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ATROCITY CRIMES LITIGATION: YEAR-IN-REVIEW (2009) CONFERENCE Abridged Transcript¹

February 4, 2010

Northwestern University School of Law

DAVID SCHEFFER, MODERATOR

PROFESSOR AT THE NORTHWESTERN UNIVERSITY SCHOOL OF LAW

¶1 Welcome to the third annual Atrocity Crimes Litigation Year-in-Review Conference, which will cover the jurisprudence and practice of seven international and hybrid war crimes tribunals during the year 2009. I am Professor David Scheffer and I will moderate the discussions today....

¶2 This was an exceptionally eventful and significant year in the work of the war crimes tribunals, namely: the International Criminal Court, the International Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber of the Court of Bosnia and Herzegovina, and the Special Tribunal for Lebanon. If anyone doubts whether international justice has not only arrived but deeply entrenched itself in the international community's response to armed conflicts and atrocities, stick around. Seventeen years after the creation of the International Criminal Tribunal for Yugoslavia, the unique mixture of laws that governs the tribunals—what I call atrocity law—and the crime of genocide, crimes against humanity, and war crimes, prosecuted before the tribunals—what I call atrocity crimes—have become the new normal. We are here today to un-package the new normal and understand precisely what happened during the last year that advanced or impeded the

¹ The full transcript and video recording can be accessed at <http://law.northwestern.edu/humanrights/html>.

development of atrocity law, that extrapolated greater meaning out of the atrocity crimes, and that shone a bright light on the due process rights of defendants. . . .

¶3

Göran, would you describe 2009 as a year in which international criminal law evolved significantly in the tribunals' jurisprudence or did international criminal law actually experience muddled and less decipherable characteristics due to perhaps conflicting signals from the tribunals? What's your general assessment of the performance of the tribunals in the year 2009?

GÖRAN SLUITER

PROFESSOR AT THE UNIVERSITY OF AMSTERDAM

¶4

Before I answer that question, may I briefly react [to the prospect of genocide charges in the International Criminal Court case against President Omar Hassan Ahmad Al-Bashir of Sudan]? I think it is a wonderful decision to include the charge of genocide, especially from a procedural perspective. In the Genocide Convention we have this clause, which has long been forgotten, that the state must either arrest and try the person accused of genocide, or extradite that person to an international tribunal of which the state has accepted jurisdiction. That is the ICC—I would say the tribunal meant in that provision is clearly the ICC. That is the international tribunal with jurisdiction. The issue now is whether states have accepted the jurisdiction. I think you can argue that if you say the Security Council has created the jurisdiction of the ICC over Darfur on behalf of all its members, then all U.N. members can be said to have accepted the jurisdiction of the ICC. This could mean that Al-Bashir can no longer travel safely to a number of states where he thought he could travel safely to because those are not states parties to the ICC. However, if that state is a party to the Genocide Convention, the prosecutor could then point to that state and say, "Wait a minute, you are a party to the Genocide Convention. You must either try that person yourself or extradite that person to the ICC."

¶5

Now coming back to the general assessment of 2009, it has been a very exciting year and also a very difficult year but these are of course very much clichés. I have one big concern which will not make me very popular among my neighbors—I am surrounded by

prosecutors on both sides. In the jurisprudence my biggest concern is the rights of the accused at all levels—at the pre-trial level, at the ¶6 trial level, and at the post-trial level. If you look at the case where in 2009 we have, for example, at the ICC an Appeals Chamber decision saying that you cannot be released prior to trial if no states want to accept you. As in the case of Mr. Bemba, the Appeals Chamber said, “Before we can release somebody, we must have a state that is willing and able to accept the accused person.” Well, what if no state wants to do that? Does it mean that the accused must always stay in detention prior to trial? So I think that’s a fundamentally wrong decision from a human rights perspective.

¶7 A military case at the International Criminal Tribunal for Rwanda (ICTR) [from December 2008 (but published in 2009)] said that the accused were tried within a reasonable period of time. [The detained persons were arrested in 1996 and received a judgment in 2008-2009] so we have twelve years—for one accused it was twelve years and for another accused it was eleven or ten—of pre-trial detention, and ten-twelve years of waiting. How can there ever be a trial within a reasonable period of time? I am very puzzled, and I also don’t like the reference in that decision saying that the accused now have life imprisonment such that there was no prejudice to the accused. That is not correct because you are entitled to the presumption of innocence until the judgment in your case. And this is a general big problem: the length of these trials—and these are extreme cases at the ICTR but also at other tribunals. These lengths are sometimes absolutely unacceptable. We must find a way to shorten the trials, or, if that is not possible, [a means to] provisional release.

¶8 In the International Criminal Tribunal for the Former Yugoslavia (ICTY) appeals decision [in the] *Krajišnik* [case], where one of the issues was ineffective representation, there was a list of problems relating to the performance of counsel. He did not have enough time to prepare; there was no defense strategy and a lot of the Appeals Chamber judges said, “Well, it’s not perfect but it can do.” I wonder what really should be the standard for the Appeals Chamber to say: this is a situation of ineffective representation. It was a very puzzling case to me; I wonder whether if there had not been a completion strategy, then maybe they would have the situation where they could have said, “Well, we should have a retrial. . . .”

¶9 One other significant decision is the Special Court for Sierra Leone's Appeals Chamber judgment in the October 2009 *RUF* case. That was the last decision pronounced in Freetown – there is now only one trial going on and that is [the] Charles Taylor [case] in The Hague – that was actually their legacy for Sierra Leone and for Freetown. And this is the “monster of joint criminal enterprise.” The majority basically said [paraphrasing], “Well, there's joint criminal enterprise for all of the accused.” But there is one really strong and powerful dissent saying [paraphrasing], “This is going too far, this is one accused who does not share the intent of the other participants in the joint criminal enterprise, and therefore he should not have been convicted by the Appeals Chamber.”

...

DAVID SCHEFFER, MODERATOR

¶10 I'd like to turn to Serge Brammertz, who is the Prosecutor at the ICTY. . . .

¶11 A lot of people around the world, particularly in the United States and in the United States Congress, are now asking a lot of questions (and this is true in the Security Council of the United Nations as well) about, “Well when does all this end? We created you in 1993. Enough is enough!”

¶12 Your office has prepared, as has [the ICTR], completion strategies to actually work itself out of a job. Serge, what is a realistic assessment of a practical completion strategy?

SERGE BRAMMERTZ

*PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE
FORMER YUGOSLAVIA*

¶13 The short answer would be that indeed when the Tribunal was created sixteen years ago, nobody was thinking about having a Tribunal for sixteen years. For that reason, in 2004, the Security Council decided on the principle of the completion strategy: that no new indictments could be issued after 2004, that the Tribunal had to concentrate on the main perpetrators, and that they had to transfer other cases to the region (the country of the former Yugoslavia). They also decided to help work on capacity building in the region. At that point, the timing for the completion strategy was 2008 for

first instance cases and 2010 for appeals cases. We are in 2010 and we are still running first instance cases. . . .

¶14 So these deadlines cannot be respected for a number of reasons. We had Karadžić arrested after the decisions on the completion strategies, and other fugitives have been arrested during this period. So we are indeed today in this difficult situation where, on the one hand, we have the highest trial duties ever (ten trials ongoing), and on the other hand, we have to implement – to start – the completion strategy this year. So we will, in the next two years, lose sixty percent of our staff as a result of this completion strategy. This is, of course, quite challenging when we have a number of court activities and deadlines and stuff looming. We have a big problem with retaining staff. Every month twenty to thirty people leave the ICTY to go to the Special Tribunal for Liberia, the ICC, or other tribunals because there is no future for them if they stay at the ad hoc tribunals.

¶15 Lucky for us, we have partners helping us in the region. When the Tribunal was created, there was no judiciary in the countries of the former Yugoslavia. We were replacing the local judiciary. That is one of the reasons why 161 people have been indicted by the Tribunal since its beginning. With the U.N. enlargement process and with the democratic revolutions in the countries of the former Yugoslavia, the region has strengthened its own judiciary; thus, the Tribunal has transferred ten cases to the region. We have today partner organizations in the countries of the former Yugoslavia, with war crimes prosecution offices in Serbia, Croatia, and Bosnia and Herzegovina in Sarajevo.

¶16 So we are, on the one hand, finalizing our cases in The Hague, and on the other, transferring remaining material to the region. We are in this lucky situation where we have partners who can somehow take over, because for the next ten or twenty years there will be hundreds of war crimes cases conducted in countries of the former Yugoslavia.

¶17 On the issue of the lack of an ICC completion strategy, I think the ICC needs a completion strategy for each situation. The ICC cannot stay forever in the DRC and cannot stay forever in Uganda. You need a completion strategy since the ICC is dealing with only a very limited percentage of cases. And the ICC also needs a partner in the region. I see this as one of the main challenges for the ICC: the need for a partner to deal with the impunity gap.

DAVID SCHEFFER, MODERATOR

¶18 Fatou, I'm thinking particularly of Uganda. Haven't you, de facto, conceptualized a completion strategy for Uganda, for example? You haven't apprehended anyone yet, but . . .

