. But the president came in, and with the help of the Senegalese and other friendly forces, it was put down. But most of the leaders, as I said, fled to—

**FATOU BENSOU DA:** Neighboring countries.

**HASSAN JALLOW:** —to Guinea-Bissau, to Libya, and also some to Cuba as well. The leader died just last year, I think.

**FATOU BENSOU DA:** Last year, yes.

**HASSAN JALLOW:** Yes, last year. He died in exile last year.

**GREGORY L. PETERSON:** From an outside perspective, what was the strategic significance of Gambia? Was it the river? Why would Russia and Cuba be interested in Gambia during the Cold War?

**HASSAN JALLOW:** Well, the Gambia is a small place, but it's of strategic importance in that region, given the river as a means of navigation and communication into the interior. Through the river, you can travel to Senegal, to Mali, to Conakry. You get good connections to all those countries.

At the same time, also going on during that period was—and this is linked to the Special Court for Sierra Leone as well—that Ghaddafi at that time was taking quite a number of West Africans to Libya to train them, for them to come back and overthrow their governments. Charles Taylor was one of them. You'll find there were connections between Charles Taylor's group in Liberia and groups in Sierra Leone, groups in Burkina Faso, and this group in the Gambia who tried to overthrow the government. It was really a regional conspiracy to try and change the politics in that region through Ghaddafi, allegedly through Russia, and the Cubans as well.

**GREGORY L. PETERSON:** The president declared a state of emergency. Did that kick in your office into extraordinary powers?

**HASSAN JALLOW:** Yes; our constitution at the time allowed the declaration of a state of emergency, which then had to be approved by the National Assembly. That was done, and once that was done, there were powers granted to the executive to enforce curfews, to also arrest and detain people who were suspected of having been involved in the attempted *coup*. Quite a number of people were detained, just over a thousand, but under the constitution, they all were served with reasons for detention. Their names were gazetted in order to avoid secret detentions, and they were each brought before a review tribunal within fourteen days of their detention to determine the need or the legality for any further detention. And so I was involved in setting up those tribunals, those review tribunals, and also then sending advice to the president once the tribunals had done their work, as to where that particular person should be released from further detention or should continue to be in custody pending investigations.

**GREGORY L. PETERSON:** So you were pretty busy.

**HASSAN JALLOW:** I was involved in that, incidentally, with Fatou's uncle, who was my senior at the time.

**FATOU BENSOUDA:** Yes.

**HASSAN JALLOW:** The two of us were responsible for then advising the president on the need for continued detention or otherwise of the accused, and at the same time, involved then in building up cases for prosecution.

But one important decision which was taken once the emergency was declared, the government took the decision that, given that the damage had been widespread, and many people, many Gambians, had been touched by the events, that no Gambian judge or Gambian prosecutor should be involved in those cases. So we just served, then, as investigators or people who coordinated the investigations. And that's where Sir Desmond de Silva then comes in. He was the first chief prosecutor.

**GREGORY L. PETERSON:** Gambia at the time was part of the British Commonwealth.

**HASSAN JALLOW:** That's right.

**FATOU BENSOUDA:** Yes.

**GREGORY L. PETERSON:** And therefore, you reached out to the British Commonwealth to seek help. Whom did you reach out to, and how did Sir Desmond get in the game?

**HASSAN JALLOW:** Well, the Gambia was sort of a commonwealth. We had a tradition of working with Sierra Leone, with Ghana, with Nigeria, judges and magistrates, and in that context, we were able to get attorneys for prosecution and also for judges. I think Sir Desmond can pick up there about how he came to the Gambia. He was the first chief prosecutor.

**GREGORY L. PETERSON:** How did you get in the game?

**SIR DESMOND de SILVA:** Well, one must remember that this was the high watermark of the Cold War, and the River Gambia was one the Russians had been seeking to put ships into. For 250 years, the Russians had been looking for what they call warm water ports. This attempted *coup d'état*, in the Gambia, presented the Russians with a warm water port on a platter, and there was a great deal of nervousness in Washington, London, and so on and so forth. And because the Gambia had, on independence, inherited the English Treason Act of 1351, I was called into the Foreign Office, and they said: "Well, there are only three people who understand this. One is dead. One is mad. And the other is you." I had operated this Act in Sierra Leone in 1967, because they, too, had a problem, and I had to go out there. I understood something about this Act, so I got sent out.

I went to see President Sir Dawda Jawara, who'd been reinstalled at the President's house in Banjul, and I said to him: "Now, look, you do understand that the English Treason Act of 1351, the only penalty is death." They didn't mess around in 1351, you see? And he said, "Oh, dear. We haven't hanged anyone here for thirty years, and what's more, the hangman is dead." So I said, "Well, we'll have to deal with that." And so we had to provide—I had to draft—firing squads and things of that kind.

We had a lot of investigators, and there were a thousand people in detention. And a lot of people had done the same sort of things that amounted to treason, but given the penalties, one was very conscious of the fact that it would have been mass execution. We really had to cut it down to those who bore the "greatest responsibility," a phrase that keeps cropping up. I tried to leave out those with big families and all sorts of things, but ultimately, I was forced into tracking those who had been trained in Moscow and trained in Libya, because, one must remember, these were Cold War days and one was expected to do that.

Having drafted indictments against, I think, a total of about forty-five people—one must remember that we finished forty-five trials in four years, which some people think is a remarkable achievement, and that is trials and appeals and so on and so forth. Every prosecutor came in from outside. Every prosecutor working under me came in from outside, other parts of the Commonwealth. Every judge came from the Commonwealth. So it was a totally internationalized court, a completely internationalized court. I mean, I wouldn't have worked under any other system, because the *coup d'état* had touched almost every family in one way or the other, and it would have been a process that was no longer transparent if, in fact, we'd used local prosecutors and local judges and so on and so forth. It worked wonderfully, and as I say, not only did it work wonderfully, it worked very quickly. We kept the evidence to strictly that which was needed to prove the indictments and so on and so forth.

I remember Fatou, of course. When I was prosecuting, she was reading out the indictments to the defendants and things of that kind. We had to work very hard. I remember on the third day, the judge had risen, and I was just about to leave my place at counsel's table, and one of the defendants shouted my name and signaled me to come over. So I went over to the dock, and he said to me, "You know, you're working too hard. You're going to be dead before we are." He said, "I suggest this coming weekend, you take a girl and go to a bird sanctuary." And, you know, there's a lovely bird sanctuary there. Well, I'm not going to tell you what I did. He wasn't executed, because one of the things I did was to persuade the president—before I left, finally, I wrote him a letter to say that when one looked down the trail of a nation's history, there are bright lanterns, and often the lanterns that burn brightest are those that cast the light of humanity over that path. I think just one person was executed. I think one.

