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Atrocity Crimes Litigation: Year-In-Review (2011) Conference

Abridged Transcript

March 14, 2012

Special Tribunal for Lebanon, The Hague

David Scheffer, Moderator

Professor at the Northwestern University School of Law

¶1 Welcome to everyone. I'm David Scheffer, the Director of the Center for International Human Rights at Northwestern University School of Law in Chicago. I'm going to introduce everyone, and then I will commence with questions that are pertinent to the jurisprudence and practice of the major International Criminal Tribunals during the calendar year 2011. There will be some questions that slip into 2012, because there have been some significant events in 2012 that we need to be cognizant of and take note of.

¶2 (WHEREUPON, the *Lubanga* judgment was announced via video feed.)

¶3 Let us reconvene in the aftermath of that historic initial judgment by the International Criminal Court and refocus on 2011 at all of the international criminal tribunals and their associated mechanisms.

DIANE AMANN, ACADEMIC COMMENTATOR

EMILY AND ERNEST WOODRUFF CHAIR IN INTERNATIONAL LAW AT THE UNIVERSITY OF GEORGIA SCHOOL OF LAW

¶4 We have at this point six major tribunals operating, and I would submit there is a seventh, eighth, and ninth in operation or very shortly in operation. Are there any common things that we can think about as we see some tribunals entering retirement, and other ones, as the ICC, almost in their teen years at this point? I think we can see a constant trend of growing attention, growing aspirations, and growing expectations for the project of international criminal justice.

¶5 The son of the Shah of Iran has petitioned the International Criminal Court to pay attention to what he alleges are international crimes in Iran. For someone who grew up while the Shah of Iran himself was in power and remembers what was human rights and how unfulfilled aspirations of humans' rights were, how unadjudicated they were at the time that the Shah himself was in power, it's astounding to me to think that his son is now turning to that mechanism.

¶6 There is a sense now that there's somewhere we may get justice that didn't exist before. That seems to be a constant across the tribunals. I find it a very positive thing because with interest and awareness and expectations, comes, one hopes, some results.

¶7 The concern, of course, is that international criminal justice doesn't always deliver on those results, and making that delivery happen is incredibly difficult. The dockets continue to grow, the need for resources continues to grow; yet the pies continue to shrink or be divided into other tribunals.

¶8 2011 was also a watershed year because the UN Security Council is now interested in the International Criminal Court. It has referred a second case, and there appears to be movement toward a possible referral in Syria. So we see even the elites, the P5 of the international community, suddenly interested in the project of international criminal justice, seeing it as a tool for its ends. That, too, may have as many downsides as upsides.

¶9 Finally, we see that we are getting more expressive indications that sometimes international criminal justice can deliver. I think what we just saw, Judge Fulford's reading of the summary of the verdict in *Lubanga*, was incredibly powerful. It was concise, it was cogent, it was clear.

¶10 I suspect even in simultaneous translation, virtually everyone who listened understands that making children under 15 years of age kill other people is simply not permitted in the international community. And someone who is responsible for that, if he is identified, investigated, and prosecuted by international criminal justice, will be held responsible. That is the kind of message that is important to get out and that we are beginning to hear more often.

¶11 I would also add that it was really important in the *Lubanga* judgment to hear the chastisement of certain behavior in the course of that prosecution. There were millions of people listening to what was said about the conduct of the prosecution and what the judges felt was not tolerable, and the fact that multiple witnesses' testimony was excluded from consideration in the development of the judgment.

¶12 I find that a very healthy development, that the judges forthrightly acknowledged issues and demanded and recommended remedies for that. To me, that's a dynamic system that's moving in the right direction, and we should find that as encouraging as those of us, all of us, who care about human rights find encouraging a judgment against someone responsible for these kinds of crimes.

DAVID SCHEFFER

¶13 Hassan, one of your major judgments this year was the *Butare* judgment, a ten-year journey for your tribunal. Could you talk to us about the *Butare* case and the judgment and the significance of that particular conviction of Pauline Nyiramasuhuko—the first woman ever convicted on a genocide charge?

HASSAN JALLOW

CHIEF PROSECUTOR, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

¶14 You're right. It's been a ten-year journey for *Butare* basically because it involves the largest number of accused we've ever had together in a joint trial at the ICTR: six accused, quite a number of counts, I think almost close to 40 counts, with so many other particulars. When you have that body of accused, it has an impact on the proceedings in terms of scheduling, times of examination of witnesses, *et cetera*. Plus, the Chamber had to deal with over 1500 interlocutory motions and interlocutory appeals in that case alone. At the end of the day, the Trial Chamber

had a transcript of close to 130,000 pages to go over in two years in order to be able to write a judgment. I think all these things together made sure that it was a prolonged trial.

¶15 The lesson we drew was to stop any further multiple-accused cases at the ICTR. Since then, we've always gone with single-accused trials, and we did a lot more single-accused cases within the same period than we could accomplish through the multiple-accused system.

¶16 It's significant also in the area of sexual violence. It featured the only woman who was indicted by the tribunal, Pauline Nyiramasuhuko, with her son, Ntahobali, for sexual violence, among other counts. She was convicted of genocide and also crimes against humanity—rape as a crime against humanity—under Article 6(3) responsibility.