FATOU BENSOUDA

DEPUTY PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

¶19 We haven't apprehended anyone yet; but this is to comment on what Serge has said regarding the completion strategy for each situation, which I think is correct. I think when the ICC was conceived, it was meant to ensure that national systems would be in a position to eventually investigate and try their own cases. So obviously, while we are in these different situations, the aim is that the domestic jurisdiction will be developed to the extent that it will also be able to take on and try its own cases. The aim should not be to stay indefinitely. The aim should be at one point in time to exit that situation and make sure that the national jurisdiction is in a comfortable position to take on any cases, or as Serge has rightly said, to fill the impunity gap that has been created by [having the ICC take] only the most responsible and leaving the others.

¶20 Regarding Uganda, we have not specifically started thinking about a completion strategy because the arrest warrants, as you know, have been issued against the leadership of the Lord's Resistance Army but remain outstanding. We continue to urge those in the international community and those who would be in a position to help to ensure that Joseph Kony and the other leaders of the Lord's Resistance Army who are still the subject of arrest warrants issued by the ICC are apprehended and transferred to the ICC. I'm sure you have noted that Uganda is trying to do some domestic proceedings against them. But I think those who should be subject to those domestic warrants are those who are not the targets of the ICC. I think that Joseph Kony and others should be transferred to the ICC and then [Uganda] should look for what to do with the others. . . .

SERGE BRAMMERTZ

¶21 We are also working on the worst case scenario: what would happen if the Tribunal closes its doors and the fugitives are still at large? Who would be competent to judge them? To deal with them

once they are arrested? That's why the Security Council is discussing the creation of a so-called residual mechanism with two components. [This would apply to both the ICTY and the ICTR.] First, to deal with residual questions: witness protection, provisional release, and requests for assistance coming from the regions. All these requests will come in once the Tribunal is closed. But also with a kind of, I would say, sleeping Tribunal with a legal basis, a legal framework for the Tribunal to be activated once one of the two or [both of the two] fugitives are arrested. [This will] very clearly give this message that wherever and whenever the two fugitives are arrested, there will be an international judicial mechanism dealing with them; nobody can sit it out and wait for the closure of the Tribunal. And I don't think there's anybody more competent to do so in our case.

¶22

...
A word about the archives, which is the important question. [The archives] will be a problem for the ICTR and the ICTY because, as I said, even after the closure of the Tribunal, people will need access to the archives and databases. So more than a year ago, a working group was established to study the alternatives. [Discussion questions included]: Where to put the archives? Should there be one archive for the ICTR/ICTY, or two archives? Where to locate them? Who will have access?

¶23

...
What we are doing for example at the ICTY is to make sure that those who have to consult those millions of pages are able to do so. We have since last year, with the financial support of the European Union, set up a project with prosecutors from Serbia, Bosnia, and Croatia integrated in my office, which also shows a totally different dynamic than fifteen years ago when [the cooperation of the tribunals and the local jurisdictions] was very vertical. Today, it is very horizontal with such cooperation. We receive more requests for assistance from the regions than the requests we are sending there. So we have now liaison prosecutors integrated in our office, people who have very direct access to our databases. Every year we have ten junior prosecutors from the region who are [switching] every six months [among] the different sections in our office to make sure that, once we leave in three years time, there [will be] at least 100 people who are familiar with and are willing to consult all the databases in order to make sure that

victims, perpetrators, alleged perpetrators, and the judiciary have access to the writings...

FRANÇOIS ROUX

*HEAD OF DEFENCE OFFICE, SPECIAL TRIBUNAL FOR LEBANON
FORMER DEFENCE COUNSEL, EXTRAORDINARY CHAMBERS IN THE
COURTS OF CAMBODIA*

¶24 The trial of Duch [before the Extraordinary Chambers in the Courts of Cambodia] was the most difficult one because it happened more than thirty years after the fact. It was also a big challenge for the international criminal system. One big problem had to do with having a criminal court in a country where the offenses took place, but the government did not want the trial to take place. Because it was a hybrid court, the staff, the judges, the lawyers were duplicates: one from Cambodia and one from the International Committee. They hoped to establish a dynamic between international staff, but I am afraid it [did] not establish this dynamic.

¶25 Many people in Cambodia see this court as a colonial court, like colonialism. The Prime Minister of Cambodia has said many times that he was praying for the court to fail and he was praying for the international judges to go back. This was the social and political context in which they ha[d] to work.

¶26 One of the particularities is that the accused, from the beginning, said that he wanted to plead guilty, he wanted to confess what he did and asked the Cambodian people to forgive him, and he asked the Khmer Rouge to do the same thing. So the court ended up working more in the context of a truth commission rather than a court. This position of Duch, the accused, made the prosecutor feel very uncomfortable, because the accused was being a better prosecutor against himself than was the prosecutor.

¶27 Everybody knows that in Cambodia there were approximately 196 prisons, but only one, S-21, [was on trial]. It was clear that more atrocities had happened in other prisons, other than S-21. And so the question arises: why not prosecute those who committed the crimes in those prisons? Why prosecute only Duch? This is one of the particularities of the Cambodian context.

¶28 Under pressure of the international community, the Cambodian government accepted the tribunal to prosecute just a few, only the leaders of the Khmer Rouge. But it's not enough to say that we are only going to prosecute the leaders, that if a criminal is

not one of the leaders, he will not be prosecuted. It's an extremely complex situation they have to deal with.

¶29 So for two years, Duch pleaded guilty and he begged for forgiveness. But at the last moment, his Cambodian lawyer said that because he was not one of the leaders, the tribunal did not have jurisdiction over him. So his Cambodian lawyer asked for acquittal...

¶30 Three main things to say about the [Special Tribunal for] Lebanon: [first], the Lebanon court is the first international tribunal to judge terrorists, and not the last; second, the court will have *in absentia* trials; [finally], for the first time, the international community created an Office for the Defence Counsel, which would be the equivalent of the Office of the Prosecutor. That's huge progress for international justice.

¶31 I always tell the judges in international courts, "Don't forget why you have been nominated." The reason I always say that is because when they establish an international court, it is to fight impunity. But when the court is created, it is there not to fight impunity, but to serve justice. And when the court is established, the prosecutor fights impunity, defense lawyers defend, and judges render justice...

DAVID SCHEFFER, MODERATOR

¶32 I'd like to jump to David Schwendiman, who joins us from Utah, but formerly was well-established in Sarajevo. David, I think it would be fascinating—most of the people in our audience probably don't have a clue about the War Crimes Chamber in the Court of Bosnia and Herzegovina and you must have had to have work with a slightly different perspective, because everyone else here is dealing with the top of the leadership pyramid in terms of prosecution and defense. You are at the mid-level and low-level. But also, your defendants are those whom the people probably identify with the most because these were the individuals closely associated, or at least allegedly so, with the commission of the actual crimes. Can you tell us how that played out for you in the War Crimes Chamber?

DAVID SCHWENDIMAN

*FORMER DEPUTY CHIEF PROSECUTOR OF THE SPECIAL DEPARTMENT
FOR WAR CRIMES IN THE PROSECUTOR'S OFFICE OF BOSNIA AND
HERZEGOVINA*

¶33 I'm probably the only representative on this panel that comes from a purely domestic situation. What was going on, or what is now going on in Bosnia and Herzegovina, is not a hybrid court. It is a domestic court, and the domestic Prosecutor's Office applies international criminal law through the domestic statutes that exist in Bosnia and Herzegovina, and have existed since 2003. How [to] apply domestic statutes that were put into place in 2003 to address conduct that occurred between 1992 and 1995 is another issue entirely. But the problems faced are fairly universal: how do you choose what to do now? Who do you choose to do it? And [how] do you work your way through this large caseload?

¶34 The other thing [is that] our mandate is much, much broader. We're more like a DA than a U.S. Attorney's office. Our responsibility actually runs to everybody on all sides who was involved in a crime that was committed during a conflict between 1992 and 1995. That poses very special problems for us. That also poses problems for us because we come after the ICTY has had their chance to do as much as they have done in this area. The ICTY, for example, has collected a great deal of the evidence that we have to have access to and have to be able to use. A lot of what was done in the beginning when the ICTY was first set up in 1993 was not done ... with the idea in mind that ultimately what was collected was going to have to be used in a domestic court with domestic rules and domestic dynamics, like we have to deal with in Bosnia and Herzegovina. So working out the relationships now is critical, and that's what we've been doing for the last three years at least. We're working very carefully with the ICTY to ensure that we get what we need, that we get it in a timely way, and that we get it in a form we can use in the domestic court. There are special evidentiary rules, for example, that we've had to come up with to allow us to use that product.