**HASSAN JALLOW:** Yes.

**SIR DESMOND de SILVA:** But I think all others were spared. I think I'm right in saying that, although it was a long time ago now. The Gambia got through all those events, had all those trials, and many of the people who were judges there went on to become judges in other places, judges of some distinction. So I look back with considerable fondness on that court we created, because what we did was create the first internationalized court (which has never really been written about, although Hassan has written something about it in his memoirs). And it worked. It worked. I think the people in the country had confidence in this court, because it was a court that was untainted by local prejudice and things of that kind.

The principal culprit (who escaped to Guinea), like Charles Taylor and others, had also been trained by Ghaddafi. I remember (this is sort of a very personal story) he had taken refuge in Guinea, and somebody in the government had worked out—I think it was the attorney general—that we must get this man. I was invited to come to dinner with the attorney general and another person whose name will remain unsaid. The attorney general said, “We want you to authorize the arrest of 150 people from Guinea,” who happened to be in Banjul. And I said, “Why?” He said, “Well, we want to hold them as a hostage, hold them hostages against the return of this man.” So I said I wouldn't do that. I refused to do anything of the kind. He made a lot of noise about it, and I simply left the table.

There was a flight leaving for London that evening. It was British Caledonian, an airline that no longer exists. The captain was actually having dinner near my table. So, I went over to him and said, “Do you have any seats on your aircraft?” He said yes, and so on and so forth, and I managed to get myself ticketed. I took a car, and I went to the airport, because I was going to have nothing more to do with this tribunal, being asked to have 150 hostages taken. I was in the departure lounge when two police officers came and arrested me. They arrested me on the basis of having stolen a car to get to the airport.



They arrested me and took me back to Banjul. I was taken back to the hotel, which I'd left just a few hours before, and there, still sitting at the table, was the attorney general, who produced a bottle of whiskey and put it on the table and said, "Forget it. You've won, and there it is." So I carried on from there, and there was no more nonsense talked about hostages.

So there it was. We completed what I think was a fairly well-conducted series of trials. As I said, despite the fact that capital punishment was the order of the day and certainly the order of the day so far as the punishments were concerned, it was not meted out, except in one case. Looking back, I personally feel very gratified that I was associated with that successful operation.

**GREGORY L. PETERSON:** Fatou, again, being a registrar, you know, calling, reading the indictments and all of a sudden seeing this influx of non-Gambian prosecutors, judges, what was the buzz in the court?

**FATOU BENSOUDA:** I think, as Sir Desmond said, those who came were very highly regarded, if I can put it that way. They were highly regarded. And he also talked about in four years we were able to complete this, and I think this is a good lesson for all of us to learn. But then, again, all of the judges and the prosecutors were coming from commonwealth countries, and we did not have this problem of different systems, or a hybrid sort of system than we had to work in, like most of the current tribunals have to do. So we were able to proceed, really, in a very quick fashion, and for forty-five trials to take place in four years, I think, is quite an achievement.

**GREGORY L. PETERSON:** Hassan, one of the things that you wrote in your *Journey for Justice* was the Sheriff Dibba case, which you felt that was an important indication of how the process really

worked. Why don't you talk a little bit about that, because I think that's very instructive.

**HASSAN JALLOW:** Well, if I may go back a bit, it was a truly internationalized court. It didn't apply international law, but as Desmond has indicated, it applied the common law and local Gambian law and some old English statutes, which some of us had never seen, let alone understood. The judges were all non-Gambian. The prosecutors were all non-Gambian. I think it's instructive that most of them then went on from there to play very senior roles in international criminal justice. Sir Desmond was, of course, chief prosecutor of the Gambian Special Division, and he became chief prosecutor of the Special Court for Sierra Leone. Judge Ayoola, who was Chief Justice of the Gambia at the time and very much responsible for running the court at that time, became president of the Special Court for Sierra Leone. You had George Gelaga King, who was a judge of the Special Division in the Gambia, who became a justice of appeal of the Special Court. And of course, you have Madame Bensouda, who became a chief prosecutor as well. And it really was a truly international court—

**FATOU BENSOU DA:** And Prosecutor Jallow.

**HASSAN JALLOW:** Oh, okay. I think there are many lessons to draw from the whole thing. One is that it was a hybrid court, but because it applied a uniform system of law, the common law, all the judges, the prosecutors were from common law jurisdictions. And Fatou said, we did not run into the serious problems that would cause delay in the current international tribunals—the language problems, the interpretation problems, the translation problems, and also the problems of understanding concepts from different legal traditions. So things moved fairly well, to the extent that from 1981 to 1984, we were actually able to complete the trials.

The second thing is that it was done properly. There was due process. The Supreme Court exercised effective judicial oversight over, for instance, the whole process of detention. If, for instance, we did not serve a detainee on time with the reasons for detention or we did not publish the particulars of the detainee in the press in time or we did not take the detainee before even a review tribunal on time, the court held that that had the effect of nullifying the detention, of invalidating the whole detention itself. It was a very proactive court, which was concerned about maintaining the fairness of the whole process.

Then you had the Sheriff Dibba case. Sheriff Dibba was then the leader of the opposition at the time, and there was a lot of suspicion that he had been involved in planning these events, because in the course of that week, he had been visited several times at his residence by the leader of the *coup*, of the rebels. Unfortunately, of course, they were the only ones who were at these meetings, and so it was difficult to tell what went on. And to the credit of Sir Desmond—I still remember that, I've narrated it in my book—when he reviewed that file relating to the leader of the opposition, who had been detained, he felt—and he gave a legal opinion—that the evidence was not strong enough to secure a conviction, and that any attempt at prosecution would appear to be a political move.

Unfortunately, there were other foreign lawyers in the country who thought otherwise and who thought he should be prosecuted. So he was prosecuted and in the end acquitted by the court. Then it fell on me (Sir Desmond had left) to advise the government as to whether to appeal against that acquittal or not. I felt also that an appeal would not succeed, and it would send the wrong impression that he was being persecuted, more than just being prosecuted. He was acquitted by the Court, and the president respected that decision. Not only that, but he went farther to order his immediate release from detention. It was a very fine example of adherence to the rule of law.

There was another dimension to it—that it was not only at the trial stage that you had the foreign lawyers. Each of the accused had a right of appeal, but the appeal went to the Court of Appeal, which was then constituted to comprise the chief justices of the other countries, common law countries in West Africa, or their representatives. The chief justices of Nigeria, of Ghana, of Sierra Leone, or their designates, then sat on the Court of Appeal to review these cases. It was removed, really, from the Gambian judges entirely. It was a very difficult period for the country, but I think, as Amnesty itself recognized, the process itself had been handled very, very fairly.

