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Pieter H. F. Bekker

David Stoelting

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# ***The ICC Prosecutor v. President Medema: Simulated Proceedings Before the International Criminal Court***

Pieter H. F. Bekker\*  
and David Stoelting\*\*

On July 18, 2000, as part of the Annual Meeting of the American Bar Association, an all-star cast of American and English lawyers gathered in the Common Room of the Law Society of England and Wales in London to simulate oral argument before the International Criminal Court ("ICC"). The fictitious proceedings involved a head of state, President Luis Medema, charged with genocide, war crimes and crimes against humanity. The prosecutors and defense counsel engaged in lively oral argument before the Trial Chamber in the context of three critical issues: (1) jurisdiction of the ICC over citizens of non-state parties; (2) testimony of an anonymous witness; and (3) the national security exception. Following vigorous debate, which followed the procedures set forth in the Rome Statute, the Trial Chamber deliberated and rendered its judgment.

The transcript that follows is a largely unedited record of these proceedings. All of the judges and lawyers are distinguished international lawyers, and the success of the simulation was due to this superbly talented group of lawyers. We are immensely grateful for their participation. The Trial Chamber was comprised of Prof. James Crawford, Monroe Leigh, Esq. and Prof. Vaughan Lowe. The Prosecutors were Geoffrey Nice, Q.C. and Daryl A. Mundis.<sup>1</sup> Steven Kay, Q.C. and Sylvia de Bertodano served as defense

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\*White & Case LLP, New York, NY; immediate past Chair, International Courts Committee, ABA Section of International Law and Practice.

\*\*Morgan, Lewis & Bockius LLP, New York, NY; Chair, Committee on International Criminal Law, ABA Section of International Law and Practice.

AUTHORS' NOTE: On November 27, 2001, as this article was being readied for publication, we were greatly saddened to learn of the untimely passing of Monroe Leigh, one of the distinguished panel of judges in these mock proceedings. Monroe Leigh was a giant of international law, and also a person of uncommon wisdom and grace.

During the past few years, we were privileged to work with Monroe in drafting and presenting to the ABA House of Delegates two resolutions supporting the International Criminal Court. Monroe was deeply committed to the ICC, and worked tirelessly to ensure that these resolutions

counsel.

The ICC will be the first permanent court established to try individuals for genocide, war crimes and crimes against humanity. Its constituent document is the Rome Statute of the International Criminal Court, adopted on July 17, 1998, in Rome, Italy, following an intensive five-week diplomatic conference. The three issues debated here were also debated during the Rome conference and have continued to generate debate, and these issues are likely to be argued before the ICC's Trial Chamber once the court begins operations.

The complete transcript of the program, oral argument, deliberations and judgment in *The ICC Prosecutor v. President Medema* follows.

## INTRODUCTION TO THE PROGRAM

### MR. BEKKER

The Defense team and the Prosecution will be allowed fifteen minutes each to make their oral presentation on three main arguments. We believe that these arguments are representative of the ongoing debate surrounding the creation of a permanent International Criminal Court and are likely to be featured in real-life proceedings before the ICC.

The first argument involves a challenge to the jurisdiction of the ICC over Medema's case, and will be introduced by David Stoelting. The second argument, which will be introduced by me, is a challenge to the admissibility of evidence offered by an anonymous witness. The third and final argument combines issues of evidence, forum definition and fair trial as a minimum guarantee to which the accused is entitled. This argument will be preceded by a brief introduction by David Stoelting.

Before the program closes, the audience will witness the deliberations of the Trial Chamber forum to deal with Medema's case. They will be public deliberations and will not be held in camera.

It is now my pleasure and privilege to introduce to you today's all-star cast of American and English lawyers who together will simulate proceedings involving a fictitious head of state, President Luis Medema, before the International Criminal Court concerning charges of genocide, war crimes and

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were approved. We were honored that Monroe came to London to participate in this exercise, and his crisp, penetrating questions and insightful observations were a highlight of the proceeding.

We dedicate this article to Monroe Leigh.

1. The views expressed herein are those of Mr. Nice and Mr. Mundis and are not attributable to the United Nations, the ICTY or the Office of the Prosecutor.

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crimes against humanity. Incidentally, any similarities in this mock trial with any real persons are entirely coincidental and unintended.

Today's Trial Chamber proceedings will be presided over by Professor James Crawford, Whewell Professor of International Law at the University of Cambridge. A native of Australia, Professor Crawford has been a member of the International Law Commission of the United Nations since 1992. Within the ILC, he was responsible for preparing the 1994 Draft Statute on an International Criminal Court. Professor Crawford is a member of Matrix Chambers in London and the Institut de Droit International.

Our senior judge today is Monroe Leigh of the Washington, D.C. law firm of Steptoe & Johnson. Mr. Leigh served as the Legal Adviser of the U.S. Department of State in the Ford Administration from 1975 to 1977. A former president of the American Society of International Law, he currently chairs the ABA's Working Group on Rules of Procedure and Evidence for the International Criminal Court.

The third judge is Vaughan Lowe, Chichele Professor of Public International Law at the University of Oxford. He succeeded Ian Brownlie in this post last year. Professor Lowe also practices as a barrister from Essex Court Chambers in London.