¶35 Let me mention one other very important problem and that is that we have witnesses that we have to use in the domestic proceedings who have been used over and over again at the ICTY [to] generate transcripts, but [this has] also [worn] out [those witnesses]. What we have had to do is come up with a means for

organizing the work in Bosnia and Herzegovina to reduce the strain on that witness population. The killing was quite effective during the first part of the war, if you're talking about cases from Eastern Bosnia and if you're talking about Srebrenica [in 1995] at the end of the war. There are only twenty-eight living witnesses who are victim witnesses about what happened to the men in Srebrenica in 1995. These were people who were able to escape or were wounded and left for dead, but then survived. We have to use those people over and over again unless we're careful about the way we construct our cases.

¶36

So the domestic side of this has selectivity problems. It has evidentiary problems that follow from having an international tribunal come first. ... Uganda and France are both looking to Bosnia and Herzegovina. I met with the people from Uganda last summer, over how they were going to address some of these very same issues (coming after a large international tribunal sweeps the field). France came to us to talk again about some of the problems that a domestic jurisdiction is going to have dealing with these caches of evidence and material, that sort of thing, as well as domestically adapting what they need to do in order to prosecute these cases.

¶37

So that leads to the last point and that is, it's in the domestic courts where a great deal more of the development of this law is going to take place. We are incredibly grateful to the ICTY and the ICTR for the development of the jurisprudence up to now. But when these institutions begin to drop off, it is in the domestic courts where the crimes against humanity jurisprudence is going to be expanded, where the genocide jurisprudence is going to be expanded – and there are a great many of them this last year with genocide, with genocidal intent, with the definition of crimes against humanity, particularly rape as torture and some of the other cases. And also the development of techniques or methods for dealing with these large, massive cases that are not typical to a civil jurisdiction, such as plea bargaining [and] the use of immunity in atrocities cases. We have followed the jurisprudence of the ICTY when it comes to a great many of these issues. So, while we always come last, figuratively and actually, technically, in what's going on, it's probably going to be at our level where these things have their greatest future. So there needs to be some very heavy attention paid not only to capacity building, whatever that means (and we can talk about that later), but also to the outcome of these decisions. In Bosnia and Herzegovina

so far, we've tried over fifty cases in the three years that we've been doing this work. And there are about forty decisions that have been rendered in the first instance that are now translated and available to be studied; slightly less than that on a second instance (which makes [a decision] a final and binding verdict). So there is a growing body of this jurisprudence that needs to be very carefully scrutinized by people outside the system to see whether it actually meets international expectations or at least the quality the international community has come to expect. . . .

SERGE BRAMMERTZ

¶38

The one area where I would say the ICTY could have done better, and probably other tribunals, too, is in the area of outreach. Despite outreach projects and programs, despite work with local NGOs in order to explain judgments, the reality is that there are very many difficult legal concepts and judgments that are so complicated in terms of language used that everyone can more or less find what he is looking for. The experience we've had in the ICTY is that we've been criticized by almost all communities: [of] being anti-Serb, because the majority of people across the region are of Serb nationality, [of] being biased against Serbs, and [of] not prosecuting enough people from other communities. So we are still working on this issue. What I have experienced in the two years that I have been in the job is the fact that if you do not have the local politicians with you, it is almost impossible. What we see still today—today it is better than five years ago—is that local politicians are [saying] to the international community what the international community wants to hear, saying we are committed to the principle of international justice, but saying domestically, you know we are still with you, they are prosecuting our heroes. That is very bad for justice. You can only be successful if you are so far away from the place where the crimes have been committed [and if you have an outreach program [and] have the local politicians with you. That's why I'm so convinced that what the War Crimes Chambers and other local courts are doing is the most efficient. Having a Serbian court try Serbian nationals for crimes committed against the Muslim community has a much greater impact than a decision in The Hague where everyone will try to use the nationalist example.

¶39

How can we measure it? Quite interestingly, in Serbia quite recently we [saw] an independent organization manage a survey to see what people think about General Mladić. As you know, Mladić

is one of the two main fugitives we are looking for. He's allegedly co-responsible for the crimes committed in Srebrenica, where up to 8,000 men were executed. So in those latest surveys conducted just a few months ago, nearly sixty-five percent of people interviewed in Serbia were against him being arrested and delivered to the ICTY. A majority also still believe that he is a hero and not a war criminal. So as international justice and the international community, and also as local politicians, I think we have a problem if today the majority of people consider Mladić to be a hero and not an alleged war criminal. It is still a very big issue for us, but I think it's a problem for the majority of tribunals.

DAVID SCHWENDIMAN

¶40 To have effective outreach, and I say this from the receiving end of some of this, and also from the end that's responsible for doing some of this on the domestic level, you have to have education, information, and explanation. I think the efforts to educate the public in the former Yugoslavia, and especially in Bosnia and Herzegovina, got a slow start, but have gotten quite good in the recent past. The efforts to inform the public, the educated public, in Bosnia and Herzegovina, are a little more problematic. How are you going to do it? Because the media in Bosnia and Herzegovina is very polarized. There aren't many objective journalists in Bosnia and Herzegovina. So that becomes problematic. You have to inform yourself in our outlets, which are very limited. It becomes problematic if you look at the core values of prosecution, which are presumption of innocence, confidentiality, those sorts of things that you need to stick to when you're dealing in any system, but particularly a domestic one. So there are these issues that are associated with outreach.

¶41 One of the things that is most important about outreach, and was not done well in the beginning (and it's a problem the international community faces because of the dynamics of this movement to make sure these cases get prosecuted), is that the expectation is often created that everybody who committed a crime, anyone who did anything, is going to be investigated, is going to be prosecuted, and in the end is going to be convicted and they're going to get a maximum sentence. Now that's extreme, but I can tell you that there are many people in Bosnia and Herzegovina who believe that's [why] we exist. That's what the ICTY existed for, and the great deal of disappointment that leads to a lack of confidence

comes from this expectation that just simply can't be met. So, the one thing I would say about outreach is that it's got to be done along these lines, but it has to peg expectations in a proper and realistic way in order for it to have any effect at all.

COURTENAY GRIFFITHS

DEFENCE COUNSEL, SPECIAL COURT FOR SIERRA LEONE

¶42 I think the whole question of outreach has been a particular problem for the Charles Taylor trial and the Special Court for Sierra Leone. I think there are question marks in the sub-region as to the need for a tribunal, particularly in light of the millions of dollars being spent on setting up this court, when contrasted with the level of deprivation and poverty in Sierra Leone. And many Sierra Leoneans were saying, "Well, we don't have roads. We don't have running water. Why are you spending money on trying those merely most responsible? Wouldn't that money be better spent building roads and schools and so on?" Consequently, there was a need to sell the idea of the court to the Sierra Leonean population and to the Liberian population as well.

¶43 And by switching the Taylor trial from Freetown to The Hague, it created certain psychological problems. For people in Africa, the idea of Taylor, a black man, being taken in chains up to The Hague, created certain problems which needed to be addressed. I think the outreach department has made admirable efforts to bring the message, but they've been beset by many difficulties, one of them being this: yes, the trial is broadcast over the internet, so if you go to the Special Court for Sierra Leone's website, you can click on a link and you can see the proceedings with a thirty minute delay. The problem is, who in Sierra Leone or Liberia has broadband? Outside of the Special Court for Sierra Leone's compound, you can't get access for the most part to broadband in Sierra Leone. So who's going to see it by that means?

¶44 Additionally, however, the outreach department has shown some imagination. So, consequently, they take recordings of the proceedings to outlying villages, put up large screens and so on, and show extracts from the trial to the local population. And they also distribute snippets of the proceedings to the local radio and television stations for broadcast. And they've done a pretty good job with that in Sierra Leone.

¶45 The job they've done in Liberia, in contrast, has been not as effective. Thus, it's been left to us as a defense team to provide CD-ROMs of the proceedings to people in Liberia for broadcast in local media. And so consequently, what was supposed to have been one of the most important goals of setting up this court – to leave this legacy of respect for the rule of law and so on in West Africa – just hasn't materialized because of logistical difficulties thrown up by switching the trial to The Hague. . . .

FRANÇOIS ROUX

¶46 For me, what is most important about the outreach is not only to show we fight against impunity. The most important thing is to show that we are building the right society. The world is not the white people on the one side and the black people on the other side. The world is not that. So we need, by the outreach, to demonstrate that we are going to set up a world with rights, with law.

¶47 I would like to say something about Cambodia. One of the successes of Cambodia is the people who attended the trial; more than 20,000 people went to the trial! This is unique in the international community. . . .

FATOU BENSOUDA

¶48 I think the challenges that we face in this area, in the ICC, are enormous. Compared to the other ad hoc tribunals and the other hybrid courts, we are dealing with different situations in different countries, first and foremost. It's not just one situation geographically limited to one area. That already is a big challenge.

¶49 And secondly, we are also dealing with situations of ongoing conflicts. Whether it is the Democratic Republic of Congo or Uganda or Central African Republic or Darfur—in all the situations we are dealing with, conflict still rages in those areas.