**GREGORY L. PETERSON:** One of the things that strikes me, here we have a panel of three superstar prosecutors in international criminal law, but two of them are from a very small country. Did this 1981 trial influence the direction of your careers, so that you got to the points where you are today? Can we say that?

**FATOU BENSOUDA:** Well, for me, just working in the courts at the time, fresh out of school, working in the courts is something that I've always wanted to do. And I think that the Tribunal, the setting up of this division itself, and working for the first time with lawyers who were not from the Gambia, with judges who were not from the Gambia, was actually a bonus for me. It just entrenched my desire to do this work. This is what I wanted to do. By the time the cases were over, I had no doubt whatsoever in my mind that this is my career. It was crystal clear for me.

I just want to say that what happened then in the Gambia, if you take it in context to what is happening now, it's very significant. This was a small country that decided, for reasons of accountability, impartiality, fairness to hearing, all the good reasons why we have international criminal justice—decided to go that way. And today, you have this big pushback against the ICC from the African Union, even going to the extent of having a resolution to exempt sitting heads of state

from trial. I think the setting up of the Court itself in the Gambia again demonstrates, for a long time, the leadership that Africa or African countries have taken in international criminal justice. Okay, we did not apply international criminal law then; we applied the local domestic law. But the fact that we had judges and prosecutors from all over the Commonwealth coming to the Gambia for this tribunal does demonstrate leadership at a very, very early stage. I think, especially in Africa, we need to remind ourselves again of these steps that we had taken for accountability, for justice, rule of law, and as lessons that we should take from setting up that tribunal.

**GREGORY L. PETERSON:** Hassan, you were in the State Attorney's office. How did this impact your career path?

**HASSAN JALLOW:** Well, it may not have directly impacted on my career in international law, but clearly it—in the state law office, I was working very much on criminal matters. I was also, at the time, in charge of matters relating to human rights and international law, and all those together, I think, may have pushed me farther into international criminal justice. But the establishment of this Special Division of the Gambia Supreme Court is not very well known. We tend to always say that between Nuremberg and the establishment of the ICTY in the early 1990s, there is nothing, but clearly there was a great experiment from our very small country, which hasn't received much publicity.

Going farther down the line now, we can perhaps again look at another example from Africa in the form of the establishment of the Special Division in the Senegalese courts to prosecute Hissène Habré. This was just, I think, about two years ago or so that the African heads of state decided that one of their former colleagues ought to be prosecuted for crimes he committed whilst head of state. But since he was out of his country, they authorized his host country, Senegal, to set up a Special Division within its own courts and to exercise jurisdiction over

him. That also has been a very unique step in international criminal justice which has occurred in the African continent. I think these two examples show what the possibility is for dealing with some of these offenses in Africa, and within Africa itself.

**GREGORY L. PETERSON:** Sir Desmond, I'll give you the final word. What's the legacy of this 1981 experiment in Gambia?

**SIR DESMOND de SILVA:** Well, it convinced me that international courts work, an internationalized court can work, and that I could bring in people from all parts of the Commonwealth and actually organize forty-five trials, and have them completed in four years. And I look back now with some nostalgia at the way in which we did it. I'm really puzzled why trials are taking so long these days, in more sophisticated tribunals than the trials that took place in the Gambia in the circumstances which we described. But we did justice. We did it honorably. We did it openly. We did it in a transparent fashion, and there's never, ever been any criticism about it. In fact, Amnesty International, I think you mentioned, in its report on those trials, said there was not one blemish on the conduct of those trials. I'm happy to have played a part in that process, and if that is the legacy, I'm proud to have been a part of it, and I'm proud that my two colleagues on either side of me were in it with me.

**GREGORY L. PETERSON:** This has been a moment in time, certainly, for us here to learn something about what I guess very few people knew about. And that here, three participants who have gone on to great, great things were all together, one place, one time, cutting their teeth, if you will, in international criminal law at the trial in Gambia. On behalf of the Jackson Center, I want to thank you for sharing all that. That's terrific. With that, we stand adjourned.



## **Impunity Watch Essay Contest Winner**





*Editors' note: The following essay is the winning entry of the 2014 Impunity Watch essay contest. The winner is Hala El Solh, a high school student at Orchard Park High School. The contest is sponsored by the Summer Institute for Human Rights and Genocide Studies, the Robert H. Jackson Center, and Impunity Watch law journal. The winning essay, which was formally recognized at the Eighth Annual International Humanitarian Law Dialogs, is reproduced here in its original form and has not been altered or edited.*

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**Impunity Watch Essay Contest Winner:  
Communication's Toolbox**

**Hala El Solh**

Since the beginning of human interaction, there have inevitably been conflicts as well as human rights abuses. Every day, millions of people have their human rights violated despite the passing of the Universal Declaration of Human Rights (UDHR) in 1948. UDHR entitles each and every person with basic rights. One of the largest violations of the UDHR is genocide, or the systematic killing or elimination of a race or a group of people. Genocide has been occurring for thousands of years, ranging from the Maori slaughtering the Moriori in Polynesia to the Nazis killing millions of Jews during World War II to the torture and killing in Syria<sup>1</sup>. While these genocides were taking place, most people have looked on with indifference, never seizing the opportunity to stop these atrocities. But, there are people who have a noble heart and defy these horrors. Many people that are indifferent to genocide make the excuse that they are an ordinary person, and that they do not have the means to stand up to monstrous authority. They are terribly

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<sup>1</sup> Diamond, Jared. *Guns, Germs, and Steel*. New York: W. W. Norton & Company, Inc. 1999. Print.

mistaken. Today, more than ever before, the world has accessible tools to stop genocide that “normal and ordinary” people can use with ease. From simply using social media or snapping a picture can make a huge impact to the people being harassed all across the globe. One does not have to be a person devoting all their time to human rights to be a humanitarian. Taking small steps of resistance can go a long way, if one has the right tools. Communication is one of the most powerful and successful toolboxes, including the press, social media, and published photography. These tools are more available and within reach more than ever before.

Communication is ultimately the center of society. Even animal societies such as bees and ants have developed a system of communication. It forges relationships, fuels mass movements, and keeps people aware of others across the globe. Every day, billions of people speak and interact with each other, for it is a part of life. Communication through the press has been essential in spreading the word about genocide, not only in modern times, but even as early as the Holocaust. It has been easier to communicate with each other in modern societies more than it has ever been. Modern-day communication has even increased the global playing field when it comes to employment. People use Skype or Facetime to attend meetings and work in places across the globe that they have never visited. Due to technological advancements in communication, people can also speak to others around the world with ease and at little cost, whether they are speaking to family or friends. Modern-day communication has been a huge device in spreading news to all corners of civilization, but most significantly of all, it has spread the word about genocide and mass movements to stop those atrocities. Social media has been another huge contributing factor to standing up to genocide, because it connects people who have common causes and share the same ideas all over the world.