The role of the ICC prosecutor is played today by Geoffrey Nice, Q.C. Mr. Nice is no stranger to this role, having served as Senior Trial Attorney at the International Criminal Tribunal for the Former Yugoslavia in The Hague since 1998. He is also a barrister practicing at Farrar's Building, Temple in London. Mr. Nice will be assisted today by Daryl A. Mundis, a member of the New York and New Jersey Bars. A former legal advisor to ICTY President Gabrielle Kirk McDonald, Mr. Mundis currently serves as an Legal Officer (International Law) in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia in The Hague. Mr. Mundis also serves as co-Chair of the International Courts Committee of the ABA Section of International Law and Practice, one of the sponsors of today's program.<sup>2</sup>

The defense team is headed by Steven Kay, Q.C., of the chambers of Rock Tansey, Q.C. at 3 Gray's Inn Square in London. Mr. Kay was defense counsel in the trial of Dusko Tadić before the International Criminal Tribunal for the former Yugoslavia, the first international war crimes trial since the

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2. Mr. Nice and Mr. Mundis are currently part of the prosecution team in the Milosevic case at the ICTY.

Nuremberg and Tokyo trials. He has been lead counsel in the Musama case before the International Criminal Tribunal for Rwanda, currently on appeal.<sup>3</sup> Mr. Kay will be assisted today by Sylvia de Bertodano, who practices with him from the chambers of Rock Tansey, Q.C.<sup>4</sup>

### *MR. STOELTING*

Two years and one day ago, diplomats from 120 nations stood and cheered the completion of the Rome Statute on the International Criminal Court. That day capped an intensive five-week conference where delegates did the impossible. They took a bulky overlong document with 1500 items in brackets going into Rome and created a single Statute that was the product of civil law and common law systems. This is a unique event unparalleled in diplomatic history because the delegates were not just engaging in a treaty drafting exercise or drafting a human rights treaty. They were drafting the by-laws of a new international institution that would be the first of its kind: a permanent internationally constituted Court. As of mid July 2000, one hundred countries have signed the treaty, and twelve have ratified it. It is likely that within the next 2 or 3 years, upon the sixtieth ratification, that the ICC will become a reality. On June 30, 2000, the Preparatory Commission completed—on time—the Rules of Procedure and Evidence and the Elements of Crimes. By the end of this year, the relationship agreement between the ICC and the UN should be completed.

The American Bar Association has been a firm supporter of the Court. The House of Delegates adopted resolutions in 1992 and 1994 approving the concept of an international criminal court. In February 1998 in Nashville, with Jerry Shestack as ABA President, the House of Delegates approved a strong resolution in favor of an independent ICC. The ABA also sent a sizable delegation to Rome, which included myself. After Rome, the Section of International Law and Practice created a Working Group on the ICC Rules of Procedure and Evidence chaired by Monroe Leigh. In February 1999, in advance of the first meeting of the Preparatory Commission, the ABA's Working Group completed the first comprehensive set of rules for the ICC and presented it to each delegation at the Preparatory Commission.

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3. Mr. Kay has been appointed one of the *amicus curiae* advising the Court on behalf of the defense in the Milosevic prosecution.

4. Ms. de Bertodano is currently representing defendants in trials before the Serious Crimes Panel in East Timor, which is applying the substantive law of the Rome Statute.

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## THE FACTS

### *MR. BEKKER*

The date is July 17, 2005. The place is The Hague, the seat of the International Criminal Court. The Rome Statute for the ICC (the “Statute”) entered into force on November 1, 2002, following the deposit of the 60th instrument of ratification, acceptance or approval.

One of the first states to ratify the Statute was the Republic of Marginalia, a small country of 2 million people, almost 100% of whom are ethnic Marginalians. Marginalia has a long tradition of democratic government. Marginalia borders on the much larger Beta, a totalitarian state of 25 million people. Beta’s population is 60% ethnic Betans and 40% ethnic Marginalians. Beta has neither signed nor ratified the Statute.

Beta is ruled with an iron fist by President Luis Medema, a ruthless dictator who was democratically elected in March 2000 to a four-year term but who since has suspended normal legislative processes and rules by fiat. President Medema is an ethnic Betan, and soon after his narrow election victory began expressing anti-Marginalian sentiments.

A pro-democracy movement in Beta—the Movement for Democracy in Beta (“MDB”)—has attracted great support in Beta. The MDB espouses peaceful change and has never sponsored terrorism, but has about 2,000 persons in an ad hoc paramilitary unit. Private nongovernmental groups within Marginalia have provided financial assistance to the MDB.

Repression of the MDB—which the Medema regime views as a tool of the Marginalian government—has grown increasingly brutal. The Medema government sees Marginalians as subversives, and has imprisoned thousands of Betans of Marginalian origin. Some of the imprisoned MDB members have been tried and convicted of criminal offenses, such as arms smuggling and burglary. Others have been held without due process.

Since early 2003, the Armed Forces of Beta (“AFB”) have been torturing and murdering Betan citizens suspected of being MDB supporters. The great majority of torture and murder victims have been ethnic Marginalians. Intelligence sources estimate that 1.5 million persons were murdered by the AFB in Beta during 2003.

During the Summer of 2003, AFB forces crossed into Marginalia and reportedly killed 305 inhabitants of Aslan, a Marginalian town near the Betan border. President Medema stated in a TV interview that the killings in Aslan

occurred while Betan forces were in hot pursuit of MDB rebels and in self-defense. Marginalia, however, claims the raid was carried out solely to intimidate the MDB and Marginalian nationals sympathetic to the MDB.

During the Fall and Winter of 2003, Betan forces continued to clandestinely cross into Marginalian territory on at least 15 occasions. During these raids, hundreds of Marginalian civilians were killed. Dozens of Marginalian women were also reportedly raped by members of AFB forces.

In early 2004, Betan forces began systematically rounding up ethnic Marginalians in Beta. President Medema then announced a state of emergency, and further declared that the MDB was trying to overthrow his elected government by force. Betan men of Marginalian heritage were herded into massive concentration camps. Reports emerged from the camps that AFB forces were killing thousands inside the camps.