¶50 We have the issue of victim participation, which the ad hoc tribunals did not have. An obligation has been placed on us to make sure that the victims know that they have a right to participate in the proceedings. So this is an obligation that has been created not only for the Office of the Prosecutor, but for the judges and even the defense. And then we have the propaganda against the ICC. This has largely come about since we have issued the warrants against Omar Al-Bashir. There is propaganda against the ICC labeling the ICC as a neo-colonial institution that is targeting Africa. So we have to

work against this propaganda to explain what the ICC is all about: that the ICC is intervening because the jurisdiction has been accepted by those states (except in the case of the U.N. Security Council referral).

¶51 There is also the lack of understanding of what the ICC is all about. We have to do a lot of work. We are still doing a lot of work going out in the field to explain that this is the ICC as opposed to the image that the ICC is only targeting Africa. For example, there is a lot of misinformation out there, deliberate misinformation. There are also a lot of deliberate attacks against the ICC from persons who have an interest, of course, to gain. So these are all the areas that are stacked up against the ICC as an institution. And we are doing, at our level, all the organs, the OTP and the Registrar – there is a program, of course, for us to go out there, to go to the communities that are affected, to explain. For example, we have this interactive justice radio program in which they come back to the principles of the organs and those dealing with the cases and allow the public, for example, to ask questions and we answer those questions. At various other programs, we are trying to be as targeted as possible for the ICC to be understood. But it still remains that we have to deal with so many situations at the same time. . . .

COURTENAY GRIFFITHS

¶52 Fatou, with all due respect, I think to dismiss the African concerns about the ICC as propaganda is to do a disservice to a much more fundamental argument which needs to be held about international criminal justice. Because I do think there is a credibility issue which the ICC has to address quite urgently. Because from my travels in Africa, there is a general concern that international criminal justice is being used, as François described in Cambodia, as a tool for neo-colonialism, and that in effect, it reflects global power relationships. If one looks at that map just to the right of the door, the one that came in the [conference] pack and which denotes areas where investigations are currently taking place, it doesn't take a rocket scientist to figure out that there's an over-emphasis on Africa.

¶53 Now help me: what about Sri Lanka and what happened to the Tamils during the defeat of the Tamils last year? Help me: what about Israel and the Gaza last January? Help me also: what about the United Kingdom, and the role of my former Prime Minister Tony Blair? God help me, here in the U.S.A.: what about George W. Bush

and his role in the invasion of Iraq? We all know now that the Iraq War was illegal. But let me just take a straw poll: how many of you actually think that there is a real possibility that either George W. Bush or my former Prime Minister Tony Blair will be put on trial before an international tribunal? Show of hands, please. Who actually thinks that is a realistic possibility? Why not?

¶54 Let me give you an example. My former Foreign Minister Robin Cook, God rest his soul, he died, was asked (at the time [when] the United Kingdom signed the Rome Treaty), on BBC News Night, a current affairs program, “So Mr. Cook, now that the United Kingdom has signed this statute, is there a possibility that Prime Minister Tony Blair, or President George Bush, might be put on trial?” And he turned indignantly to his interrogator and said, “This is not a statute to set up a court to try the likes of the President of the United States or the Prime Minister of England.” That speaks volumes! Why not?

¶55 And currently in the United Kingdom, there is an inquiry going on as to the propriety of the Blair government engaging in the war in Iraq. I noticed a news program where they had an image of Tony Blair sitting in the defendant’s chair of the ICC. They had a professor of international law on the TV program asking, “Is it likely for Blair to be put on trial?” The general consensus was that it was not going to happen, and you and I know that it is not going to happen.

¶56 Just recently, some rather intrepid lawyers in London went to a magistrate and obtained an arrest warrant for the Israeli Foreign Minister, who was due to visit London at the time of the Gaza invasion. The government intervened immediately, sent the Attorney General, Patricia Scotland, to Jerusalem to apologize, in effect, to the Israeli government, [for the fact] that British citizens had the effrontery to demand the arrest of the Israeli Foreign Minister. You and I know that power relationships dictate at many levels who is put on trial in these international tribunals. That is a major concern to me for this reason: I understood when I studied law at university that whether you be princess or prostitute, whether you be President of the United States or President of Liberia, the law should be above you. But I ask you, is that the reality of today? You and I know it is not. And that is the credibility gap you’re going to have to address at the ICC if you want to put an end to this debate.

FATOU BENSOUDA

¶57 I see several issues, but mainly I see the mixture of several jurisdictions in international criminal justice being attributed to the ICC and giving the ICC a bad name.

¶58 I think in what you have discussed, you have talked about universal jurisdiction. This is not the ICC. I see that you have talked about issues of the jurisdiction of the ICC; when and how the ICC can intervene. You have addressed the issue of complementarity when you know that the primary responsibility to investigate and prosecute under the Rome Statute rests with the state. It is not the ICC. The ICC is a court of last resort, and this is what the international community intended it to be.

¶59 Let me now address the issue of the focus on Africa. First I want to say, personally, as an African, I want to commend the African leaders for engaging the ICC. The ICC has not, in any situation, except Kenya now, the prosecutor has not used his *proprio motu* powers to go into Africa. Instead, African leaders have called on the ICC and the prosecutor, and made public declarations saying we cannot investigate this case, we cannot prosecute it, please come and do it. Whether it's Uganda, whether it's the Democratic Republic of Congo, whether it's the Central African Republic. And in Darfur, it was the Security Council that asked the ICC to go in and investigate. So what do I see here? I see African leaders taking leadership in international criminal justice as far as these cases are concerned.

¶60 In the case of Kenya, what has the ICC done? The ICC has given Kenya the opportunity to investigate its own cases. I don't need to go into all that has happened; I think you've been following it. But the ICC has given Kenya the opportunity to do it themselves. But we know, we all know, that Kenya is not going to do it. And when we met in Rome in 1998, we said, "Under the Rome Statute, impunity will not be an option. If you do not do it, the ICC will do it."

¶61 If I want to address Iraq, if I were to address the role of the British, of the U.S., again complementarity kicks in. This is the statute that we have signed, that we have ratified. Today, 110 states are a party to this statute. We did examine crimes that have been committed in Iraq, for those who are nationals of states parties, because that is how far we can go. Iraq is not a state party, so we cannot investigate non-nationals who are committing crimes. And

they're in the U.S. Neither can we investigate Iraq, nor can we investigate the U.S.

¶62 But, we can collect information, with the intention of investigating the likes of the U.K., which we have done (and it is on our website if you look at it), [and] which we have [also] done against Germany and other nationals who were part of this conflict. This is the role of the ICC. This is what we had to do. . . .

ALAIN WERNER

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TRUST*

*FORMER MEMBER OF THE OFFICE OF THE PROSECUTOR, SPECIAL
COURT FOR SIERRA LEONE
CIVIL PARTY COUNSEL, EXTRAORDINARY CHAMBERS IN THE COURTS OF
CAMBODIA*

¶63 The dynamic, when you have the victims and their lawyers in the courtroom, is entirely changing. For example, in the ICC's Lubanga trial, lawyers are able to tell Lubanga and his lawyers that it's not true that children in the conflict were conscripted because your community needed them, because we ARE your community. We are the children who were conscripted. We are inside the courtroom and we are telling you that it was not for the interest of our community. And that's really what I like with this victim participation of civil parties. It's certainly not like one international community against one party who said, "Ho, ho, you are coming against my people." But it's changing the dynamic.

¶64 Now there are so many questions about the Duch trial and Cambodia. It has been challenging for civil parties in the Duch trial because you had one judge in particular – Cynthia Cartwright, who was a former attorney general of New Zealand, a very senior jurist, and very well respected – who quite frankly did not understand at all why we were there. She's 100 percent common law, so the need to have a lawyer in the middle ... she did not understand why we were there.

COURTENAY GRIFFITHS

¶65 I still don't. [Laughter.]

ALAIN WERNER

¶66 So it has been a tremendous challenge for us to try to work as much as we could, to try to explain. There were about ninety civil parties, but the problem will persist in case number two, which will be the big case because there will be 2,000 or 3,000 victims.

DAVID SCHEFFER, MODERATOR

¶67 Case number two will be coming up in about a year or so in Cambodia and that will be the top four surviving leaders of Khmer Rouge. So it will be a much, much higher rank than the defendant in the first trial.

ALAIN WERNER

¶68 ...Genocide is going to be a very interesting issue. Genocide now may be charged in Cambodia for the Cham, which is an ethnic and religious minority, and for the Vietnamese. A very interesting question: I know from the inside that the Prosecutor's Office is still trying to decide whether or not to bring genocide charges relating to Buddhist victims. And that is becoming very interesting to say that between 1975 and 1979 that basically the Buddhist religion—they were trying to basically eliminate, eradicate Buddhism. And probably there will be a decision. And there may well be that in the next month or two there will be a decision to go after the accused for trying to eliminate Buddhism.

¶69 Thirty years ago, without much proof, how do you prove genocidal intent? Everything is going to be about inferring the intent. And the problem is that, like in Yugoslavia, in Cambodia, they went after everybody. They killed everybody. They killed the intellectual, they killed the royalist. They killed everybody. They didn't kill just the Cham or the Vietnamese. They killed everybody. So how do you prove that there was intent to target one group? That is going to be, I would say in the next year or two, a fascinating legal issue.