¶17 And, again, as it turns out, the evidence then discloses while the trial is going on that she actually ordered the commission of rapes. But because she had not been indicted for that, the Trial Chamber could only convict her on the basis of 6(3) responsibility. It's the sort of problem that prosecutors come up with in the course of these trials: your evidence discloses something a little bit more serious than you had originally thought, and there is no way of getting the judges to allow you to amend your indictment to bring it in line with the evidence because they are faced with completion strategy deadlines.

¶18 It's significant also that she's a woman who was convicted of sexual violence against other women, and I think it indicates that that sort of offense does not have any gender boundaries. It can be committed by men on men, women on women, and across as well. [The conviction] has been received very, very well in Rwanda, because her activities were quite notorious.

DAVID SCHEFFER

¶19 Let's change the subject completely to Special Court for Sierra Leone. During the course of 2011, you struggled with cases concerning contempt of court. Could you brief us a little bit on how that transpired and why that was considered so significant.

FIDELMA DONLON

DEPUTY REGISTRAR, SPECIAL COURT FOR SIERRA LEONE

¶20 As you mentioned, the Prosecutor filed a motion for the investigation of a number of people on the allegation of the commission of contempt of court under Rule 77 of our Rules of Procedure and Evidence. The motion and the information contained basically relates to the AFRC case, which is a case that's actually completed before the Special Court.

¶21 There were three indictees in that case. They were all found guilty and they're currently serving their sentences in Mpanga Prison in Rwanda. The information that was received by the Prosecutor was that two of the prisoners in Rwanda, in conjunction with two individuals in Sierra Leone, over a period of time in November, contacted protected witnesses, visited those witnesses, and indicated that in exchange for money, they would request that they would recant their testimonies.

¶22 In this particular case, the Trial Chamber did rule that they had reason to believe that the aforementioned persons possibly committed contempt of court under Rule 77 for attempting to bribe a witness and also for interfering with the administration of justice. Under our rules, it's only an independent investigator that can investigate contempt rather than, I think, the *ad hocs*, at which the Prosecutor can also. An independent investigator was appointed, and the independent

investigator submitted the sealed report to the Chamber. The Chamber issued an order in lieu of an indictment, and at the initial appearance, one of the individuals pleaded guilty to the charges contained in his indictment. We will see what the outcome of the trial is.

¶23 One of the challenges that our institutions is facing, and I'm sure ICTR is probably the same, and Yugoslavia, is we're moving towards completion of our mandates. Thankfully, we have now residual mechanisms, which do have the power, if necessary, to investigate and to prosecute contempt cases. It is very important at this stage in the history of the tribunals that our witnesses do not feel abandoned. If there are credible charges that people are attempting to interfere with witnesses, it's very important that the institutions use the mandates that have been conferred upon us to deal with those.

DAVID SCHEFFER

¶24 What I'd like to do now is jump to Cambodia and to Prosecutor Andrew Cayley. Andrew, we're going to be a little unorthodox calendar-wise here. There was a tremendously important judgment handed down on February 3rd of 2012, by the Supreme Court Chamber in Trial Number 1 against defendant Duch, former head of the Tuol Sleng prison in Phnom Penh.

ANDREW CAYLEY

INTERNATIONAL CO-PROSECUTOR, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

¶25 Ultimately, the Trial chamber found that over 12,000 men, women, and children perished in that place. Duch was found guilty of the crime against humanity of persecution. He was also found guilty of a number of grave breaches of the Geneva Convention. Duch appealed on the issue of personal jurisdiction.

¶26 The personal jurisdiction of the court is such that it was established, and I'm reading now from Article 2 of the law on the establishment of the court: "To bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations," *et cetera*, including of Cambodian law.

¶27 Now, at the beginning of the trial, in accordance with the normal practices of all the international courts, the Accused are given the right to make jurisdictional challenges. And at the beginning of his trial, Duch did not make such challenge. Then at the end of the trial, he essentially made a challenge to the personal jurisdiction of the court, saying, "Okay, yes, I'm responsible, but I'm actually not within the personal jurisdiction of this institution because I'm not senior nor one of those who are most responsible." And within the trial judgment, the judges simply said, "Actually, you're too late. But, in any event, we will examine this issue and we find you to be one of those most responsible even though you are not one of those who are most senior."

¶28 In essence, what was found by the Supreme Court Chamber is that the Court essentially has jurisdiction over two categories: first of all, senior leaders who are most responsible; and then others who are not senior leaders, but are most responsible. They also found that the issue of personal jurisdiction was non-justiciable; that it was a matter of discretion for the co-prosecutors and the co-investigating judges and could not be examined by the Trial Chamber or by the Supreme Court Chamber. The only exception to that was instances essentially of bad faith. So his appeal was dismissed.