Betan women and children of Marginalian heritage were put on huge transport trucks and moved across the border into Marginalia. More than two-thirds of the Betans of Marginalian ancestry—nearly 7 million people—were displaced in this fashion.

On December 17, 2004, Marginalia made a “Referral of a Situation by a State Party” to ICC Prosecutor Geoffrey Nice under Article 14(1) of the Statute. The Referral alleged that the following enumerated acts may constitute genocide, crimes against humanity and war crimes under the Statute:

- (1) Medema’s crackdown on the MDB within Beta;
- (2) the murders of Marginalians in Marginalia during the cross-border raids;
- (3) the rapes that occurred during these raids in Marginalia;
- (4) the mass killings of Betans of Marginalian heritage in Betan concentration camps; and
- (5) the forcible transfer of women and children from Beta into Marginalia.

Prosecutor Nice then began analyzing the information in the Referral, as well as information from other sources pursuant to Article 15(2).

After evaluating this information and concluding that “there is a reasonable basis to proceed with an investigation,” as required by Article 15(3), Prosecutor Nice submitted to the Pre-Trial Chamber of the ICC “a request for authorization of an investigation” pursuant to Article 15(4).

After examining the request and supporting material, the Pre-Trial Chamber on March 23, 2005 determined under Article 15(4) that there was “a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court.” Accordingly, the Pre-Trial Chamber authorized the commencement of an investigation by the Prosecutor.

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On March 27, 2005, pursuant to Article 18(1), Prosecutor Nice provided confidential and limited notification of the investigation to the governments of Marginalia and Beta.

Upon receiving authorization, the Prosecutor launched an intense investigation of the situation in Beta and Marginalia. On the basis of this investigation, the Prosecutor concluded that President Medema had committed crimes within the jurisdiction of the ICC and that Medema's arrest was necessary to ensure his appearance at trial.

Thus, Prosecutor Nice, with Assistant Prosecutor Daryl Mundis, prepared an "application" for submission to the Pre-Trial Chamber, as required by Article 58(1) of the Statute. The application concluded that the evidence supported charges against Medema of genocide, war crimes and crimes against humanity.

The Pre-Trial Chamber examined the application and the evidence presented by the Prosecutor. Upon concluding that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court," the Pre-Trial Chamber issued an arrest warrant with respect to President Medema under Article 58 on March 29, 2005.

On April 6, 2005, President Medema crossed the border into Marginalia, apparently to visit Betan paramilitary troops. After a day spent with AFB forces, Medema was captured by the Marginalian military police on April 7, 2005, during his morning jogging round with only one bodyguard and handed over to the Marginalian authorities that same day. Marginalia authorities immediately transferred Medema to the ICC Detention Unit in The Hague, following compliance with Article 59 of the Statute, where he has been held since April 12, 2005.

Upon Medema's arrival in The Hague, the Pre-Trial Chamber satisfied itself "that the person has been informed of the crimes which he or she is alleged to have committed, and of his . . . rights under the Statute," as required by Article 60(1) of the Statute.

Medema retained Steven Kay, Q.C. and Sylvia de Bertodano to represent him before the ICC.

The Pre-Trial Chamber held a confirmation hearing under Article 61 of the Statute on May 19, 2005. On the basis of this hearing, the Pre-Trial Chamber concluded that "there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged," and therefore confirmed the charges brought by the Prosecutor.



Once the charges were confirmed by the Pre-Trial Chamber under Article 61 of the Statute, the ICC Presidency constituted a Trial Chamber to deal with Medema's case. The judges of this Trial Chamber are James Crawford, Monroe Leigh and Vaughan Lowe.

David Stoelting will now introduce the first argument.

FIRST ARGUMENT: JURISDICTION OVER A DEFENDANT  
FROM A NON-STATE PARTY

*MR. STOELTING*

The first argument is a challenge to jurisdiction based on Article 19 of the ICC Statute. Article 19 permits the accused, in this case President Medema, as head of state, to challenge the jurisdiction of the Court. This may be done at various phases in the proceedings. In our example, it has happened after the confirmation of the charges under Article 19(6).

The challenge to the jurisdiction of the Court is referred to the Trial Chamber and, as the materials state, President Medema is the head of state of Beta. Article 19 allows for challenges to the jurisdiction and admissibility. Admissibility has to do with cases being investigated by a state with jurisdiction, or whether the person has already been tried, or whether there are insufficient grounds to prosecute. This is not an inadmissibility motion. This is a jurisdictional motion being made by the defendant. The grounds are that as a head of state there is no basis to prosecute him because his country, Beta, has not signed or ratified the ICC treaty.

*MR. KAY*

Your Honor, Steven Kay for the defense of President Medema. The application by the defense here is for the immediate release and return of President Medema to his home state of Beta. The ground of that application is an initial challenge to the jurisdiction of this Court under Article 19(6) of the Rome Treaty. If we can turn now to Article 19(6) and look at the wording so that the Court can see the basis for which the defense made this particular application:

Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with Article 82.

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The issue here is over the jurisdiction of this Court rather than the admissibility of any evidence. The Court will have heard already that my client, President Medema, was the head of state of the Republic of Beta. He was democratically elected by the people of Beta and his government subsequently extended his tenure of office to that of being life president. The important principle for this Court to understand today is that Beta, the state of which he was head, has neither ratified nor signed the Statute. Beta is not a country that has acknowledged that the Statute, the Treaty of Rome, is binding upon that state. Beta therefore is asserting its sovereignty, internationally, before this Court and the right to not have any interference by third parties or outside states (either as a group collectively or individually) in relation to its affairs.