¶70 But let me just tell you one thing that is very interesting. In Cambodia, when you talk to the people, they don't care about the legal issues. Me, of course, I am very interested, but they don't care. They tell me, "Of course there was genocide in Cambodia!" And when you talk to the Cambodians, even at the end of the day if the ECCC says no genocide, that isn't going to matter for [the

Cambodians]. Because I can tell you that the perception there is that there was a genocide. And I think that is interesting because there was a divide between what we as jurists ask about the Genocide Convention, and when you are in Phnom Penh and you talk to the people, they say it's genocide, that's it.

DAVID SCHEFFER, MODERATOR

¶71 Before we get Courtenay's perspective, I thought I'd just add that because of my position at the time, I was actually very cognizant of what was transpiring in 1996 in the Balkans. One of the realities of war crimes and the arrest of war criminals in the Balkans in 1996 is that it was the year right after the Dayton agreement. We had no agreement of any practical value with NATO as to how to actually affect an arrest on the ground in Bosnia. We didn't start to reach those kinds of strategies for arrest until 1997. So in 1996, that was the year of no arrests, and we all knew it wasn't going to happen, unless of course the NATO formula [was used], which is unless you walk in front of me and say, "Hi, I'm a war criminal. I've been indicted. Here I am. I'm in your space. Please do something with me," then they could take you in. But they were not going to proactively go out there and actually arrest you in 1996. That strategy simply did not evolve until 1997.

¶72 So, I have always wondered—I of course was not part of these Holbrooke discussions with Karadžić. Other aides were with him. But I've also often wondered if he—to be fair to Karadžić, if we wish to for a moment—whether there was some misunderstanding when someone might have said to him in the room something like, "Well, you understand what NATO's policy is right now with respect to arrests. It's only if you voluntarily approach them and literally give yourself up to them that you would be arrested. And our priority now is that you do not stand for any political office in any manner, shape, or form" in September 1996. That was the goal. Lustrate him. That was the goal for September 1996. So, I've often wondered what may have been said that may perhaps have led to a misimpression at the time. And then of course may have been extrapolated again and again into something which he thought was a more formal representation, but of course was not. Courtenay?

COURTENAY GRIFFITHS

¶73 A similar situation arose with Charles Taylor. Just to remind ourselves of the history of the unveiling of the indictment against him: that was done in June of 2003 while Taylor was in Accra, engaging in negotiations with the warring factions who were besieging the government in Monrovia. Now the situation was that if he were to agree to stand down, that the indictment that had been declared against him would be stayed and no proceedings would be taken against him. Parties to that agreement included [Thabo] Mbeki, President of South Africa, [Joaquim] Chissano, President of Mozambique, [Olusegun] Obasanjo, President of Nigeria, and [John Agyekum] Kufuor, President of Ghana. That was Taylor's understanding. The indictment, although declared, would not be effective if he agreed to stand down, which in due course, in August of 2003, he [did by going] into exile in Nigeria. Thereafter, and this is the reality of the situation, Ellen Johnson Sirleaf, who was subsequently elected President of Liberia, came to an agreement with Obasanjo that if she requested Taylor's handover, he would do that. Initially, Obasanjo wasn't willing to do that. But unfortunately for him, contrary to the Nigerian Constitution, he wanted a third term in office. And it just so happened that his desire for that third term coincided with a visit he made to guess where? Washington. And on his arrival, he was told in no uncertain terms: Hand over Taylor. And that was the background to the so-called attempted escape of Taylor by car over the border to Mali, where he was arrested and handed over to Ellen Johnson Sirleaf.

¶74 The important question is: should that be seen by an international tribunal as an abuse of process? We need to understand that the concept of an abuse of process in effect means an abuse of the process of the Court. But the Court wasn't a party to the agreement. And that's the fallacy in the argument – that somehow, abuse of process can attach in a situation like this. Because what we're actually looking at is the interface between international diplomacy and international criminal law. Both don't have the same goals. Neither do both have the same implications. And that's the trouble with trying to use those types of agreements – attempts to bring peace to a situation – with the desire of an international tribunal thereafter to bring to justice the likes of Charles Taylor and Karadžić. That's the difficulty. Because the Court was never a party to the agreement, why should the Court be bound by it? Because it's

not the Court that implemented this agreement in the first place. That's the fundamental difficulty with the argument.

...

DAVID SCHEFFER, MODERATOR

¶75

May I jump to the ICC for a moment, Fatou, and go back to Uganda? There are obviously risk strategies with respect to Joseph Kony and the Lord's Resistance Army indictees, many of which I'm sure you cannot talk about. But there was an event a year ago that was a very dynamic event on the ground, a military operation that went across the border in the Democratic Republic of Congo for the purpose of trying to arrest Joseph Kony and I presume the three other indictees – I'm not sure if you were looking for the whole group or just for him. There were reports that the United States had been involved in some of your intelligence gathering, etc., to help facilitate your activity. But the Lord's Resistance Army reacted quite viciously on the ground after the operation began. Can you talk to us a little bit about that and whether or not that was a sobering moment in terms of, "How do you arrest these individuals?"

FATOU BENSOUDA

¶76

What I think is clear is that what Joseph Kony has been doing over the years is to use time and money – money that he receives through assistance from peace talks – to be armed, to recruit more people, and then to attack again. He uses this time that is supposedly meant for peace talks to take place [to] rearm and then [attack] again. There was for the first time in a long time a very serious attempt to get Joseph Kony in late 2008. And of course there were the negotiations that took place – Vincent Otti was leading it, for the first time was being very open. But what has happened? Otti has been killed. Not only is Joseph Kony attacking innocent civilians, but [he is] also [attacking] those in his army. We've seen him attacking them and killing them because they were serious about the peace talks. So I think what Joseph Kony is doing ... he should be seen for that. He's using time and money to regroup, rearm, and attack again. There is no serious attempt, really, on his part that peace talks should take place.

DAVID SCHEFFER, MODERATOR

¶77 If you were to withdraw the indictment, as he has requested, would the peace process take off?

FATOU BENSOUDA

¶78 I don't think so. I don't think so. And over the years, I think we've seen the various methods he has been using to continue to commit the crimes he has been committing. And what we see now is not only that it is concentrated in Northern Uganda, but we have seen that it has moved on to the Central African Republic, it has moved on to Sudan, and to all these countries within the sub-region that he has [the] opportunity to operate in, even in the Democratic Republic of Congo. Look at the incident that happened in 2008. People are gathered to celebrate Christmas. He attacks them. Kills almost 1000 people. Takes the food these people were using to celebrate Christmas. They ate among the dead bodies, slept, and then they left.

¶79 I mean, with respect to the argument that if the ICC were to withdraw the indictments, then the process, or the peace, would go on, I think that is a non-starter. We have to look at the ICC indictment as one of the key instruments in the first place in even getting the Lord's Resistance Army serious about talking. We've seen that immediately after the indictments were issued, we saw the likes of Vincent Otti and Kony pretend to come to the negotiating table. But that is not what the indictment is for. The arrest warrants are not to bring people to the negotiating table. It is for the warrants to be executed, and for the persons who are responsible to be brought to justice.

¶80 So I don't think that ICC withdrawal would have helped in any way.

DAVID SCHEFFER, MODERATOR

¶81 Christine, you had two blockbuster arrests in August 2009, one indicted fugitive from the Democratic Republic of Congo, and one from Uganda. Was that a good night in Arusha? Or was it just finally sort of an exhausted sigh?

¶82 But at large remains Mr. Kabuga. And there has been some tension between the Tribunal and Kenya with respect to Mr. Kabuga, who is a top indicted fugitive of the Rwanda Tribunal. Can

you give us your arrest scenario from the Rwanda Tribunal with regard to first, you got two of them in, but you still have a very significant one [at large] – and that whole relationship with Kenya?

CHRISTINE GRAHAM

*SENIOR APPEALS COUNSEL, INTERNATIONAL CRIMINAL TRIBUNAL FOR
RWANDA*

¶83 Well, if we start with Nzuwonemeye, who was the indictee arrested in Kampala in Uganda, I think that was seen as a step forward, in that he was clearly visible on the evidence that had come out in the Tribunal in other cases, in particular in the case of Habyarimana. He is not the highest level official that we have tried, of course. He was at the captain level. He was well known, or as the evidence would suggest, he was well known as a Hutu extremist within the military, which is the prosecution's theory, of course, that the Hutu military's extremists were the driving force in relation to the genocide.

¶84 So in terms of cleaning up the case docket, if I may use that word, or the evidence, it certainly was a good step that when he was finally arrested, we could now read evidence directly against him and put our case on.

¶85 Also, it confirms the idea that there is no impunity. Many of the accused, of course, are sitting and waiting for the mandate to expire and in that way, evade justice. So any arrest, even if it's not the high level person like Kabuga, is good in terms of making sure that you cannot avoid justice by hiding somewhere.