Published photography is another method of communication, using pictures to convey a message to the world. Countless people around the globe have cameras whether on their cell phones, electronic tablets, or digital cameras. Those pictures do not need processing and within seconds can be sent to an opposite corner of the globe and shared with millions of people. Photojournalists and ordinary people are snapping pictures and instantly posting them online to reach millions in no time. In the communication toolbox, the tools of the press, social media, and published photography have been used to stand up to the atrocities of genocide, as seen through the White Rose Movement during the Holocaust, the Arab Spring in Tunisia, and the Caesar Project in Syria.

The White Rose Movement was created by Hans and Sophie Scholl, students at Munich University. A group of students handed out leaflets against Hitler and the Nazi Regime as well as World War II. As many already know, the Nazis were killing millions of Jews (about six million in total) without mercy. They took the Jews from their homes and moved them to the ghettos. From there, they were sent to concentration camps where they would have a humiliating evaluation where Nazis poked and prodded them. The healthy ones would go to concentration camps and perform intense labor with inadequate amounts of food and water. Many died from the horrid conditions. The less healthy ones were sent to death camps. They would be tortured and put in gas chambers that killed them. Not only Jews were killed. Other people were targeted including homosexuals, disabled people, gypsies, Jehovah's witnesses, people that went against the Nazi Regime, as well as countless others. The members of the White Rose Movement risked everything, including their lives, to try to spread the word of the horrible crimes that were being committed. They could have been tried for treason punishable only by death. The members of the White Rose Movement stood up to genocide by using the press. It was a form of nonviolent resistance and standing up for what is

right in the midst of chaos and violence. The members used a mass media form to resist against the unjust government and its killing machine. They became symbolically successful. The White Rose Movement symbolized the power of nonviolent resistance as well as the power of mass communication and the press. The movement spread the word of the crimes being committed by the Nazis in an effort to gain opposition. These members became role models for others. Unfortunately, the Gestapo arrested Hans and Sophie Scholl in February 1943. However, their resistance didn't stop there. They whole-heartedly admitted to their "crime" to try to save the rest of the members. They were soon beheaded but remained a symbol of nonviolent resistance and the power of the press. Hans and Sophie Scholl's actions will be transcribed in history forever, due to their noble resistance to genocide through the press<sup>2</sup>.

For many years President Zine al-Abidine Ben Ali ruled Tunisia with an iron fist. He violated human rights such as freedom of speech, religion, and press. Ben Ali's brutal and corrupt government embezzled the country. Many Tunisians lived in poverty. The Tunisian government rounded up practicing Muslims and opposition leaders to the government and slaughtered them. To add oil to fire, they weren't allowed to protest until Mohammed Bouazizi set himself alight in 2011. This sparked the Tunisian Jasmine Revolution and Arab Spring. Since the internet was mostly censored, Jamel Bettaieb used one of the only uncensored websites: Facebook. Through his blogs on Facebook, he and many others set up demonstrations and protests for democracy in Tunisia against the politically oppressive government. He also posted pictures of the police brutally cracking down on demonstrators that traveled the world like wildfire. As a result, thousands of people protested and Ben Ali was thrown out

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<sup>2</sup> Lipson, Karin. "The Young Germans Who Stood Up to the Nazis." *New York Times* 31 Mar. 2013: 9(L). *Opposing Viewpoints in Context*. Web. 31 July 2014.

of power. Free elections took place not long after. Ben Ali was later sentenced to thirty-five years in jail for theft and illegal possession of jewels and money. Bettaieb utilized social media to further fuel the start of the Tunisian Jasmine Revolution and as a result a new democratic government was elected. This demonstrates the power of communication and what it can ultimately do. The valuable tool of social media was incredibly successful in taking a stand against genocide, and ultimately brought down the oppressors. In Bettaieb's case, resistance changed the lives of many oppressed people, sparked revolutions all over the Middle East and North Africa, as well as establishing a democratic government in Tunisia. Social media plays a major role in modern-day resistance and has changed many lives overall.

The Caesar Report has released astonishing and horrifying photos of Syrian people being massacred and tortured as a result of the Syrian government and its dictator Bashar al Assad. "Caesar" (his real name has not been released for his own safety) sneaked over 55,000 photos out of Syria that document the horrors that the Syrian people suffer through daily. The majority of these tortured Syrians have committed no crime. They just opposed their tyrannical, cruel government and hated that they could not vote Assad out of power. The atrocities are so terrible that Dr. David Crane, the chief prosecutor of the Special Court for Sierra Leone, described as "the photos show crimes the like of which we have not seen since Auschwitz." These photos are spreading everywhere, including to the United Nations and the International Criminal Court. Because of the power of photography and Caesar's will to stand up to genocide, the photos that Caesar has presented provide solid, clear evidence that the Syrian government is indeed committing genocide. Caesar has used the media to spread his message through the photos he snuck out of Syria. Sneaking out thousands of pictures saved on a tiny flash drive is so much less flagrant than sneaking out a pile of hard copied ones. Therefore, this proves how powerful the tools of media and photography truly are.

Caesar's courage and communication tools have motivated the world to take action in Syria and to stop the genocide there. His impact on the world will be imprinted for a great period of time due to his will as well as his publication of the photos that display what is truly happening in Syria at this very moment<sup>3</sup>.

These three examples of the resourcefulness of the tools of the press, social media, and published photos depict that standing up to genocide is not as difficult as it seems. Simply supporting a campaign against genocide by "liking" it on Facebook or making a video announcing your support for the victims is enough to make a difference. A majority of people have access to the communication tools used to combat genocide, whether it is a camera, a computer, or a mere pen, so take a stand against genocide. Everyone has the potential to make a difference; it is up to oneself to use this power for good or for evil.

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<sup>3</sup> Rogin, Josh. "Syrian Defector: Assad Poised to Torture and Murder 150,000 More." *The Daily Beast*. The Daily Beast Company LLC., 2014. Web. 31 July 2014.

## **Conclusion**





## Concluding Observations: Yearning for Justice

Mark David Agrast\*

Beginning in 2007, the International Humanitarian Law Dialogs have provided a unique window into the role of international tribunals in enforcing and reinforcing the norms of international humanitarian law in post-conflict situations. As in previous years, the Eighth Dialogs brought together an extraordinary gathering of experts to share their experiences on the front lines and reflect on the future of international criminal justice.