- ¶29 Now, the OTP appealed a significant number of issues. The most important were: we argued that the Trial Chamber had erred in subsuming all of these crimes against humanity within the persecution charge, and that the Trial Chamber had erred in respect of sentencing.
- ¶30 At the end of the trial, in the Trial Chamber's determination, Duch was sentenced to a period of 35 years, reduced to 30 years as a result of a period of illegal detention under the jurisdiction of the Cambodian government. He had already served a period of 11 years by the time we got to the Trial chamber judgment, so he ended up with a sentence of 19 years. And I found it very difficult trying to explain to public gatherings why he had only received 19 years of imprisonment.
- ¶31 But what I had welcomed at the time was the fact that the Trial Chamber, which included Cambodian judges, had determined that there had been a period of illegal detention, because this was illegal detention essentially under the direction of the Prime Minister. In Cambodia, there are many allegations of government interference and patronage of judges. So for Cambodian judges to make this kind of independent determination was something that we welcomed very much.
- ¶32 The Supreme Court chamber in its judgment gave a life term with no reduction for either the period of illegal detention or any mitigating circumstances. They adopted the description that we had given on appeal of the S-21 security camp as a "factory of death."
- ¶33 I was personally obviously disappointed that they did not give any credit for the period of illegal detention. There was a significant outcry from the nongovernmental organizations. In essence, the reason given by the majority of the judges—there was a dissent by two international judges—was that it was not the Extraordinary Chambers that was responsible for this period of illegal detention; thus, they could not give a remedy.
- ¶34 They also concluded that it was not an abuse of process that he was detained illegally for that period of time. I think that's a shame, because one of the other functions that we have in Cambodia is to try and build capacity within the domestic legal system. We don't yet have a written judgment; everything I'm saying is based on the oral judgment of the court.
- ¶35 Briefly, I'll talk about the civil parties. One of the difficulties that arose was that there was a two-part approval process to be admitted as a civil party. The Trial Chamber in 2010 made an initial determination on whether individuals could be civil parties based on quite a low threshold. Then at the end of the judgment, they made another determination and re-examined all of the evidence to decide whether or not somebody was qualified, whether or not they could show these special bonds of affection and dependence with the direct victim. And, unfortunately, people who were admitted during the first phase of consideration ended up falling out in the judgment.
- ¶36 The Supreme Court chamber addressed that issue and found that the Trial chamber hadn't communicated this process effectively to the civil party community and allowed people to present further evidence during the appellate process, uplifting the evidence that they had originally offered to establish their claim. I think it was another nine civil parties were admitted.
- ¶37 I think it was a good result. I think it satisfied the victim communities. I've been criticized by NGOs for essentially reacting to public outcry. I don't see any problem with that at all. I think that's what prosecutors do. It's a matter of public policy that victims' needs should be addressed within the boundaries of law and procedure of the Court.

DAVID SCHEFFER

- ¶38 I'm going to jump to Mark Harmon and ask him to describe to us the perspective within the prosecutor's office of the capture of Ratko Mladic and of Mr. Hadzic last year, the last two

indicted fugitives of the Yugoslav Tribunal, and also to comment on the denial of the severance motion in the Mladic case.

MARK HARMON

SENIOR TRIAL PROSECUTOR (RECENTLY RETIRED), INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

¶39 Of course, when Mladic and Hadzic were arrested, there was euphoria in the tribunal, as you can well imagine. One of the significant things about the arrest of Hadzic and Mladic is we at the Yugoslav Tribunal indicted 161 people and we arrested 161 people—with the exception of some deaths. But, ultimately, everybody who had been indicted met some form of justice, whether it was Divine justice or whether it was Yugoslav justice, they met justice.

¶40 Now, let's talk about the Mladic severance motion. Mladic was indicted for four separate crime bases. The prosecution then sought to sever the four crime bases into one trial involving a prosecution of Mladic for the crimes committed at Srebrenica and have a second trial with the three remaining sets of crimes in a second trial.

¶41 The prosecution asserted the following in terms of its application for severance: Separate trials would maximize justice for the victims, would not prejudice the accused, the separate trials could be managed more efficiently, and then it used some cryptic language. It said severing the second indictment would better meet, quote, "unforeseen contingencies," close quote, should Mladic's health deteriorate.

¶42 As you can imagine, the defense vigorously opposed the application for severance. It said essentially that Mladic would not have adequate time to prepare for the second trial because he would be engaged in the first trial, and, because of the limited resources that were available to him, that would disadvantage him. He also asserted that there would be a repetition of witnesses who would have to come in the cases. For example, a witness would come and describe who he was and what his authorities and competencies were in one trial, and the witness would have to be recalled in the second trial.

¶43 Now, the Trial Chamber had to balance the competing allegations. The Trial Chamber rejected the prosecution's motion for a severance, and it found that there would be prejudice to Mladic if the cases were severed, it could render the trials less manageable and efficient, and the two trials would unduly burden the witnesses who would be called in both trials.

¶44 That is essentially the brief version of what the decision was, and in that opinion as well, the Trial Chamber chastised the prosecution for being cryptic, essentially. It said that it would not consider Mladic's health as a factor since no information on his health had been presented to the Trial chamber; there had been no medical reports presented. It said if unforeseen circumstances meant that it's better to conclude with a judgment of conviction or acquittal in at least one smaller trial, it should have argued the point directly and not cryptically.

DAVID SCHEFFER

¶45 Do you have any personal opinion about whether that was a wise judgment by the Chamber?

MARK HARMON

¶46 My personal opinion is I can agree with it. I frankly think that the Trial Chamber was correct in terms of assessing the burden on the defense in terms of managing a pre-trial case at the same time you're running a case.

ANDREW CAYLEY

¶47 It's interesting listening to what Mark says because all of the reasons that they've given why they reject the severance are actually many of the reasons why we were urging the court to have a more expansive first indictment.

¶48 In Case 2, because of the size of the indictment, the court has severed the case. In essence, what the court has done is it's stated that there will be a series of minitrials, and the first minitrial will include all of the linkage evidence—so all of the evidence linking the accused to all of the crimes within the indictment—but the only crimes that will be addressed are [those that took place in the course of committing the first major crime, forcible transfer].