It is an accepted principle of international law that a treaty is only binding on the countries that have ratified that treaty. No treaty of international law is able to bind a state that has not signed the treaty because of the recognition of its sovereignty.

Your Honor, you have a question?

*JUDGE CRAWFORD*

Let's assume that Marginalia, rather than referring this matter to this Court, had wished to try the accused itself. Surely it could have done so consistently with international law because the crimes alleged were either crimes committed on the territory of Marginalia or fell within universal jurisdiction. Why cannot Marginalia transfer that jurisdiction to this Court?

*MR. KAY*

I am glad Your Honor asked that question at this stage because it is fundamental to this issue of jurisdiction. Marginalia has chosen not to try President Medema under its legal system. The right that Marginalia may have against a citizen within its own sovereignty within its own state is something that Marginalia should have considered and put the President on trial within its criminal justice system. In transferring the President out of its criminal justice system, Marginalia has waived its right to a trial on its own soil. We're dealing here with the jurisdiction of this Court. The citizenship and nationality of President Medema never changed. He was always a citizen of Beta. He was captured on Marginalian soil but he was not subject to any

treaty that Marginalia may have signed in respect to its own citizens. Medema remained a citizen of Beta and was entitled to have the laws of his state apply to him.

*JUDGE CRAWFORD*

Isn't there a distinction between the accused's position as head of state of Beta and his position as a national of Beta? Would you accept that if Marginalia was asserting jurisdiction over a person who was a national of Beta, but had committed crimes in Marginalia, the issue that you have raised would not arise?

*MR. KAY*

That is possibly so and would need to be looked at separately. But the position here is that we have a head of state and the sovereignty of the state of Beta remains with the head of state. It is the head of state which Marginalia has chosen to transfer out of its own jurisdiction and transfer to the jurisdiction of another Court whose jurisdiction is open to challenge. I hope that deals with the issue for Your Honor.

*JUDGE LEIGH*

I would like to follow up on Judge Crawford's first question. Suppose there was a pre-existing bilateral treaty between Marginalia and the third country. And suppose Marginalia chose not to exercise its own jurisdiction but rather to respond to an extradition request from a third country. Would there be any objection in international law that could be lodged to that?

*MR. KAY*

That is not the position we have here. If President Medema, captured on the soil of Marginalia, was subject to an extradition request from a third-party state to Beta, the position would then be that he would be subject to proceedings within Marginalia. The position here is that this defendant has been transferred into a collective jurisdiction of states parties. The treaty that has been sought to be applied against him is a treaty which is concerned with a collective of states determining that they will put on trial defendants for particular crimes who are subject to the Treaty. But the Treaty has not overturned international law. It may be an historic and important treaty. But it is not a treaty that has been able to in some way reflect international law differently than any other treaty in the history of the world.

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Do I see a question from His Honor, Judge Crawford?

*JUDGE CRAWFORD*

Yes, you did. Can I take you to Article 12? Your description of this Court does not really take into account the content of Article 12, which says that the preconditions for the exercise of jurisdiction are either a referral by the state on whose territory the crime was committed or a referral by the state of which the accused is a national. Now why can't a group of states together, as it were, pool the jurisdiction that they have under international law? And if they can do that with effect as against third states, why isn't Article 12 precisely such a pooling?

*MR. KAY*

It is all subject again to previous international law. It cannot overturn that which has gone before. It is worthwhile here considering now the effect of the Vienna Convention on the Law of Treaties. This Court has to accept that as an internationally binding convention that governs the interpretation and implication of treaties. It is quite clear under Article 34 that a treaty does not create either obligations or rights for a third-party state without its consent. That is the important principle here because Medema as head of state of Beta is entitled to have the benefit of the Vienna Convention applied to his particular circumstances. Other states may have chosen to combine themselves and create a separate jurisdiction or agreed to a jurisdiction over their affairs, but this cannot impinge upon the internationally recognized and internationally supported principle of sovereignty that entitles states only to be bound by those conventions or treaties which they have ratified or signed.

*JUDGE CRAWFORD*

Still, Medema is not now the head of state of Beta.

*MR. KAY*

He was the head of state when he was arrested. To apply a different set of rules simply because there has been a change in government in Beta would be really unfair. It would be a way to be able to get around any flaws in any treaty or convention by arresting those that assert their rights and saying,

well, because someone else now is president, you are not entitled to the benefit. The fact of the matter is, the crimes asserted against him are those whilst he had sovereignty of that state.

*JUDGE CRAWFORD*

The point is that his state has not intervened and made this objection. We could understand if Beta were to intervene and say that this Court has no jurisdiction over Medema by virtue of principles of sovereignty. But they have not done that. Surely this is something that belongs to Beta and not to Mr. Medema, in the same way that the immunity asserted by Mr. Pinochet belongs to Chile and not Mr. Pinochet.

*MR. KAY*

No. My client is asserting his right of sovereignty that existed at the time that the allegations were made against him. There was no other separate sovereignty with any other individual at that time. It was only with President Medema. To suggest that in some way because his government is not now supporting him would, again, with respect to the Court, be an attempt to diminish and derogate from the genuine rights that people have under international law and under international treaties. Those principles cannot have been overturned by a Statute that has only just had its sixtieth state ratify it and say that it holds some greater position within the tenets of international law than any other convention. Article 35 of the Vienna Convention is quite clear on this. An obligation arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third party expressly accepts that obligation in writing. Those are the express words of the Vienna Convention, to which many UN states are parties. It has been a guiding principle of international law of the past century.

In these circumstances, if there were to be a trial, it may only be a trial that could take place in *Marginalia*. It may be subject to challenge, but our submission is that this Court should at this stage, if jurisdiction is not possible, return President Medema to a country that he wishes to go to.