¶86 That applies in relation [to] the indictment of Ndahimana, who was arrested in Congo. And he forms part of the Kabuga cases, which originally arose from the case against Seromba the priest, in the famous situation in which they brought down the church and in that way killed a large number of victims. Over a thousand victims were killed through the destruction of the church. Ndahimana featured in that original indictment against Seromba and Kanyarukiga. So these indictments had been split up as the indictees were arrested at different times. So there were three parties to that. Seromba was convicted and sentenced to life at the Appeals Chamber level. He was convicted at trial of twenty years I think, but then it was changed on appeal and he got life. And Kanyarukiga, who is currently on trial. Now we have Ndahimana, who is about to

go on trial. So I think also that is a nice closure in terms of having all three of [them] arrested and tried. . . .

DAVID SCHWENDIMAN

¶87 You asked about plea agreements. Yes. We began doing pleas, and some plea bargaining about a year and a half ago. We have followed, as best we could, the example that was set by the ICTY regarding some of the factors they used to decide when and how we should be doing that. We tried to improve on some of the ICTY practices. We hopefully did. We installed a policy which I call the Practice Direction. Practice Direction Number Two spells out all the factors a prosecutor needs to consider when someone presents to the prosecutor an offer to plead guilty. We really didn't go out to people and offer pleas. It usually came from the defendant or, in many respects, it was something that was obvious under the circumstances generally because a plea had happened before, or because the man knew something that he knew we would want to know. And this has become more of a situation where we took over excavation and exhumation at the state level, beginning this last year in January 2009. More people began to come forward who were accused, indicted, and on trial offering up information about where bodies might be and where graves might be.

¶88 As many of you may know, there were 20,000 people who were reported missing during the war. About 15,000 have been found and recovered. Not all of those 15,000 have been identified. There are at least 7,000, perhaps more, who remain unaccounted for, unfound. Many of those will not be found because they were dead on the surface. Those remains don't exist any longer. But a good percentage are still in graves, either small graves of five or fewer, or mass graves of five or more around Bosnia and Herzegovina. In the one case we had a man come forward during trial who had actually been involved at an execution site at Korićanske Stijene and offered us the place where about thirty-five to forty bodies might be found in a place where we had not been looking. We dealt with the man and he was given a deal that was less than ten years, in the end, which happened without my approval. When we got back, after the court did not approve it, we made it very clear that no one was going to be pleading anything below the statutory bottom in the code. And that was then raised. But we went out to the location and I think we found about thirty-five bodies in that location. Again, they had not been found before.

¶89 One of the primary goals that we have, one of the objectives in our mission statement, is to use the forensic process to the extent it's reasonable to help find and locate those who are still missing and identify and reunite them with their families. This has a forensic purpose, obviously, because we need to prosecute this case with the forensic evidence, but this is also a humanitarian issue for us. That plea was criticized only for the amount of time that the person got, not for the fact of the plea.

¶90 I also pled Pasko Ljubičić, the person responsible for Amici. And we pled one of the defendants, Dusan Fustar, to a nine-year term. But we did it partly to get this plea agreement process started, but also because under the circumstances it made sense.

¶91 One of the factors obviously that we're looking at is whether or not we have the evidence to continue with the prosecution that would result in a conviction as we worked our way through the trial. Often times there will be a failure to be able to obtain a witness, or whatever. Particularly in the domestic courts, because while the ICTY and the ICTR and others have the ability to go anywhere they want and acquire a witness, I'm in a domestic court [and so] I'm bound by every rule that has to do with my going to Spain, for example, to talk to anyone the ICTY convicted and incarcerated in Spain. I have to get the permission of the Spanish government even to come into that country for that purpose. I can't simply go there. If it's an ICTY witness or defendant, or someone [who is] in custody there, I have to get the permission of the ICTY to go do those interviews. So it becomes complicated for me. And often, as it was in the case of Ljubičić, we had to negotiate a plea because we failed in getting together some of the evidence that we needed to have. . . .

COURTENAY GRIFFITHS

¶92 I was quite shocked when I arrived in the international tribunals at the disparity of resources between the prosecution and the defense. I accept that given the much greater role that the prosecution has to play within a criminal trial that you're not talking about exact equality of resources. That's not realistic. But the fact is, for a case the size of Charles Taylor, the initial legal team consisted of two lawyers and a couple of legal assistants, which was totally inadequate. And it left me with the abiding impression that many of these tribunals are established to convict. And consequently, there doesn't appear to be . . . I'm glad I've provoked some interest [laughter] this late in the afternoon. I see everyone coming to life.

FATOU BENSOUDA

¶93 Coming at you.

DAVID SCHEFFER, MODERATOR

¶94 No jet lag anymore.

COURTENAY GRIFFITHS

¶95 Jet lag is gone. And it seemed to me that the basic principle [is] that in order for international criminal law to have any credibility, the defense has to be in a position to put up a proper fight against the prosecution. Otherwise, it will lose all credibility. The defense has to be in a position to protect the rights of the defendant properly. Otherwise, let's just forget it. Let's just call this victor's justice and be done with it. All right? That was my initial impression. But at the same time, I have to say that as a result of the stance taken by Charles Taylor and his initial team, I have a feeling that the team I am now head of is perhaps one of the best defense resource teams there's ever been in an international tribunal. I'm pretty confident that we are the best resourced...

¶96 In any event, in January [of last year], the prosecution in the Charles Taylor case called a witness in, one Hassan Bility, a Liberian journalist who was, allegedly of course, detained and tortured on Taylor's orders. Now during the course of his cross-examination by me, he informed us for the first time that with the assistance of ECOMOG, that is the Economic Community of West African States that had sent troops to try to stabilize the situation in Sierra Leone, he had been transported clandestinely from Liberia into Sierra Leone in order to report on events in that neighboring country. Now that was of interest to the defense for this reason: we had evidence that ECOMOGC was involved in arming one of the factions in the Sierra Leonean conflict. So from our point of view, what were they doing injecting this Liberian journalist into that situation? So I wanted to ask Mr. Bility some questions about this. He objected on the basis that so to do would involve him disclosing his sources. Now our argument was, this has nothing to do with disclosing your sources. First of all, what we want to know is the identity of those who facilitated your entry into Sierra Leone. It's not as if you obtained information from these individuals. They merely facilitated your clandestine entry into the country. So that

shouldn't be covered. Secondly, we argued that in a situation such as this, journalistic privilege should be trumped by the need to provide evidence that directly goes to the guilt or the innocence of the accused. And in our view, that overriding consideration should trump any journalistic privilege.

¶197 And we also argued, now look, you claim you were assisted in entering Sierra Leone by ECOMOG military officers. They are military officers! What kinds of concerns can there be about the safety of these individuals, especially now that they were safely back in Nigeria? What concerns could there be to trump the defendant's need to know in that situation? Nonetheless, the Tribunal decided against us, on the basis that what we in Europe regard as Article 10 of the European Convention on Human Rights – what you in the U.S. regard as the First Amendment under the Constitution – their view was that that is such an important principle that it cannot be endangered in any way. And that by forcing Bility to disclose who it was that facilitated his entry, the right under Article 10 – your First Amendment – should override all of that because of the democratic concern for freedom of speech.

¶198 I'm not so sure on the facts of that case that I agree with that reasoning. It might have been a different matter if, for example, the journalist had received direct information from a different source. But what it does expose is this: journalists are not evidence gatherers in the sense in which I as a defense advocate understand it in the criminal court context. For the most part, those I am going to examine about the evidence-gathering process are, for example, police officers or investigators, who operate under a certain set of rules and regulations as to how they must behave and the propriety of the methods they can employ in gathering evidence. Journalists don't operate under the same kind of guidance. And so in my mind as a defense advocate, it's very dangerous to place journalists in that situation because they're always going to have to tread that very narrow line between the disclosure of sources and, frankly, telling the truth. And I'm not so sure you want to place yourself in that kind of invidious situation.

ROY GUTMAN

FOREIGN EDITOR, MCCLATCHY NEWSPAPERS

¶199 Can I just say that I am familiar with the cases that have come before The Hague Tribunal, having been asked at least four or

five times myself to testify based on my reporting on the Balkan Wars. And the practice of U.S. news organizations on the whole is rather different than the practice of European news organizations, in that it is almost universal that U.S. news organizations do not want their reporters to testify for the very reason that that you can't actually go back to the scene as a neutral, detached person easily. And in the case you're just mentioning, the reporter could not work with ECOMOG in the future very easily, or with the people who helped him in this particular case, and go back to them for more information, if he were to testify about who they were and what they did on behalf of your client in this particular case.