¶49 And one of the difficulties I had with this is: how can you hear all of the linkage evidence for all of these minitrials, come to a determination only on the forcible transfer, and then transmit all of that evidence into the second minitrial? I don't see how that can be done if you look at all of the jurisprudence of all of the courts. There's no mechanism, particularly where it involves acts and conducts of the Accused, and there's been no answer from the bench as to how we're actually going to do this.

¶50 Secondly, we're going to be calling witnesses back time and time again simply because witnesses often can address more than one particular crime. So they will come in and talk about forcible transfer, but they can actually talk about experiences in a security camp in the Northern Zone. We can't ask questions about the crimes concerning the security camp in the Northern Zone, so we've got to bring them back.

¶51 So whilst at the time I understood that there needed to be some form of severance because of the age of the accused, my recommendation was, bearing in mind that the donors are sick and tired of this court and I don't think there will be a series of minitrials—I think this will be the only minitrial that actually takes place—was that we should include within that first minitrial at least one security camp, one forced labor site.

DAVID SCHEFFER

¶52 Iain, in the year 2011, this court rendered a decision on the crime of terrorism, and the late Judge Cassese was deeply involved with that decision, and we honor him today.

IAIN MORLEY

SENIOR TRIAL COUNSEL, SPECIAL TRIBUNAL FOR LEBANON

¶53 First of all, what a great loss last year in October. He is a great loss, and he is sorely missed.

¶54 With regard to the crime of terrorism, you may all be aware that in January of 2011, there was a hearing in the Appeals Court. There is a provision under Rule 17*bis* which allows the Pre-Trial Judge to refer to the Appeals Chamber questions of law and to seek the guidance of the

Appeals Chamber as to what the law is here at the STL. We are required to apply not international law as is more common at the other tribunals, but here it is domestic Lebanese law.

¶55 And, of course, the question arises: Is there a conflict of any sort with regard to international law norms, or are there any lacunae in the domestic law which can be filled by reference to international law? And where there is a conflict, where there are lacunae, what should be the prevailing approach? To apply domestic norms? To apply international norms? Or to apply essentially the principle everything should be resolved in the favor of the defendant?

¶56 As a result of the Rule 176*bis*, questions were referred to the Appeals Court for consideration. There were a lot of questions, one of which was: what is terrorism internationally? What is it we are dealing with as a crime here at the STL?

¶57 It was apparent that Judge Cassese, lively of mind as he has always been, was curious to see whether or not terrorism might be definable internationally for the benefit of the international community. So the 176*bis* application became, to some extent, an opportunity to consider this.

¶58 And in the end, the judgment which was rendered on the 16th of February of 2011 found that establishing a political motive may not be necessary. It could be contextual, it could be part of the circumstance of what has happened, but it is not a necessary element that needs to be proved in order to establish that a crime is terrorism.

DAVID SCHEFFER

¶59 Could you just give us an update on the issue of trials *in absentia* before the Special Tribunal for Lebanon?

IAIN MORLEY

¶60 Certainly, David. There is a provision within the rules at the Special Tribunal for Lebanon to hold trials in the absence of accused, and a decision was rendered earlier this year that there will be a trial *in absentia* in respect of the indictment.

¶61 As a result of the decision to proceed to a trial *in absentia*, there has now been an appointment of defense counsel, and there are four defense teams *in flagrante* as we speak. And they are distinguished counsel. So what we do know is that people who know what they're doing are here and they are about their business.

¶62 It is also useful to perhaps reflect on how the trial *in absentia* provision over in Lebanon is, generally speaking, regarded as a formality. It is almost unheard of in Lebanon for a trial *in absentia* process to result in an acquittal. It is a formality, which is generally done on the face of the papers.

¶63 But we are embarked upon a different sort of exercise under the heading "Trial *in Absentia*," and how that exercise actively plays out as a matter of procedure, as a matter of arguments, as a matter as to what can properly be put forward by the defense, we don't know yet.

HASSAN JALLOW

¶64 Of course, the ICTR and the ICTY statutes don't provide for trials *in absentia*, and that is part of our problem. When you have a body of fugitives whom you can't arrest, and you are losing your evidence, the witnesses are dying, some cannot be traced, *et cetera*, what do you do, given that you can't try them *in absentia*?

¶65 What we did was to come up, with the approval of a plenary of judges, with the new Rule 71bis, which allows the Prosecutor to call his witnesses in the absence of the accused person, have them subjected to cross-examination for the purpose of preserving the evidence. And we've gone through that process in respect of three of our top fugitives. The Judges have now had to restrict the limits within which [defense] counsel can do that. That's the way we've been trying to address this problem of having to maintain our cases, preserve our cases, given the fact that we cannot have trials *in absentia*.

DAVID SCHEFFER

¶66 Very interesting, Hassan. I want to jump to Caroline here. Could you, from the defense side, just speak briefly about the importance of the issue of exculpatory evidence.

CAROLINE BUISMAN

DEFENCE CONSULTANT, INTERNATIONAL CRIMINAL COURT

¶67 Yes. Thank you. On exculpatory, obviously we have two issues. There's the disclosure application on the prosecution, and the ICC goes a step further, because, actually, the prosecution has the obligation to investigate incriminating and exonerating circumstances equally.