Your Honor, those are my submissions on behalf of the accused at this stage.

*JUDGE CRAWFORD*

One final question, for me at least. If your principal submission failed in the Court and the Court said, in the circumstances, it could exercise jurisdic-

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tion, would you take any other point with regards to the territoriality of the particular crimes in this case? Some of the alleged crimes were committed in Marginalia. Some appear to have been committed exclusively in Beta. Does that make any difference to our jurisdiction?

*MR. KAY*

That would make a difference, quite plainly, in relation to those factual circumstances and that may be a matter, if this Court chose to put the defendant on trial, that we would raise. But this matter, of course, should be considered in relation to the pure application of international law. That is our guiding point here, that because of the clear sympathies within these kinds of treaties, within this kind of law, which has the support of many political areas. It should not be held to be a treaty that in some ways has any greater right of legitimacy than any other treaty. If that is to be the case, then principles of international law will be overturned without a clear consensus of states. I do remind the Court that this is not a Statute that has been universally accepted by every nation.

Those are my submissions on behalf of the accused.

*MR. NICE*

Well, on behalf of the prosecution, we take an entirely different view, happy though we are to accept as noncontroversial many of the points Mr. Kay makes in his elegant argument. I note, as a matter of interest, unless I misheard Mr. Kay at the beginning, that he is seeking the return of President Medema, I think, to Beta itself, a country which, as was noted, is subject to new rulers and which is declining to cooperate at all with this Court in the provision of documents that would be helpful to Medema's defense. An odd position to be arguing.

Let's deal briefly with matters that are noncontroversial. First, are the crimes generally within the jurisdiction of this Court? Our submission is that they certainly are. I shall come back later to the problem of those crimes that appear to have been committed in Beta and not in Marginalia.

Is the somewhat complicated process of referral dealt with properly by the prosecution in this case? It is covered by a number of Articles from 14, 15, 18, 58, 59 and 6. Typically, I am afraid that with this Statute, the route through the provisions is not linear, but never mind. It seems that all those

procedures have been gone through correctly. And we come to the heart of the issue, which is Article 12, and to an extent, Article 13. Note that there are ways in which jurisdictions otherwise available might be excluded.

Most important, and reflecting the underlying principle of this Statute's complementarity, is Article 17. In the interest of brevity, I will summarize. Article 17 describes situations where this Court has jurisdiction because another state seized of jurisdiction either does not exercise that jurisdiction over an individual, or does so in an unsatisfactory or improper way, or for improper motives. That does not apply here. Therefore, there is no question of jurisdiction being lost through inadmissibility.

Let's then come back to Article 12. The defense characterizes our position as one asserting universal jurisdiction by this Court over any individual. Not so. It is worth observing that for the reasons I set out and that I may have time to cover, there may be jurisdiction by this Court over individuals in any territory of the world, but that is not the issue which we are concerned with here. But just to make that point good, the Court will have in mind that under Article 13, and pursuant to a Chapter 7 reference by the Security Council, this Court could have jurisdiction not only over the territory of any state party over a non-state party, and probably over a non-member of the United Nations as well. So to that degree, and simply by way of interest, universal jurisdiction is a potential. But it does not arise here, or it does not arise yet.

#### *JUDGE CRAWFORD*

At what point does the jurisdiction of the Court crystallize? Let's assume that there was a Security Council resolution tomorrow in relation to the accused.

#### *MR. NICE*

It would crystallize upon ratification of the Treaty. Under Article 11(1), that is the only binding temporal limitation on the Court. That brings with it an interesting conundrum, which I probably just have time to touch on: if, as might happen in this case, the initial trigger for jurisdiction was a reference by a state party, so that the provisions of Article 12(2) apply, but the initial trigger under Article 12(2) by a party that had signed up late that left outstanding, and some of the offenses that needed to be swept up by a Chapter 7 reference under Article 13. For example, because some of the offenses were on the territory of a non-state party, as it were, Beta, why then the reference under Chapter 7, by dint of Article 13, would have a wider temporal reach

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than the initial reference. But that is just an oddity and it does nothing to undermine our basic argument on jurisdiction.

*JUDGE CRAWFORD*

Judge Leigh?

*JUDGE LEIGH*

I am not quite clear as to the basis of personal jurisdiction. You assert the ICC has jurisdiction in respect to the alleged crimes. But surely you mean to go further than that and establish personal jurisdiction, not merely subject matter jurisdiction. In the next paragraph you speak of jurisdiction not being excluded but surely you have an affirmative obligation. You found personal jurisdiction in some positive way?

*MR. NICE*

Absolutely. I will come to that, if I may. Article 12(2) says, of course, that in cases of Article 13(a) or (c), where there is a state reference or where the prosecutor initiates proceedings on his or her own behalf, jurisdiction can be exercised. That applies in this case. You then come back to Article 12(2)(a) and see that jurisdiction is granted if “[t]he State on the territory of which the conduct in question occurred or, if . . . [t]he State of which the person accused of the crime is a national” has accepted the jurisdiction of the Court.

Here it is very simple. The crimes, or most of them, are committed in Marginalia, a state which has accepted the jurisdiction of the Court. Therefore, by way of Articles 13(a) and 12(2)(a), jurisdiction is granted to this Court. But before I turn from that, we must look very briefly at Article 24, 25 and 27, which sweep up a number of points. It is clear from all those Articles that it is persons who are liable. Article 24(1): “No person shall be criminally responsible.” Article 25(1): “The Court should have jurisdiction over natural persons pursuant to this Statute.” Article 27(1): “The Statute shall apply equally to all persons without any distinction based on official capacity,” and then it deals with heads of state in particular.