The American Society of International Law is honored to continue its longstanding co-sponsorship of these Dialogs and to publish the *Proceedings*. As the Society's new executive director, I would like to express my appreciation to David Crane, who established this annual forum and continues to guide and nurture it; to our fellow co-sponsors for their generous support of the Dialogs; and to our colleagues at the Jackson Center and the Chautauqua Institution. I also wish to acknowledge the dedicated work of three of my colleagues—our director of publications, Emily Cumberland, our director of education and research, Wes Rist, and the new managing editor for the *Proceedings*, Emily Schneider—without whom this volume could not have been produced.

The theme of these Eighth Dialogs, “A New World (Dis)order: International Humanitarian Law in an Uncertain World,” invited an assessment, not only of the successes and failures of the tribunals during the year just past, but also of the relevance of international humanitarian law in a period of increasing instability across the globe. With several of the special tribunals winding down and the International Criminal Court confronting an ever-increasing docket, this seemed an appropriate occasion to take stock.

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

In her opening keynote, Ambassador Intelmann struck a sober, even somber note that caught the sense of contingency that pervaded these Dialogs, as the participants contemplated a world that seemed to be descending into chaos. At the same time, she surveyed a more hopeful landscape in which the ICC was beginning to function “as a real court,” earning the support and confidence of the international community and being looked to with increasing optimism by those who are “yearning for justice.”

Much of the discussion over the succeeding two days centered on what must be done to vindicate that yearning. Although there were differences of emphasis and approach, the participants agreed on the fundamentals. First, states and international bodies must take decisive steps to end impunity. States must end the practice of granting amnesty or immunity to heads of state and other senior officials and allowing individuals under indictment to travel freely. And they must give timely and effective cooperation to international criminal tribunals in such matters as the execution of arrest warrants.

Second, states and international bodies must provide the tribunals with the stable funding they require to carry out their investigative and prosecutorial mandate. During the sessions, the Security Council came in for some pointed criticism from current and former international officials for its failure to take action to improve state cooperation and to pressure the General Assembly to provide additional funding to support its referrals to the ICC.

A third requirement is for the tribunals themselves to develop and adhere to consistent legal standards. There was much concern expressed over the “fragmentation” that resulted when two of the special tribunals came to opposite conclusions as to whether prosecutors must show that the accused gave “specific direction” to convict him of aiding and abetting under customary international law. The Appeals Chamber of

the International Criminal Tribunal for the former Yugoslavia (ICTY) overturned the conviction of Momčilo Perišić on the basis that such a showing is required. The Appeals Chamber of the Special Court for Sierra Leone (SCSL) expressly rejected this approach, upholding the conviction of Charles Taylor on the basis that the prosecution must prove only that the accused's acts substantially contributed to the commission of the crime. The consensus among the presenters was that the SCSL had the better grasp of international law, but also that such doctrinal fragmentation is not helpful to the credibility and predictability of the international criminal process.

A fourth requirement for ending impunity is to hold accountable the perpetrators of sexual and gender-based violence and provide justice to their victims. In her Katherine B. Fite lecture, Zainab Bangura explained that sexual violence played no part in the indictments at Nuremberg and indeed, the extent to which rape of civilians was “an intrinsic part of the machinery of genocide” had only recently been brought to light. Sexual violence was seen as “a lesser crime, an inevitable byproduct of war, the random acts of a few renegades, or mere collateral damage.” Today, much has changed: sexual violence is recognized as a proper subject of international humanitarian law, and both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have held high-level commanders mass rape of civilians. As Valerie Oosterveld noted, the Global Summit to End Sexual Violence in Conflict (London, June 2014) resulted in the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, as well as best practices issued by the ICTR and the ICC.

Yet, despite this progress, conflict-related sexual violence is too often concealed behind “a wall of silence”; it remains “at the bottom of a hierarchy of human rights violations,” and both international and domestic justice systems lack the capacity to effectively investigate and prosecute these cases. That must

change if the survivors are to regain the dignity that was taken from them. And it must change if their societies are to rebuild and achieve reconciliation.

The fifth requirement is perhaps the most challenging of all: mustering the political will to do what must be done. The record thus far has not been encouraging. During the discussions, Hans Corell and David Scheffer criticized the Security Council for failing to meet its responsibilities under the Charter to protect civilian populations and maintain international peace and security. Corell urged the permanent members to take a number of steps, including refraining from using their veto unless their core national interests are at stake, and exhorted them to stop violating the Charter themselves. It does not seem likely that the permanent members will take this advice, and Scheffer urged that other solutions be found, whether through humanitarian intervention or collective self-defense. The situation would seem to offer little reason for hope, though Scheffer did acknowledge that the Council had somehow mustered the political will to create the various special courts and to allow them to operate—for the most part, without interference.

Finally, some of the participants offered reflections on what international criminal proceedings can and cannot achieve in delivering justice. Brenda Hollis observed that no matter how well international courts are funded and how effectively they perform their work, they will never be able to fully carry out their mandate by prosecuting all of the low-level perpetrators. As a result, many survivors will continue to live among those who victimized them and who “flaunt their crimes.” What the courts can do is hold accountable those who bear the greatest responsibility for the crimes that occurred and remove them from continuing to play a destabilizing role in their countries. In so doing, the courts can help restore societal equilibrium and provide some measure of justice and closure for the survivors. As

Nicholas Koumjian reflected, “the legacy of Nuremberg” was not the number of men who were hanged or convicted, but rather “the process of finding justice” and giving “recognition to the victims about what happened to them.”



# Appendices





**Appendix I**  
**Agenda of the Eighth International  
Humanitarian Law Dialogs**

**Sunday, August 24 through Tuesday, August 26, 2013**

**Sunday, August 24**

*Arrival of the Prosecutors & Participants*

5:30 p.m.      **Reception and Dinner (Invitation only)** at the Robert H. Jackson Center. Program: The Joshua Heintz Award for Humanitarian Achievement Ceremony; The First International Court in Africa: “A conversation with Sir Desmond De Silva, Fatou Bensouda, and Hassan Jallow,” moderated by Gregory L. Peterson

**Monday, August 25**

7:30 a.m.      **Breakfast.** Athenaeum Hotel.

9:00 a.m.      **Welcome** by James C. Johnson (President of the Robert H. Jackson Center) and Thomas M. Becker (President of Chautauqua Institution).

9:15 a.m.      **Impunity Watch Essay Contest Award Ceremony** presented by Andrew Beiter and Abigail Reese.

9:20 a.m.      **Introduction of the Keynote Speaker** by David M. Crane, Chairman of Board, Robert H. Jackson Center.