¶68 If there's exonerating evidence, what do you do? In *Lubanga*, it is a particularly serious situation because even the judges couldn't actually look at it, so that's also why it led to a stay. We had the same problem, by the way, in *Katanga*.

¶69 As you probably are aware, in *Bizimungu*, this actually led to an acquittal. They made it very clear in the case of *Bicamumpaka*, that on one issue, if not for the late disclosure, they would have found that there was evidence to convict him on.

¶70 In the ICC, this is actually the complaint in absolutely every case: the defense complains that the prosecution does not actually investigate exonerating circumstances equally. I think that's more the problem than the disclosure issue. Maybe it's not very realistic to expect the Prosecutor to look for evidence equally that incriminates as well as exonerates the person that they are prosecuting. I thought this was a really good idea to have someone more neutral, but, I mean, maybe neutrality and prosecuting is not the easiest match.

¶71 But I do think up until today, this has been a real failure. The Prosecutor's never gone to Aveba, which is where my client lives. In *Sangu*, where the defense was of the view that if you have a radio operator, where do you start? You start at the radio station to find transcripts. But they didn't do that. Instead, they relied on what witnesses had said.

ANDREW CAYLEY

¶72 Although the ECCC has many problems, it's almost eliminated the problem of exonerating evidence. Why? Well, first of all, because the investigation is done by an investigating judge. Because he's not part of the prosecution, he or she can do that completely independently. Now, whether or not that really works in practice is another question.

¶73 But more importantly, at the ECCC, the defense actually have access to the entire case file, which means that you don't end up in the situation that often arose at ICTY where exonerating evidence exists for your case, but you don't actually know it's in the system.

DAVID SCHEFFER

¶74 I would like to return now to Sara Criscitelli from the International Criminal Court and ask her about the experience the Court had during the year 2011 with the referral by the Security Council of the Libya situation to the Court.

SARA CRISCITELLI

¶75 If I can detour a little bit, the prosecution doesn't have its own police force. It has investigators, but it doesn't really have authority to enter into national jurisdictions and investigate. We do it with the consent and the approval of the State on which the evidence is located, and we are bound by that.

¶76 So just as a quick example, we can't just go to radio stations in Kenya. We need the consent of the Kenyan authorities. We have to make a formal request for assistance, and the Kenyan authorities have to approve it. So, you know, a private defense lawyer has, oddly enough, a lot more leeway in terms of investigating than the prosecution does in this international context.

¶77 Back to Libya, the Security Council resolution obligates states to cooperate, and that is always a plus, and that makes the availability of assistance that much greater and certainly quicker than the absence of an obligation by the Security Council. Nonetheless, the Security Council cannot guarantee that life will be safe for investigators within Libya. So the Security Council referral is both a plus because it provides something of assistance, and a little bit of a negative because there's political pressure and an assumption that with the Security Council referral, you can get what you need to get.

DAVID SCHEFFER

¶78 I would like to turn to Diane, if I might, on a very related issue that involves Libya and Sudan and Kenya. Has the African Union evolved in its perspective with regard to the International Criminal Court, or are we still today where we were a year ago?

DIANE AMANN

¶79 Well, I think we're clearly not where we were a year ago, in part because we have two more situations in Africa since a year ago. [The] concentration of matters in Africa in the last, say, two years or so, has given rise to a critique that, to quote Jean Ping, who was the [African Union] point person on this, had been called "discriminatory" and even "neocolonialist"; that this was yet again the Western powers creating and maintaining and through things like Security Council referrals, even pushing an Africa docket to the exclusion of everything else. And I must say that the Prosecutor's Office and the Presidency of the ICC failed for a long time to have any response to that whatsoever.

¶80 In the last half-year or so, the ICC establishment has made inroads into that critique. You saw about midyear of last year the media finally understanding that there were two sides to that argument, at least. And so suddenly you started seeing the media saying, "We actually bothered to contact a spokesperson from the Court who had a response." And the response was, in various ways that evolved and, I think, got some traction, was that the reason we're in Africa—in

addition to the very legalistic reasons of self-referral and Security Council referral—[is that] there are bad things happening in Africa.

¶81 Something like two-thirds of the states in Africa are States Parties. They want to be in the Court. They want international criminal justice. The people that we're going after are the people we think are most responsible for these offenses, and we're doing it on behalf of the people in Africa who are suffering from this.

¶82 Would it be nice to be elsewhere? Yes. But it's not wrong to be here. And I think we began to see that moving to at least people saying, "Well, gee, maybe I have to think about this issue more." Mr. Jean Ping was not re-elected to his position at the end of last year by the AU. He almost lost to a South African woman who ran against him. So that suggests to me that within the AU itself, there is a rethinking among its member states of whether this critique is something they want to advance.

¶83 Now, it also must be said that the fact that the new incoming prosecutor of the ICC is herself a native of Gambia has to have changed the calculus somewhat. It is much harder if someone with that background says, "We need to be in Cote d'Ivoire." And then she delivers the head of state to the detention center here before we even know as a public matter that the man has been indicted. That suggests to me perhaps the beginning, or at least the opportunity for a beginning, of a new narrative in the sort of very old story that we've been hearing in the last two years about Africa versus the ICC.

DAVID SCHEFFER

¶84 Thank you, Diane, very much. Fidelma, could you talk to us about the WikiLeaks episode of the Special Court for Sierra Leone in 2011?