I go swiftly for want of time. For having articulated, I hope, the basis for jurisdiction under the Statute, it is worth having in mind how this prob-



lem mirrors conceptually the problem that beset the drafters of this Statute, particularly the United States, which was concerned about the position of its peacekeepers operating in territories where they might find themselves accused of war crimes. Its concern was that should not happen. It would not have had those concerns to the degree it did had it not been for the reality that jurisdiction is personal and bites according to the position, the status of the territory upon which the alleged crime occurred.

*JUDGE CRAWFORD*

Mr. Nice, if you look at Article 11(2), it says that the Court may not exercise its jurisdiction with respect to certain crimes unless the crime is committed after the Statute is in force for that state. Article 11(2) implies a connection between a crime and a state. You point rightly to later provisions that say criminality is personal. It is only personal, though, once Article 11 has been satisfied. Surely one can read into Article 11 a precondition that, if the state to which a crime is attributable is not a party to the Statute, then jurisdiction may not be exercised in relation to that crime.

*MR. NICE*

Well, that is the argument the defense has raised. As I have ventured to suggest, it is misplaced. It is Article 11(1) that bites here. Article 11(2) relates only to the provisions of Articles 12(2), and to demonstrate, I can make these points. If it was really intended to limit jurisdiction in the way that can be just about inferentially drawn from an extended reading of Article 11(2), the Statute would have said so in terms. If Article 11(2) had that effect, Article 13 and Chapter 7 itself should surely be of no effect. It makes no sense to read it in that way, with great respect to Your Honor and indeed to my learned friends who have the job to do that they have to do. It can only bite on Article 12.

*JUDGE CRAWFORD*

Mr. Kay, I think, puts his argument another way. He says that it does not matter what the Statute says, there is a rule of international law that the state may not have jurisdiction exercised over it without its consent. Beta has not consented. Nothing in the Statute can change that. This is, in effect and in substance, jurisdiction over a state because of Medema's official position at the time that the crime was committed.

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*MR. NICE*

Again, we reject that entirely. Although we do not really challenge for these purposes his proposition about the need for people to sign up to a treaty, there may be exceptions. But this is not about the consequences of a treaty for a state. This is about the consequences of a treaty amongst several parties for individuals and the individual is pursued and the individual is caught.

In my remaining time, may I, because it may be important for your deliberations, take you very briefly to Article 98, which returns to the topic I was touching on earlier and was probably born out of the United States' concern to protect its peacekeepers from suit. That Article says that "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person." Now that provision probably was designed to save those who would be covered by status of forces agreements as between the United States or other peacekeepers and territories upon which their peacekeepers might have found themselves operating. Your Honors, the rule, I think agreed as recently as the Summer of the year 2000, says that the Court may not proceed with a request for the surrender of a person without the consent of a sending state, it . . .

*JUDGE CRAWFORD*

Mr. Nice, I wonder if I could just interrupt you. The point you make about Article 98 is taken, but of course there is no request for surrender or assistance here. I think Judge Lowe has a question which is of more general concern.

*MR. NICE*

Certainly, but I must deal with that if I am allowed the time.

*JUDGE LOWE*

You said, Mr. Nice, that you were going to address the question of crimes that took place wholly or partly in Beta. I wonder if you could.

*MR. NICE*

In a sentence, then, one argument would be that (an argument not yet developed in this Court in any earlier occasion) where there is a total criminality, some of which is within the territorial jurisdiction and some of which is not, it would be proper to look at the totality and unjust to do otherwise.

*JUDGE LOWE*

Could you just say whether you understand the total criminality to mean an offense or a bundle?

*MR. NICE*

It would have to be a bundle of offenses, but from the very way we frame this indictment we do not suggest that they are inseparable. It would be inconsistent for us to do so. But if that argument, once advanced, did not find favor then we would, in view of the gravity of the offenses committed on the territory of Beta, make appropriate representations so that the Security Council might then make a reference under Article 13(b). That, of course, can have odd consequences for temporal jurisdiction.

*JUDGE CRAWFORD*

This is why I asked earlier when the jurisdiction of the Court crystallizes. Surely it is the case that once the accused has been put in jeopardy by appearing and pleading, the Court's jurisdiction either does or does not exist. How can the jurisdiction come into being later on, like the Cheshire cat?

*MR. NICE*

I do not think there is any restriction, if I may respectfully say so, on more than one reference. If reference one covered crimes A to C, and reference two covered crimes D to E, there is no double jeopardy.

*JUDGE CRAWFORD*

Let's assume that the Court has convicted Mr. Medema, but, on appeal, it was held that the Court was erroneous, for example, in applying your collective crime theory. Could the Security Council cure that defect retrospectively after the Appeals Court decision?

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*MR. NICE*

I do not really express a view on that. But I am not sure really, if that course of events unfolded, what the position of the office of the prosecutor would be. I would not even seek to go beyond what was left standing at the end of the appeal.

*JUDGE CRAWFORD*

Can I just take you to the five crimes alleged? It is clear that two of them were committed in Marginalia. What do you say about the fifth, the forcible transfer?

*MR. NICE*

As we set out in our argument, we say that because that crime only takes effect when the victims are effectively forced out, it has to be a crime committed in Marginalia as well as Beta. It would be nonsense, and an invitation to international disaster, to find that countries that were not signed up to this Statute could kick people out free of any kind of risk because all they are doing is sovereign to their territory. And so you would say is that crime must sound as a crime in both territories and it was no authority to the contrary.

*JUDGE CRAWFORD*

Thank you very much.

*MR. NICE*

Thank you.