¶100

Now I've laid out the reasons that Americans are reluctant to testify. But it's interesting. One of our British colleagues, Ed Bulleomi, is one of a number of European journalists who are not only willing to testify, but were eager to testify before The Hague Tribunal. But I think there's a cautionary tale when reporters volunteer like that. And Ed is the proof of it. He offered to speak on behalf of the *Karadžić* case or one of the major cases and the defense said, it's all well and good that Ed is going to speak on behalf of ... I think it was the prosecution based on his articles. But then there is the issue of discovery. "We'd like to see his notes. We'd like to see his notebooks." And once he was already in the court, he didn't really have a lot of choice. So, they took his notebooks and went through them and scoured them. I don't know, my notes aren't always all that neat, but in fact I could always find things because I put in telephone numbers, sources, ideas, as well as quotes from sources. And quite frankly, my notebooks are a pretty open book. But I don't think in a court situation, I want everything of my own methodology put before the court. And I think that's one of the major reasons I probably shouldn't testify, or at least put it this way: there are issues of conscience from every one of us as journalists. We all hope that justice will be done. The stories we are writing is because of injustice and massive injustice and atrocity. And that's why they're news, because they shouldn't be happening and that's what journalism is all about—presenting that to the public, what shouldn't be happening and what should be stopped. But there are examples . . . there are cases where at least in my mind, if my testimony were going to make the difference between the acquittal of a criminal and the jailing of an innocent man, I think I would sooner testify than carry on with my job, because I also have a conscience.

¶101 But on the whole, I think the tribunal has been a little overzealous in inviting journalists. And the case of Jonathan Randall of the Washington Post was really a good one in that I think they went much too far in issuing a subpoena to him. And I think the rules are reasonable. But on the whole, I think I would err on the side of caution and not put journalists before this terrible dilemma....

¶102 The Bush Administration, for all of its flaws, or elements that you could criticize, has been supportive of some of these international tribunals. For all of the unwillingness to sign onto the International Criminal Court—and of course the Democrats were not much better—they worked out a modus of cooperating with the Tribunal and being supportive of it. But I think Afghanistan is a big exception. I don't know completely why, but I can suspect it. And I can only give you anecdotal evidence, which is the journalistic defect. For example, I was involved in the story in 2002 about when General Dostum organized these container shipments of human beings, who had been captured and were prisoners of war, and should have been treated as prisoners of war, who were basically suffocated, if not executed with firing squads.

¶103 But anyway, and what we did—I was [at] Newsweek—before we published a word, we went to the Americans and laid things out at every level we could and asked for their response. Because the U.S. Special Operations Forces were embedded in General Dostum's units. They were there—they came in after 9/11—because they knew what was going on, and it was essential that they knew what was going on. And General Dostum was very cooperative and he was their man in some ways. And they would not comment on it. In fact, they would not say anything about it. And General Dostum basically got away with it at that point. Now fast-forward to 2008. We sent in a reporter—I worked for McClatchy at that point—and we sent in a reporter who I think took some life risks in going into Dash-ti-lali, quite frankly, where we had heard, from an NGO called Physicians for Human Rights, where we had heard that the graves had been moved. But we didn't know the details. We didn't know when, we didn't know who exactly had done it. You could assume it was General Dostum. But anyway, this fellow Tom Lassiter actually went out to the graves. He discovered new ones. He brought out a GPS unit with him. You know, he had an exact fix on these graves. And he reportedly, very carefully, that in fact he thought that additional graves had been disturbed. And once again, since it's journalistic practice, at least with the old-

fashioned, mainstream organizations, we went to the authorities. We went to the U.S. military, to the U.S. Embassy, [and] to Mr. Karzai's government. General Dostum had actually been asked to leave the country at that point for other, slightly unrelated, reasons, so he was in Turkey. So we actually staked him out in Turkey. Lassiter went there and spent a good ten days trying to get Dostum to talk to him. In any case, no comment. Once again, no comment.

¶104 So what does the pattern tell you? It says that . . . you know, they made the argument in 2002 that this is not the time to put people on trial for war crimes, especially when they were war crimes by allies of the United States, namely, General Dostum, because we need him in the future. And what is the argument in 2008? In 2009? And why exactly has General Dostum been promoted into another government position? And where is the United States with some kind of public statement beyond the one that I just quoted you from this General? It's a mystery to me. And I wish that there was some way that something could get him, because I'm convinced that if you want peace in Afghanistan, you have to, if not unearth these remains, you've got to account for them. You've got to find out who did it. You've got to give some closure to the families of the Taliban, who are real people, and to the families of the Hazaras, who were killed in 1998, and the families of the Uzbeks, who were killed at some other point. But whatever it is, you've got to give closure. And I think it's a real short-sightedness by the American side that international justice is not just a slogan. I mean, this conference reveals just how far it's come. But this is the single biggest example of a lack of accountability, of impunity.

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CHRISTIAN WENAWESER

KEYNOTE SPEAKER

*PRESIDENT, ASSEMBLY OF STATES PARTIES AT THE INTERNATIONAL
CRIMINAL COURT*

*PERMANENT REPRESENTATIVE OF LIECHTENSTEIN TO THE UNITED
NATIONS*

¶105 Now the third amendment [to be considered at the Review Conference of the International Criminal Court in Kampala, Uganda] is by far the biggest, the one you have heard about, the one

you will hear about, and that is the crime of aggression. You know the Court has jurisdiction over three crimes, which we call the core crimes in Rome: genocide, crimes against humanity, and war crimes. It also has jurisdiction over the crime of aggression, because aggression is already in the Statute. But at this time, the Court is not able to exercise that jurisdiction. Because what we did in Rome is we were not able to agree on a definition of crime of aggression and we were also not able—and that is a linked issue—we were also not able to agree on the extent of jurisdiction over the crime of aggression. So what we did is say, “If and when we review the Rome Statute, we will take up this question again.”

¶106

David [Scheffer] has mentioned that I have been foolish enough to chair the working group that dealt with the crime of aggression for, well, I guess for five years, and we are now approaching the big moment in a way where we have the opportunity to deal with the crime of aggression at the review conference. So someone has asked me at some point whether it will happen and whether it will be adopted. I don’t have a final answer for that. My answer to that is this is the moment for states to decide what they want as far as aggression is concerned. I think most people believe that as far as the legal groundwork that was necessary we have come a long way. I do believe we have done very good work on the definition. We have found language there that I believe is acceptable to a very large number of states, and a definition that finds very strong support across the board. We always knew that was going to be the easier part, or the less difficult part. It has not been easy by any measure, but it was the less difficult part.

¶107

The more difficult part is to say, “What is the role of the Security Council in triggering the exercise of jurisdiction?” And that as you know, to some extent, is a legal question, but it’s far more a political question. We do not have an agreement on this. We do not have a compromise on this. We are still trying to find ways to bring the groups closer together. You know, of course, that the permanent members of the Security Council in particular are holding the strong view that the Security Council should have the exclusive competence, in accordance with Article 39 of the U.N. Charter, to say this-and-this act was an act of aggression. And if, and only if, the Security Council has made such a determination that a State has made an act of aggression against another State can the ICC come in and say, “Okay, we have a determination from the Security Council,

now let's see who has individual criminal responsibility." So that is the view of the permanent members of the Security Council.

¶108 As you can imagine, and as you probably know, that is not a position that many other states agree with. And those who do not agree with that view don't do so for two reasons, essentially. The first is the record of the Security Council in determining that an act of aggression has been committed. The Security Council pretty much never does that. In sixty years. So that is the record. I could of course argue that it could lead to criminal responsibility, then maybe the Security Council will change its ways. But those of us who know the Security Council—and I happen to be one of them, because I am an Ambassador in New York—have serious doubts about that. So that is the first reason.

¶109 The second reason, of course, is that these people argue that this is an independent judicial institution. Any decision made by the Security Council is inherently a political decision. It's never really a legal decision. So having the Court dependent on the Security Council on a question of such magnitude will undermine the perception that the ICC is an independent judicial institution. And I think that is a serious argument. We have, of course, under the current system, under the Rome Statute, as it is today, we already have a role of the Security Council. The Security Council has the competence to refer a situation to the ICC, which it has done once in the case of Darfur, which as you know is a very controversial decision. And is something which Fatou [Bensouda] and myself and many others have to explain over and over again; this is not something that the ICC decided, this is something that the Security Council decided. So that's the first role the Council already has under the Statute. The second role under the famous Article 16 of the Rome Statute is the competence of the Security Council to suspend an ongoing investigation. So the Security Council can, and it has been discussed, both in the case of Darfur and earlier on also in the case of Uganda, the Security Council can decide that, in the interest of peace (and that can mean a lot of things), in the interest of peace . . . the investigation must be suspended so the Council can directly intervene in the work of the ICC.

¶110 So this is where we are on aggression. The difficulty is clear. It's really about defining under what conditions this court can exercise jurisdiction. There is actually an agreement, which is something I want to emphasize very strongly, there is actually an agreement among states that the first [entity] to make a

determination should be the Security Council. And that is a big compromise in a way, on the part of those who are very skeptical about any role of the Security Council in general, as far as the ICC is concerned. So the question we are dealing with now is simply, “What happens if the Security Council does not make a determination? Can somebody else do it? Can the General Assembly do it? Can in the International Court of Justice do it? Can the Court itself do it? Can the Pre-Trial Chamber do it?” So that is the question.

¶111 This, as you can imagine, will take up most of our time, as far as the amendment part is concerned in Kampala. The other two issues will be relatively simple.