FIDELMA DONLON

¶85 Broadly, the law, Rule *92bis* of the tribunal, allows a chamber to admit as evidence information basically if it does not go to the proof of the act or conduct of the accused, if it's relevant for the purpose for which it's been submitted, and, finally, if its reliability is susceptible to confirmation. I believe in December of 2010, the *Guardian* newspaper published a series of cables originating from 2009 from the U.S. ambassador in Liberia to Washington, which had been picked up from WikiLeaks.

¶86 And subsequently in January of 2011, the defense filed a motion before the chamber to reopen on the basis of *92bis* for the admission of the two WikiLeaks cables, and, in addition, I believe it was an article from a Liberian newspaper called the *New Democrat* that contained an apology by the U.S. ambassador in Liberia to President Sirleaf Johnson.

¶87 The defense put it to the chamber that, "In terms of relevance, the cables and the apology support the defense position that the prosecution of Mr. Taylor is, in fact, political, and his indictment was deliberately selective. It will be recalled that lead defense counsel submitted during the defense's opening statement that Mr. Taylor was only indicted and arrested because of the U.S. [Governments'] interest and pressure."

¶88 The outcome of the *92bis* motion was that the Chamber have agreed to admit the two WikiLeaks cables that were contained in the *Guardian* newspaper, but they did not agree to admit the *New Democrat* article. The information is admitted, but, of course, we have to remember that under *92bis*, it's susceptible to confirmation.

DAVID SCHEFFER

¶89 Sara, we're going to turn our attention to Kenya. The concept of a network among alleged perpetrators was at issue and the relationship between what constitutes a network and what constitutes the more conventional type of entity we look to for planning purposes and organization of some character all came to a decision in the Kenya case.

SARA CRISCITELLI

¶90 At the time we requested authorization to investigate on the issuance of the arrest warrants and at the confirmation stage, Judge Hans-Peter Kaul disagreed with the concept that an organization that lacked certain state-like attributes could suffice under the Statute. The prosecution is taking the position that it says "state or organizational policy," so you start with the language of the statute, which distinguishes between something that is state or state-centered and something that is not state-centered. One of the issues is going to be how much of this is jurisdictional, how much of it is statutory interpretation in terms of the elements of the crime, and how much of it is actually sort of proof of the elements at the trial.

DAVID SCHEFFER

¶91 We had a lot of discussion in Kenya about the course of complementarity with the Kenyan government. Can you bring us up to date of what happened during 2011?

SARA CRISCITELLI

¶92 What the Court said was right now, you haven't shown us anything. You have stated an intent, you have produced your laws, but we don't actually see any movement. So right now, when we assess the jurisdiction of this court on admissibility, we don't see any ongoing proceedings.

CAROLINE BUISMAN

¶93 It's not that there's been no actions. They have actually tried many people for post-election violence, so it's not that there's only these six suspects. So that's, of course, the question: whether or not we should have this view on admissibility, that it's for the ICC to decide who they should prosecute. Maybe they want to prosecute someone else.

¶94 On the issue of organization, well, it's pending, so I also don't want to go too far, but I do think that Kaul looks at it from a structure point of view. Indeed, he thinks there needs to be state elements, but he looks at the structure, whereas if you look at the majority decision, it's more victim-oriented. The defense takes the view that it should be more looking at the structure because the drafters of the ICC Statute discussed, for instance, crimes like terrorism and Mafia sort of crimes, and we take the view that they meant to exclude those.

DAVID SCHEFFER

¶95 The role of victim participation was dealt with in certain proceedings before the Special Tribunal for Lebanon in 2011. I'm just wondering if you could explain it in the context of

Lebanon and how important it is for the people of Lebanon that there is victim participation in the Special Tribunal for Lebanon.

IAIN MORLEY

- ¶96 There is an office which is designed to deal exclusively with it. It's run by a splendid chap, Alain Grellet, and the extent to which it's of interest to the Lebanese is probably reflected in how much Twitter traffic there has been. People are quite interested in what we're doing here.
- ¶97 There's been quite a lot of grass-roots response to the work that's taking place here. There's a lot of Lebanese press interest in what we're doing which goes beyond simply the assassination of Hariri, but it also goes to political ramifications and issues as to how the victims are being dealt with, and outreach is a big issue.
- ¶98 Where we are at with regard to victim participation is at a nascent stage. Recently there has been the filing of applications to be considered as victims, and we don't know yet what the outcome of that is. There's been a rule change with regard to an aspect of victim participation and whether a person can be a victim and also a witness within the proceedings, or at least the ease with which that can happen.
- ¶99 And we anticipate in time in the courtroom there will be victim participation teams of lawyers. We don't know how many, but we anticipate at least two to represent their interests once they have been identified as to who they are. How the participation of victims' counsel will work, we don't know. It's all new.