- 9:25 a.m.     **Keynote Address** by Ambassador Tiina Intelmann
- 10:00 a.m.     **Break.**
- 10:30 a.m.     **Reflections by the Current Prosecutors.** Moderated by Jennifer Trahan.
- 12:15 p.m.     **Lunch.** Athenaeum Hotel.
- 1:30 p.m.     **Third Annual Clara Barton Lecture** by Kimberly Theidon, introduced by Federico Barillas Schwank.
- 2:30 p.m.     **Panel on the Relevance of International Humanitarian Law in 2014.** Moderated by Leila N. Sadat. (Panelists: William Schabas, Hans Corell, and David Scheffer) Fletcher Hall.
- 4:00 p.m.     **Break.**
- 4:15 p.m.     **Clayton Sweeney Porch Session:** A conversation with the Prosecutors and students, moderated by Andrew Beiter and Joseph Karb. Athenaeum Hotel.
- 5:45 p.m.     **Reception.** Athenaeum Hotel.
- 6:30 p.m.     **Dinner.** Athenaeum Hotel.
- 7:30 p.m.     **Fourth Annual Katherine B. Fite Lecture** by Zainab Bangura, introduced by Beth Van Schaak.

**Tuesday, August 26**

- 7:45 a.m.      **Breakfast with the Prosecutors.** Athenaeum Hotel.
- 8:15 a.m.      **Reflections** by Ambassador Ambassador David Scheffer.
- 9:00 a.m.      **Year in Review** presented by Valerie Oosterveld.
- 11:00 a.m.     **Porch Sessions with the Prosecutors:** Non-state Actors and International Humanitarian Law with Hans Correl, Paul Williams; Islamic Extremis with Prince Zeid Ra'ad Zeid Al-Husseini, David Scheffer, Leila Sadat; Cyber Warfare and LOAC with William Schabas, Michael Scharf.
- 12:30 p.m.     **Lunch.** Athenaeum Hotel.
- 1:00 p.m.      **Luncheon Address** by Morris Davis, Introduced by Michael Scharf.
- 2:00 p.m.      **Break.**
- 2:30 p.m.      **Issuance of the Seventh Chautauqua Declaration.** Moderated by Jean Freedberg. Athenaeum Hotel.



## Appendix II

### The Eighth Chautauqua Declaration August 26, 2014

*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:

Commending H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini as the sixth recipient of the Joshua Heintz Humanitarian Award for his important and impressive service to humanity, and welcoming his recent appointment as United Nations High Commissioner for Human Rights;

Noting with sadness the recent passing of our esteemed colleague and friend Judge Hans-Peter Kaul, and recognizing his important contributions to international criminal justice;

Noting 150 years of international humanitarian law with the implementation of the First Geneva Convention in 1864;

Noting with grave concern the upsurge in violence against civilians in conflicts worldwide, the general lack of accountability for these crimes, and reiterating the need for compliance with international humanitarian law;

Deeply disturbed by the continued prevalence of sexual and gender based violence, and the continuing lack of accountability for many of these crimes;

Alarmed that the world now has more refugees and internally displaced persons than at any time since World War II;

Recognizing the importance of the residual mechanisms to carry out the continuing legal obligations of the international tribunals and courts as they close or approach closure;

Reminding states of their obligation to ensure the effective functioning of the international judicial institutions they have created;

*Now do solemnly declare and call upon all states to keep the spirit of the Nuremberg Principles alive by:*

Ensuring accountability and equal application of international criminal law to all without double standards;

Ending impunity for the gravest crimes by refusing to countenance amnesty or immunity;


Ensuring accountability for the perpetrators of all crimes, including sexual and gender based violence;

Ensuring that the necessary legal framework, capacity, and will to discharge the universal responsibility to investigate and prosecute international crimes is in place in all domestic judicial systems;


Fulfilling their obligations to cooperate with the international criminal courts, tribunals and residual mechanisms and in particular to locate, arrest, and to surrender all fugitives accused of international crimes;

Providing adequate resources for all international courts, tribunals, and residual mechanisms to achieve their respective mandates, including the ability to meet their obligation to protect and support witnesses and those made vulnerable by their cooperation, and to ensure justice is done and seen to be done.

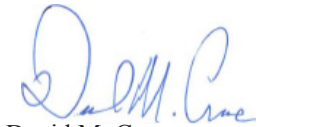
Signed in Mutual Witness:



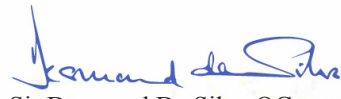
Fatou Bensouda  
International Criminal Court




Serge Brammertz  
International Criminal Tribunal  
for the Former Yugoslavia




David M. Crane  
Special Court for Sierra Leone



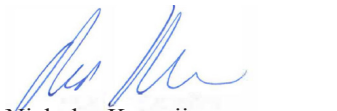
Sir Desmond De Silva QC  
Special Court for Sierra Leone



Brenda J. Hollis  
Special Court for Sierra Leone



Hassan B. Jallow  
International Criminal Tribunal  
for Rwanda



Nicholas Koumjian  
Extraordinary Chambers in the  
Courts of Cambodia





## **Appendix III**

### **Biographies of the Prosecutors and Participants**

#### **Zainab Hawa Bangura**

Zainab Hawa Bangura of Sierra Leone was appointed to serve as special representative on sexual violence in conflict at the level of under-secretary-general of the United Nations in 2012. Prior to her appointment, Bangura was the minister of health and sanitation for the government of Sierra Leone. She was previously the second female minister of foreign affairs and international cooperation, including chief adviser and spokesperson of the president on bilateral and international issues. Bangura has experience working in peacekeeping operations from within the U.N. Mission in Liberia, where she was responsible for the management of the largest civilian component of the Mission, including promoting capacity building of government institutions and community reconciliation.

#### **Andrew Beiter**

Andrew Beiter, a social studies educator, serves as director of youth education at the Robert H. Jackson Center, as well as director of the Summer Institute for Human Rights and Genocide Studies in Buffalo, NY. He also serves as co-director of the Educators' Institute for Human Rights, which recently led a conference for Rwandan teachers in Kigali. A regional education coordinator for the U.S. Holocaust Memorial Museum, Beiter also serves as a teacher fellow for the Lowell Milken Center for Tolerance in Kansas, and as a consultant for the Holocaust Resource Center of Buffalo.

#### **Fatou Bensouda**

Fatou Bensouda is the prosecutor of the International Criminal Court (ICC), and former attorney general and minister of justice of the

Republic of the Gambia. Her international career as a non-government civil servant formally began at the U.N. International Criminal Tribunal for Rwanda, where she worked as a legal adviser and trial attorney before serving as senior legal advisor and head of the Legal Advisory Unit in the years of 2002 to 2004. Bensouda has served as delegate to U.N. conferences on crime prevention, the Organization of African Unity's Ministerial Meetings on Human Rights, and as delegate of the Gambia to the meetings of the Preparatory Commission for the ICC.