SECOND ARGUMENT: TESTIMONY OF ANONYMOUS WITNESS

*MR. BEKKER*

The second segment of our program involves a challenge to admissibility of evidence brought under Article 64(9)(a) of the ICC Statute. In response to the Prosecutor's request to present testimony of a rape victim, while conceal-

ing her identity, the defense moves to exclude this testimony and argues that the failure to identify witnesses violates the accused's fundamental rights under international criminal law, including especially the right to examine or have examined the witnesses against him as guaranteed in Article 67(1)(e) of the ICC Statute. In support of its request, the prosecution will argue that not identifying witnesses is in certain circumstances appropriate and justified under international criminal law, referring to the practice to the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Article 68 of the ICC Statute provides that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Note that the word "identity" is not mentioned. In ordering protective measures, the Court must take into account all relevant factors including gender and the nature of the crime in particular but not limited to where the crime involves sexual or gender violence. But Article 68 says also that the measures "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." These arguments are representative of a debate on the controversial issue of unidentified and anonymous witnesses that has been ongoing on both sides of the Atlantic.

This debate was fueled by an August 10, 1995 decision of a Trial Chamber of the Yugoslav War Crimes Tribunal in the inaugural case of Prosecutor v. Tadiè, which authorized the prosecutor to withhold from the accused and his counsel the identity of a number of witnesses against the accused for an indefinite period, even up to and throughout trial. Both sides in this debate agree that the crucial question is whether or not a fair trial includes an absolute right to know the identity of one's accusers. The issue of unnamed witnesses thus involves the balancing of competing interests. The right of the accused to a fair and public trial needs to be weighed against the victim's right to equality before the law and freedom from fear of further abuse, especially sexual abuse. Both sides differ on the exceptions to the right to a fair trial that are allowed by contemporary international law.

The opponents of the use of anonymous witnesses by international criminal tribunals, of which Monroe Leigh is a prominent representative, believe that such use will deny the accused a fair trial, and that the right to examine witnesses against him is required by the statutes of the Tribunals as well as by international law. They fear that it may result in a conviction of an accused on the basis of tainted evidence. To them, the historically developed right to a fair trial is a minimum guarantee of due process for which contemporary international law does not allow a discount in order to provide anonymity to victims and witnesses. They draw the line at *in camera*, that is, closed session hearings.

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Those in favor of anonymous witnesses, including especially Professor Christine Chinkin of the London School of Economics, have argued that the accused's right to know and confront prosecution witnesses is not absolute, but may have to be balanced against the broader interests of the international community in the pursuit of justice, especially the safety of the victim witness. In their interpretation, exceptions are recognized by contemporary international law. In support of their argument, they have pointed out that, unlike many domestic jurisdictions, international criminal tribunals cannot operate an effective protection witness program that extends across national boundaries to the many places where witnesses in international trials are located.

*MR. MUNDIS*

Your Honors, I appear before you seeking protective measures for a victim of rape, The prosecution will rely primarily on the Statute itself, upon the rules of procedure and evidence that are in existence before the ad hoc tribunals, that is, the ICTY and the ICTR, as reflecting the emerging international criminal law system. We will also rely on jurisprudence of the ICTY and ICTR ad hoc tribunals.

I draw your attention in the first instance to the Statute of this Court and particularly those Articles which in the prosecution's view permits concealment of the identity of a victim or witness. Let me briefly summarize the relevant Articles for the benefit of the Court. Article 57(3)(c), in the prosecution's view, supports this notion. Article 57(3)(c) states that a Pre-Trial Chamber may, "[w]here necessary, provide for the protection and privacy of victims and witnesses." Article 64(7) permits the Trial Chamber to order closed sessions in order to protect victims and witnesses. Article 68(1) permits measures to protect the safety of victims and witnesses. Article 68(2) permits the Chamber to conduct proceedings in camera, subparagraph 5 sets forth the prosecutor's ability to withhold evidence or information which might lead to grave endangerment of the security of a witness or of his or her family. There are other provisions of the Statute which safeguard the accused but which do not necessarily require revealing the identity of the victim or witness to the accused. For example Article 69(2) indicates that testimony is to be given in person, except as provided for in Article 68. Article 69(7) indicates that "[e]vidence obtained by means of a violation of the Statute or internationally recognized human rights shall not be admissible" under certain conditions. The prosecution contends that, read together, these statutory provi-

sions certainly permit, in very limited circumstances, concealment of the identity of a victim or witness. Let me turn to the interplay between Articles 67 and 68.

*JUDGE LEIGH*

Can I interrupt you? I have read the Statute, and I looked for the words “identity” and “anonymous witness.” I have not found those words at any point. Have I missed something in these Articles that you cite? Can you point in the Treaty of Rome to any provision which uses the term “anonymous witness”?

*MR. MUNDIS*

Your Honor, you have indeed read the Statute quite carefully. There are no explicit provisions in the Statute which would permit either anonymous witness testimony or concealment of the identity of a victim or witness. However, it is the Prosecutor’s submission today that the Statute, when read in its entirety, the protective measures, guarantees that are inherently built into the Statute would permit, again in very limited circumstances, the protective measures that we are seeking here today. But you are absolutely correct that the Statute does not explicitly permit the protective measures that the Prosecutor is seeking here today.

*JUDGE CRAWFORD*

Mr. Mundis, you also omitted to read relevant sentences. I take just as an example, Article 68(1): “these measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” How can you confront a witness if you do not know who the witness is?