ANDREW CAYLEY

- ¶100 The biggest problem is actually not the law; it's the modalities of how they actually participate in the proceedings. And what I mean by that is this argument that we've heard quite a lot from defense lawyers in Case 2 that they are a second arm of the prosecution.
- ¶101 Because victims are in the courtroom and participating in the process, it's encouraged a lot of members of the public to come who would not have otherwise come. I wouldn't say it was a free-for-all, but certainly everybody wants to speak, and it led to elongated proceedings where you had multiple civil parties often making the same point and taking up a lot of court time. Now there are co-lead lawyers who essentially manage the submissions of all of the civil parties and do most of the examination of the witnesses in order to prevent duplication.
- ¶102 Coming in to work in a civil law system as a common law lawyer, I do think it has its value. At the end of the appeal of the first case there was a lady from Paris [who] had had essentially fled from Cambodia in 1975 and had had to leave three-quarters of her family behind, including her sister and all of her children. They all perished in S-21. She's come back 30 years later to try to see some kind of justice for her sister.
- ¶103 She came up to me afterwards at the end of the appeal and said, "Well, you know, it's 30 years on, but I actually do feel, that I took part in the process, I really was here for all of it, I had a lawyer representing my interest, I was able to speak to the court, I feel I can now actually put this behind me."
- ¶104 So for all of the challenges of the civil party victim system, there is an enormous benefit to it, and I think it addresses many of the criticisms of the ICTY, for example, where victims were essentially instruments of the prosecution and nothing else.

DAVID SCHEFFER

¶105 Fidelma, I would like to ask about the completion strategy for the Special Court for Sierra Leone. Could you give us a sense of what is the future of this court once we have the trial judgment on Charles Taylor?

FIDELMA DONLON

¶106 In terms of process and what's happening, really we have three predominant areas of work. Obviously our priority is the proceedings against Mr. Taylor, and then subsequently, as I mentioned this morning, we do have some contempt proceedings that will be going to trial after judgment in that particular case. But at the same time, we are managing the process of closure and transition to our residual mechanism. I think unlike ICTY and ICTR, we don't have an in-built period of transition.

¶107 Effectively what has been agreed by the governments of Sierra Leone and the United Nations is that there will be a residual mechanism with effectively a small office in The Hague and a small office in Freetown to manage the ongoing residual functions, which are basically the same as the residual functions that have been defined for the *ad hoc* tribunals.

¶108 The government of Sierra Leone and the United Nations, similar to the constituent documents of the Special Court, have agreed on the structure and the mandate of the Residual Special Court by signing effectively a bilateral treaty.

DAVID SCHEFFER

¶109 Mark, could you give us an update as to what transpired during 2011 and the last couple of months on the Seselj case.

MARK HARMON

¶110 As an issue of self-representation, he squarely brings into the issue of whether or not self-representation is appropriate in these cases. There's a long history which I won't comment on but should be looked at if people want to study the issue of self-representation.

¶111 In brief, he went on a hunger strike when counsel was to be imposed on him. In the backdrop of that was that Mr. Milosevic had died in prison. He was permitted then to represent himself; he went off his hunger strike.

¶112 He has been a vexatious litigant, to put it mildly. He is disrespectful of the parties, he's contemptuous of the witnesses. He has been prosecuted twice for revealing the identities of protected witnesses in books. He's disrespectful to the judges. If I conducted myself in the manner he conducts himself in the courtroom, I would be denied a right of audience, very frankly. That's my view.

AUDIENCE QUESTION

¶113 Something that hasn't been brought up to the surface, but has been alluded to by a number of the speakers, is budgetary issues. I wonder if, looking ahead, this may be something that is raised perhaps more by the defense, or perhaps it may even become an issue that the prosecution

has to address straight on in light of the budgetary issues that are affecting at least the ICC and also with respect to the completion strategies.

HASSAN JALLOW

- ¶114 Well, briefly, with regard to the firstly *ad hoc* tribunals, I think New York has been quite sympathetic where we've been able to identify and justify the need. We have money to secure the necessary resources and we're able to carry out our activities. But clearly there is a lot of impatience there with our continued existence, and I think the general view there is that it is time the tribunals close and that any successor institution should be a very, very lean mechanism.
- ¶115 But where we've been able to identify the need and really justify it, I think New York has been quite sympathetic. I'm not sure that's been the case with the Special Court for Sierra Leone.

FIDELMA DONLON

- ¶116 As Prosecutor Jallow has indicated, the Special Court for Sierra Leone together with ECCC and, I believe, STL, our statute provides that we're not funded from assessed contributions, but, in fact, we're voluntary-funded courts, and it is an understatement to say it's extremely difficult to continuously fund-raise and secure the donations that we require for our operations.
- ¶117 The global recession without a doubt had an impact on that, because we noticed a marked drop in not only our number of donors, but how much states could contribute to the extent that in October of 2009, we had to invoke the statutory provision that if there isn't sufficient voluntary funds in our bank accounts, that we can ask the Secretary General to apply to the General Assembly for an emergency grant, which is what we have to do.

DAVID SCHEFFER

- ¶118 I would like to start, actually, with Mark Harmon again, because I do think we need to talk about Haradinaj.

MARK HARMON

- ¶119 The Haradinaj case was a case where witness intimidation was a huge issue in the case, and during the case, there were two critical witnesses. The prosecution made major efforts to secure their attendance in court. They made applications to the court to extend time to secure their attendance. The court granted some requests for extensions, but then said, "No more." The court also concluded that the prosecution case was over because the prosecution had been given so many hours in which to present its case.
- ¶120 As a result of that, Haradinaj was acquitted. The prosecution appealed on the acquittal, contending that the proceedings had been undermined, they weren't fair to the prosecution. There was a reversal on the basis of this acquittal, and the case then came back to the Trial Chamber. The Trial Chamber denied an application by the defense to limit the partial retrial to the testimonies of two witnesses and two witnesses only. The defense appealed that, and Appeals Chamber concluded that the Trial Chamber hadn't abused its discretion. It said that if there is a limitation put on by how much evidence can be permitted in the trial itself, that

direction should come from the Appeals Chamber. Since there had been no direction from the Appeals Chamber, then the conclusion was that the case would be retried on evidence beyond the two witnesses' testimony.