### **Serge Brammertz**

Serge Brammertz assumed his duties as the prosecutor of the International Criminal Tribunal for the former Yugoslavia in 2008. Prior to his current appointment, he served as commissioner of the U.N. International Independent Investigation Commission into the assassination of former Lebanese Prime Minister Rafik Hariri, as the first deputy prosecutor of the International Criminal Court where he was in charge of establishing the Investigations Division of the Office of the Prosecutor, and initiated the first ICC investigations in Uganda, the Democratic Republic of Congo, and Darfur.

### **Andrew T. Cayley**

Andrew T. Cayley was appointed as international co-prosecutor of the Extraordinary Chambers in the Courts of Cambodia in December 2009 and served in that position until September 2013. He previously served as senior prosecuting counsel at the International Criminal Court where he was responsible for the first Darfur case. He also served as senior prosecuting counsel and prosecuting counsel at the International Criminal Tribunal for the former Yugoslavia (ICTY) and as a defense attorney before the Special Court for Sierra Leone and the ICTY. Cayley is a barrister of the inner temple and holds an LLB and an LLM from University College London.

### **Hans Corell**

Hans Corell served as under-secretary-general for legal affairs and legal counsel of the U.N. from 1994 to 2004. In this capacity, he was head of the Office of Legal Affairs in the U.N. Secretariat. Before joining the U.N., he served as ambassador and under-secretary for legal and consular affairs in the Swedish Ministry of Foreign Affairs from 1984 to 1994. Corell has served as a member of Sweden's delegation to the U.N. General Assembly 1985 to 1993 and has had assignments related to the Council of Europe, OECD, and the CSCE (now OSCE). He co-authored the CSCE proposal for the establishment of the International Tribunal for the former Yugoslavia transmitted to the U.N. in February 1993. He was the secretary-general's representative at the 1998 U.N. Conference that adopted the Rome Statute of the International Criminal Court, and involved in the establishment of the International Tribunal for Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

### **David M. Crane**

David M. 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. 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*, a law review and public service blog. Crane is currently the chairman of the Board of the Robert H. Jackson Center.

### **Morris Davis**

Morris Davis has been a member of the faculty at the Howard University School of Law since 2011, where he teaches legal writing,

appellate advocacy, and national security law. A retired U.S. Air Force Colonel, he served as chief prosecutor for the military commissions at Guantanamo Bay from 2005 to 2007, resigning from the position due to political interference in the trials and pressure to use evidence obtained by torture. From 2008 to 2010, he was a senior specialist in national security and head of the Foreign Affairs, Defense, and Trade Division at the Congressional Research Service. He was fired from this position for authoring opinion pieces for the *Wall Street Journal* and *Washington Post* critical of the Obama administration's detainee policies. Davis is a recipient of a Hugh Hefner Foundation First Amendment Award and was featured in a report by Citizens for Responsibility and Ethics in Washington entitled "Those Who Dared: 30 Officials Who Stood Up For Our Country."

### **Desmond de Silva**

Sir Desmond is one of England's leading Queen's Counsel in criminal law. He is a former prosecutor for the Special Court for Sierra Leone, a position he was appointed to in 2005, and one in which he brought about the arrest of former Liberian president, Charles Taylor. In July of 2010, the president of the U.N. Human Rights Council appointed him to the independent fact-finding mission regarding the Israeli interception in international waters of an aid flotilla en route to Gaza.

### **Brenda J. Hollis**

Brenda Hollis was appointed prosecutor of the Residual Special Court for Sierra Leone in February 2014 by the secretary-general of the United Nations, having served as prosecutor of the Special Court for Sierra Leone from February 2010 until its closure in December 2013. She had been extensively involved in the training of judges, prosecutors, and investigators for work with the International Criminal Tribunals. She served as senior trial attorney from 1994 until 2001 at the International Criminal Tribunal for the former Yugoslavia,

and assisted the Office of the Prosecutor at the International Criminal Tribunal for Rwanda. Hollis served for more than twenty years in the U.S. Air Force, retiring in 1998 with the rank of Colonel. Prior to her Air Force service, she served as a Peace Corps volunteer in West Africa.

### **Tiina Intelmann**

Tiina Intelmann is ambassador-at-large of Estonia for the International Criminal Court. On December 12, 2011, she was elected president of the Assembly of States Parties to the Rome Statute at the tenth session of the Assembly. She has broad professional experience in international matters and relations and therefore she comes to the presidency with a long history of involvement in multilateral negotiations. She has previously served as the permanent representative of Estonia to the United Nations as well as to the Organization for Security and Cooperation in Europe and as ambassador to the State of Israel. She has also served as under-secretary for political affairs and relations with the press in the Ministry of Foreign Affairs of Estonia.

### **Hassan Jallow**

Hassan Jallow is serving as prosecutor of the International Criminal Tribunal for Rwanda, a position he has held since 2003. Since 2012, he is concurrently serving as prosecutor of the Residual Mechanism for International Criminal Tribunals. Jallow previously worked in the Gambia as the state attorney from 1976 until 1982, when he was appointed solicitor general. In 1984, Jallow served as attorney general and minister of justice for the Gambia, then, in 1994, he was appointed as a justice of the Supreme Court of the Gambia. From 2002 until 2003, Jallow served as a judge in the Appeals Chamber of the Special Court for Sierra Leone.

### **Joseph Karb**

Joseph Karb is a middle school social studies educator who also serves as director of teacher initiatives at the Robert H. Jackson Center. Recently selected as the National Middle School Social Studies Teacher of the Year, Karb is a teacher fellow with C-SPAN, and facilitator of the national human rights video contest sponsored by Speak Truth to Power and the American Federation of Teachers. His work has also been featured in social studies research studies, PBS Newshour and Britannica Online.

### **Nicholas Koumjian**

Nicholas Koumjian has served as the international co-prosecutor of the Extraordinary Chambers in 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 prosecutor at the International Criminal Tribunal for the former Yugoslavia and later at the State Court of Bosnia and Herzegovina. He headed the U.N.-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 in Central and Eastern Europe. Additionally, he has represented both defendants and victims before the International Criminal Court.