¶112 Now let me go to the second dimension, the stock taking dimension. . . . [I]n The Hague in November we identified four topics that we will discuss in the framework of this stock taking exercise. One is complementarity. Second is cooperation. Third is victims and affected communities and the fourth is peace and justice. And I think as you have also gathered today from the discussions this morning, these are really four of the central issues when it comes to the ICC and when it comes to international justice in general.

¶113 Complementarity is, perhaps, the key feature anyway of the International Criminal Court. The Court is, in a way, a default institution. The primary responsibility, to prosecute people who have committed the most serious crimes under international law, falls on national judiciaries. That is very clear. So the ICC only becomes active when national judiciaries are not able or not willing to do their job. So a very important task of the ICC, and I think an important effect that the ICC has had, is that it makes national judiciaries look at their own responsibility in a very different way. I think that is a slow process, but I think we are seeing that. And I think that is a very important effect that the ICC is having and will certainly have over the long term.

¶114 So we will discuss this aspect—there are complementarity situations that can be quite complex. I think Uganda is a very interesting complementarity situation, where you have on the one hand, of course, indictments against the senior leadership of the LRA. On the other hand, you have a willingness from the government of Uganda—that itself has referred its own situation to the ICC—has been willing to take on cases, probably cases only on lower levels than the most senior leadership itself.

¶115 And you have complementarity discussions outside the ICC. For example, in discussing the Goldstone report in the General Assembly, the General Assembly has called upon the parties of the conflict to conduct national investigations in order to bring people to justice that may have committed war crimes. So that is a complementarity discussion outside of the ICC, at least at this point, certainly.

¶116 Now the second topic is cooperation; that I think everybody who works for the Court would agree is absolutely crucial for the effectiveness and for the future of this Court. I think States are really called on to fulfill their obligation in a manner that is different from the way that they have done it in the past. Sometimes the impression that I get is that states feel like, “We have established this Court, we have drafted the Rome Treaty, we have ratified it. Actually, we are paying for it. And that’s it. You know, we have done our part and the rest is done by the Court.”

¶117 At the same time, we all know, as States, we all know that that is not true. This Court will never be effective and will never be operational unless it can rely on the cooperation from states. The most obvious example to illustrate this, of course, is the issue of arrest. This is not a Court that has a police force. This is not a Court that can execute its own arrests. That has to be done by States. And the record on arrests is not very good. We have had some arrests. We’ve had a number of surrenders. We have also had one person—Katanga—[who] appeared voluntarily in The Hague. But actually the first arrest warrants ever issued by the ICC have not been executed and it has been, well, it has been more than five years. And that was in the case of Ntaganda. So that is the second issue that we’ll discuss.

¶118 The third issue is the issue of victims. A really novel feature of the ICC is the role of victims, the participation of victims in the proceedings before the ICC, which has turned out actually to be a very big challenge. How, to what extent, to allow the participation of victims in the proceedings before the ICC is not a question that is finally resolved. But it is something that the Rome Statute provides for. It also provides for assistance to victims and restoration to victims. And that was actually one of the most interesting parts in a way of my trip to Uganda was to go to the north of the country, the area affected by the armed conflict, and to not only see projects funded by the Trust for victims, but also to interact directly with the victims in the affected communities. It is, I think, an extremely

interesting feature of this Court and I think it . . . raises a lot of questions that we have not really thought about in detail when we established this system. Because it means, de facto, that the Court is in a way an operational agency in the field, which is really not what a criminal court usually does, or is not the type of activity the court usually engages in.

¶119 Finally, we will talk about peace and justice, which is of course a highly political topic. You have probably all had these thoughts yourself and you have certainly read about the discussions that are ongoing, either in connection with Darfur or anywhere else. How do you square the demands of peace with the demands of justice? Now we all like to say that peace and justice go hand in hand and that they are complementary, they are not mutually exclusive, and all these nice things. And I also like to think they are true.

¶120 But the fact certainly is that in reality, that can be an extremely difficult challenge. And it can be very, very, very difficult to balance the demands of peace with the demands of justice. Now this is not something the ICC has invented as a problem. You know, this was a problem with the international tribunal, where you have a situation like Cambodia where it has long passed. But as Fatou has pointed out this morning, this is a Court that is active in situations that are still conflict situations. Or, you know, shortly after conflict, but certainly with a good chance of relapsing into conflict.

¶121 So we will discuss this in Kampala, and not in a manner that is conclusive. We will not walk out of Kampala and say, “Here, these are the guidelines that every mediator in every conflict in the world now has to follow,” because that is impossible. But we will put it on the table, and we hope we will have a very good and very open discussion. And we will identify the challenges. And actually I think this is the beginning of a discussion, not the end of a discussion. It is a discussion that is very often avoided because it is a very, very difficult debate. So the Security Council has never had a very open debate on an Article 16 situation. They have never had an open meeting where they decide whether they should or should not defer an investigation against the President of Sudan. Or whether they should or should not do this in the case of Uganda. So this I think will really be a springboard for future discussions, but it is very important that we put this on the table.

¶122 Now the overall goal [of the Review Conference] is that [the] states parties [must] agree that the Rome Statute is a good

treaty. We do not have a large number of amendments on the table. We had some proposals, especially on the jurisdictional parts. We had proposals to add the crime of terrorism, to add the crime of drug trafficking, to add nuclear weapons to the list of illegal weapons. Not easy proposals, as you can see. But everybody has agreed, and I think that's important, and the states that put these proposals on the table, after we discussed these suggestions. We understand that this is not consensual. We understand that this is difficult. We understand that this is not in the best interest of the Court right now, so we are happy to talk about this at a later [time]. I think that is a very important indication that there is a strong consensus that this is a good treaty.

¶123 Now not to say that there will not be changes in the future. I think there will be, but likely of a less spectacular nature than in the jurisdictional part of the Statute. I think people in general feel that the core crimes, and perhaps the crime of aggression, depending on where you stand, give the Court a very good body of law and there's not really a need to add on additional crimes at this point. So that, I think, is a very important state.

¶124 Second, I think the Kampala conference really gives us a unique opportunity to see where we stand seven years after, and to see—to discuss the question: what is the future of international criminal justice? I think the ICC is probably the biggest achievement that we have reached in the past fifteen or twenty years. And sometimes, we as states do not quite know what to do with it politically. I think we have not quite understood yet the effect that this Court has on the larger institutional landscape, so to speak. A lot of people like to treat it as sort of an isolated institution, that sits somewhere in The Hague and they do their thing and we get the press releases and we watch the webcasts on a good day. And maybe we don't. And sometimes, they find out, "Oh, that actually affects what I do on a daily basis." Unfortunately, that seems to be the case when something interferes or seems to interfere with whatever's going on in the Security Council, but I think we really have to broaden our thinking. And you really have to consider how we integrate the international criminal justice agenda into the mainstream of what we do. How does it relate to our other activities? How does it relate to development? How does it relate to our political activities? That is the discussion we will need in the future, and I hope Kampala will be a very good point of departure for it.

¶125 Finally, I think it is very important and very welcome to me that this conference takes place in Africa and that it takes place in a situation country. It was not a very easy situation to reach. There was some unease among some states that said, “Well, you know, that could become very difficult.” But I really think it offers a unique opportunity to be in a place—I was in Uganda last week, and I was truly fascinated by the level of internal discussion that people have gone through in that country. I really don’t think that has happened anywhere else in the world. Maybe that has happened in the U.S., but for very different reasons, I am not sure. But in Uganda you have these people that have experienced this, have thought about this, and have talked about this in a manner that I really did not expect that was really very, very impressive to me. I think [that] is the best illustration of the effect that this Court has. This is not about just putting some militia leader on trial in The Hague, and then maybe he goes to jail for fifteen years, and maybe he is acquitted. This really has a strong impact on the ground, and I think that is really important.

¶126 I hope that it . . . offers [an] opportunity to have a discussion in the region that is different at times than it has been in the past. But I have to say, I was also in Addis after my visit to Uganda and to the DRC. I also think the political discussion in Africa has really entered into a new phase. We had a very heated discussion, especially after last summer, after the indictment against the President of Sudan. Many of the things that people said would happen – that African states would leave the Court – they all have not happened. The President of Sudan has not traveled to any state that is a state party. And I think we are generally politically in a good place.

¶127 For those of us who were in Rome—David [Scheffer] is one of them, I am one of them, there are others—I think we know that this Court would actually not exist without the African states. There was a very strong push from Africa at this time to say, “We want this Court. We need this Court.” And politically today, the African states are still the heart and soul of this Court because they’re the biggest constituency. They are the biggest constituency that we have among the state’s parties, and maybe I can finish with an anecdote from my visit last week.

¶128 I was actually at the state house with President Museveni and we discussed the ICC, of course. That was the purpose of my visit. And one of his cabinet members said, “Yeah, but you know, it’s

really a problem that the ICC is targeting Africa.” And Museveni looked at him and said, “Well, but what do you want? We have all these problems here. And we cannot take the DRC and move it to Europe just to make it more balanced.” And for me, that was a surprising strong expression of support that he expressed and I think it was a very nice moment, the moment on which I want to finish my comments. Thank you very much.