DAVID SCHEFFER

¶121 Andrew, I know that you've given a lot of thought and attention to what's called Cases 3 and 4 before the Extraordinary Chambers, and we would be remiss if we did not address that because they were prominent issues during 2011.

ANDREW CAYLEY

¶122 In April of 2011, I was informed by the co-investigating judges that the investigation in Case 3 had come to a completion and that I would receive Notification of Conclusion. The case had not been investigated; it had simply been shut down to meet the political imperative of the government under the Rules.

¶123 And I want to emphasize here, this was a very difficult period for the court. I found essentially refuge and shelter within the law and the rules. I made it absolutely clear to the press, to all of my staff: we will simply follow the law and the rules; that's the only thing we can do here.

¶124 I had a 15-day window in which to apply for investigative action by the judges on the conclusion of the investigation, so I did a rapid review of the case and then filed the investigative request.

¶125 At the same time, it had been the prior practice of the court, of the investigating judges, to publicize the crimes under investigation. Why? So that the civil parties could essentially work out what crimes were being investigated to see if they were actually affected by these crimes, whether they themselves were victims or whether they had relatives that were victims.

¶126 They had not done it on this occasion. They deliberately concealed the disclosure of the crime site, so I went public under the Rules in order that the civil parties would know what was being investigated so people could make application, and, secondly, so that the public were informed.

¶127 I was immediately threatened with contempt proceedings. That was subsequently reduced to an order to retract the statement that I had made and withdraw it from public domain. I immediately appealed that to the Pre-Trial Chamber on a number of grounds, and that essentially bought me a lot of time, because it remained in the public domain.

¶128 I was entitled under the Rules to actually give a summary of the introductory submission, which the Office of the Co-Prosecutors had forwarded to the investigating judges to start the investigation. I did try and stay within that framework, but, as I say, the investigating judges ordered me to retract. I applied for a stay of that order, which I was granted, and then appealed the decision.

¶129 The application for investigation that was made in Case 3 was rejected by the Co-Investigating Judges on very spurious grounds. Very aggressive language started to be used in confidential orders being issued, essentially threats being made in judicial orders. I wrote a personal letter to the International Investigating Judge and asked him essentially to tone the language down because all of my staff were reading this, and received back from him a letter, frankly, which I won't repeat here, but certainly indicated that he was going to step things up rather than bring the temperature down.

¶130 Eventually, what has happened—and I can't go through all of the law—but there was a lot of, to be frank, bogus law being used to justify decisions. This is no secret. It's out there in the public domain, and this was in response to external pressures to close these cases down.

¶131 What has now happened is the International Judge concerned resigned in October of 2011. We now have a new judge who has basically gone back through all of this work of 2011, and he is trying to now remedy all of the injustices that took place. But a very difficult year and certainly a year that makes one reflect on these kinds of courts.

AUDIENCE QUESTION

¶132 One of the major developments this year was the failure to confirm charges in *Mbarushimana* and in the *Kenya* case, and, in particular, in *Mbarushimana*, the chastisement, I guess, that was handed down by the Pre-Trial Chamber with respect to the reliance on secondary source material when trying to confirm charges. I'm just wondering if the panel have any opinions on the widespread use of secondary material at this stage in the proceedings.

SARA CRISCITELLI

¶133 It is really important to understand how complicated it is to offer non-anonymous statements of witnesses. What you have to do when you do that is set up a full system of protection, the equivalent of the Witness Protection Program.

¶134 It is a lifelong possibility, it is expensive, it is disruptive to the lives of the victims, and if you don't know that charges are going to be confirmed, it is a huge price for the ASP that funds this, for the Office, and for the witnesses themselves, to have to pay for something that may not get off the ground.

¶135 The position of the Prosecutor—and I assume the next Prosecutor will adhere to this—has always been he will give up a case, he will lose a case, rather than jeopardize a witness. So, you know, it's a balance, and where the balance is drawn, where the lines will be drawn, is up to the Appeals Chamber.

CAROLINE BUISMAN

¶136 At this moment, it's very unclear for all of us what exactly is the scope of confirmation. It's not clear what the standard actually means, it is not clear how far the defense can actually go in challenging, and this has been very clear both in *Kenya* and in *Mbarushimana*.

¶137 And what I think is very regrettable is that we have an appeal for *Mbarushimana*, but not for *Kenya*, because we actually have the same issues. We also have sought leave to appeal on the scope of the confirmation, and it would have been very nice if the Appeals Chamber could once and for all settle this issue so we know it for the future.

¶138 In *Katanga*, we actually did not even want this confirmation hearing. We wanted to waive it and we couldn't. We were bound to have it for three weeks and we didn't challenge it. So then it delays the whole procedure as well. Maybe there should even be a choice if you can have a confirmation or not.

DAVID SCHEFFER

¶139 I want to thank everyone here for their attendance, I also want to thank the Special Tribunal for Lebanon for hosting us today.