### **Valerie Oosterveld**

Valerie Oosterveld was appointed associate dean (research and administration), effective July 1, 2014, of the Faculty of Law, University of Western Ontario. Her research and writing focus on gender issues within international criminal justice. She teaches public international law, international criminal law and international organizations. She is acting director of Western University's Centre for Transitional Justice

and Post-conflict Reconstruction and is affiliated with the Department of Women's Studies and Feminist Research. Before joining the Faculty of Law, University of Western Ontario in July 2005, Valerie served in the Legal Affairs Bureau of Canada's Department of Foreign Affairs and International Trade. She was a member of the Canadian delegation to the International Criminal Court negotiations and subsequent Assembly of States Parties. She also served on the Canadian delegation to the 2010 Review Conference of the Rome Statute of the International Criminal Court in Kampala, Uganda.

### **Stephen J. Rapp**

Stephen J. Rapp is currently serving as ambassador-at-large, heading the Office of Global Criminal Justice in the U.S. Department of State. Rapp served as prosecutor of the Special Court for Sierra Leone beginning in January 2007. His office won the first convictions in history for forced recruitment and use of child soldiers for sexual slavery and forced marriage during time of armed conflict as crimes under international humanitarian law. From 2001 to 2007, Rapp served as senior trial attorney and chief of prosecutions at the International Criminal Tribunal for Rwanda, personally heading the trial team that achieved convictions of the principals of RTLM radio and Kangura newspaper, which used mass media to spread messages of hate before and during the Rwandan Genocide—the first in history for leaders of the mass media for the crime of direct and public incitement to commit genocide. Rapp served as U.S. attorney in the Northern District of Iowa from 1993 to 2001.

### **Leila Nadya Sadat**

Leila Nadya Sadat is Henry H. Oberschelp Professor of Law and Israel Treiman Faculty Fellow at Washington University School of Law and has been 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. Earlier that year, she 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 to 2003, Sadat served on the U.S. Commission for International Religious Freedom.

### **William A. Schabas**

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 to 2004, he served as one of three international members of the Sierra Leone Truth and Reconciliation Commission. Schabas served as a consultant on capital punishment for the U.N. 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. Schabas has authored more than twenty books dealing with international human rights law and has published more than three hundred articles in academic journals.

### **Michael P. Scharf**

Michael P. Scharf is interim 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, an 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 U.N. Affairs, and delegate to the U.N. 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. In 1999, he won the American Society of International Law's Certificate of Merit for outstanding book; he was also awarded the International Association of Penal Law's book of the year award for 2009. Scharf produces and hosts the radio program "Talking Foreign Policy," broadcast on WCPN 90.3 FM. Scharf is the first professor in the world to offer an international law MOOC.

### **David Scheffer**

David Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director, Center for International Human Rights, at Northwestern University School of Law. He is also the U.N. secretary-general's Special Expert on U.N. Assistance to the Khmer Rouge Trials. Scheffer is the former U.S. Ambassador at Large for War Crimes Issues (1997–2001) and author of the award-winning *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012). He received the Berlin Prize in 2013.

### **Federico Barillas Schwank**

Federico Barillas Schwank is legal advisor for international humanitarian law at the American Red Cross. Previously, Federico worked at the International Center for Not-for-Profit Law and the International Criminal Tribunal for the Former Yugoslavia. He has assisted civil society groups seeking legal reform and represented

indigenous peoples and victims of abuse before the Inter-American Commission of Human Rights and in U.S. asylum procedures. Before moving to Washington, D.C., Federico worked representing low-income migrant workers at the Southern Poverty Law Center and led the outreach program at the Hispanic Interest Coalition of Alabama.

### **Kimberly Theidon**

Kimberly Theidon is a medical anthropologist focusing on Latin America. Her research interests include gender-based and sexual violence, transitional justice, reconciliation, and the politics of post-war reparations. She is the author of *Entre Prójimos: El conflicto armado interno y la política de la reconciliación en el Perú* and *Intimate Enemies: Violence and Reconciliation in Peru*. In 2013, *Intimate Enemies* was awarded the Honorable Mention from the Washington Office on Latin America-Duke University Libraries Book Award for Human Rights in Latin America, and the Honorable Mention for the Eileen Basker Prize from the Society for Medical Anthropology for research on gender and health. During the 2014–2015 academic year, Theidon will be a fellow at the Woodrow Wilson Center and will begin her appointment as the Henry J. Leir Chair in International Humanitarian Studies at the Fletcher School, Tufts University.

### **Jennifer Trahan**

Jennifer Trahan is associate clinical professor of global affairs at New York University. She 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 she 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, chairperson of the American Branch of the International Law Association's International Criminal Court Committee, member of the ABA 2010 ICC Task Force, and member of the New York City Bar Association's Task Force on National Security and the Rule of Law. She was an NGO observer at the ICC Review Conference in Kampala, and lectured at Salzburg Law School's Institute on International Criminal Law.

### **Beth Van Schaack**

Beth Van Schaack is a visiting professor at Stanford Law School and visiting scholar at the Center for International Security & Cooperation. She recently stepped down as deputy to the ambassador-at-large for war crimes issues in the Office of Global Criminal Justice of the U.S. Department of State. Prior to that appointment, Van Schaack was professor of law at Santa Clara University School of Law, where she taught and wrote in the areas of human rights, transitional justice, international criminal law, public international law, international humanitarian law, and civil procedure. She was a member of the U.S. Department of State's Advisory Council on International Law and served on the U.S. interagency delegation to the International Criminal Court Review Conference in Kampala in 2010. She also advises a number of human rights organizations.

### **Paul R. Williams**

Paul R. Williams is Rebecca Grazier Professor of Law and International Relations at American University and president and co-founder of the Public International Law & Policy Group (PILPG). In 2005, Williams, as executive director of PILPG, was nominated for the Nobel Peace Prize by half a dozen of his pro bono government clients. 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, Williams served in the U.S. 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. He is a member of the Council on Foreign Relations and the ASIL.

### **Zeid Ra'ad Al-Hussein**

Zeid Ra'ad Al-Hussein is ambassador and permanent representative of the Hashemite Kingdom of Jordan to the U.N. Commencing in September 2014, he will be U.N. High Commissioner for Human Rights. From 2007 to 2010, he served as Jordan's Permanent Representative to the U.N., Jordan's ambassador to the United States, and non-resident ambassador to Mexico. He served as Jordan's deputy permanent representative at the U.N. from 1996 to 2000. Prince Zeid played a major role in the establishment of the International Criminal Court. From 2002 to 2005, he was the elected first president of the governing body of the ICC, and was the first U.N. ambassador to chair the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel. In 2004, he chaired the "Panel of Experts for the U.N. Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice," in the matter regarding the boundary dispute between Benin and Niger. In 2005, he produced a report that provided a comprehensive strategy for the elimination of sexual exploitation and abuse in U.N. peacekeeping operations, which was later endorsed by 191 Heads of State and Government. From 2004 to 2007, Prince Zeid was the chair of the Consultative Committee for the U.N. Development Fund for Women.