*MR. MUNDIS*

Your Honor, certainly the prosecution would agree wholeheartedly with the need for a fair trial for this accused and any other accused who is brought before this Court. However, the Prosecutor would submit that protective measures for victims and witnesses are also necessary, for the simple reason that, again, in certain circumstances, if victims or witnesses are not guaranteed protective measures, they will be unwilling to come forward. In effect, the simple matter is, that if we do not have witnesses and victims coming forward, we will not have any proceedings before this Court.

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*JUDGE LEIGH*

Isn't that an inherent problem for every prosecutor?

*MR. MUNDIS*

Absolutely. However, what the prosecution is arguing is that if, again, in very limited circumstances, and on a case by case basis, we are to provide protective measures to the limited extent necessary to guarantee that these victims and witnesses do in fact come forward, we will be advancing the cause of justice.

*JUDGE LEIGH*

Does it make a difference that the right to interrogate is listed among the minimum guarantees which is not qualified in the text of the treaty? You are arguing from a position of deriving it from various Articles in the Treaty which do not explicitly say that the prosecution, or either party, is entitled to withhold the identity of a witness it proposes to produce.

*MR. MUNDIS*

Although it could hinder the defense in terms of its ability to cross-examine the witness or victim, it certainly does not completely eliminate the right to cross-examine that witness. It is the Prosecutor's view that it is certainly possible to cross-examine a witness without knowing the identity of that witness. For example, concealing the identity of a witness or victim does not in any way hinder the ability of the defense to cross-examine on the contents of what that witness would testify to. It certainly would not hinder in any way the ability of the defense to cross-examine on the witness's demeanor and it certainly would not hinder in any way the ability of the Trial Chamber itself to question the witness or to observe the witness's demeanor and the Prosecutor contends that, in fact, those are the key elements of the right to cross-examine.

It is the right to confront the accuser, the right to observe the demeanor of the victim or witness. Protective measures would not hinder that aspect of cross-examination at all.



*JUDGE CRAWFORD*

If we have discretion, which you say can only be exercised in extreme cases, what are the grounds for exercising it here?

*MR. MUNDIS*

If I may, Your Honor, let me turn briefly to the facts as developed at the pretrial conference that we had in this case. In this case, the witness and her proposed evidence encompasses the following features and characteristics. She will give evidence of systematic rape by the top 6 leaders and associates of President Medema, but not of Medema himself. All of these men that the witness will testify about are still at large and are believed to be holding sway with the present regime, whose continuing skirmishes in the setting of an unresolved armed conflict are thought to have casualties running in the hundreds per month. The witness still has family living in Beta. She is prepared to give evidence only if she is given protective measures. She was one of seven women who were mistreated in the same fashion, and these other women will be testifying without the benefit of protective measures because their families have relocated out of Beta. So her testimony in that effect will be in support of what the other witnesses whose identity is known to the defense will be testifying about. Of these seven women, two of them are prepared to give evidence openly. The others are prepared to give evidence with limited forms of protective measures, primarily to protect their identity from the public but not from the accused in this case.

These witnesses will all give testimony of similar type of mistreatment at the hands of the accused and his associates, including the witness that is the subject of this motion. She is a former military nurse and will be able to recall specific anatomical details relating to each of the men that the prosecution is proceeding against.

*JUDGE CRAWFORD*

Surely, that is the point. She is not giving any evidence against the accused. Why is her evidence relevant?

*MR. MUNDIS*

Your Honor, the Prosecutor's view is that, as a crime against humanity, her testimony would certainly go to establish the widespread or systematic jurisdictional elements of the offense. It is simply part of the Prosecutor's case that these sexual assaults were of a systematic nature and were widespread

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and we need to present as much evidence as possible on each of those points in order to support the finding with respect to crimes against humanity.

*JUDGE LEIGH*

What would be the effect on the prosecution's case if this tribunal decided to exclude the testimony of the witness you have asked anonymity for? That you rely on the other two witnesses?

*MR. MUNDIS*

We would certainly rely on the other witnesses, notwithstanding a detrimental ruling from this Trial Chamber. However, again, it is the Prosecutor's view that pursuant to the Statute and the Prosecutor's right to control the presentation of its case, it would be detrimental to the Prosecutor's ability to put forward evidence of the widespread and systematic nature of these sexual assaults. The Prosecutor's view is that certainly it is within our discretion to call witnesses of our choosing, to support the counts as charged in the indictment. An adverse ruling from this Trial Chamber would hinder our ability to do that.

*JUDGE CRAWFORD*

It would not be fatal?

*MR. MUNDIS*

Not necessarily. If I could turn, in the few minutes that I have remaining, to the interplay between Article 67 and 68. Article 67 provides, as Judge Crawford has indicated, for a fair and impartial public trial and for the accused to cross-examine witnesses against him. However, pursuant to Article 68, there are exceptions to the provisions set forth in Article 67 and several of those clauses are relevant here.

First, Article 68, in referring back to Article 67, supports the position that Article 67 guarantees are not absolute.

Second, it clearly provides that the Trial Chamber has discretion to order such protective measures, to protect victims, witnesses, even for the accused.

Third, it gives the Trial Chamber the ability and the flexibility to fashion protective measures based on the situations of each case. For example, you

may conduct proceedings in camera or use other special means as may be warranted.

Fourth, and most importantly for this case, protective measures for victims of sexual violence are mandatory.

Fifth, in determining which measures are appropriate, the Chamber must take into consideration all the circumstances, including the views of the victim. As I have indicated, this victim has indicated that she will not testify without the protective measures that the Prosecutor is asking for today.

Finally, in order to sum up, there are certain public policy grounds which underlie the provisions governing protective measures, unlike procedural safeguards that are available to the accused in many national jurisdictions. The Statute of this Court does not confer absolute rights upon the accused with respect to the right to cross-examine the witnesses against him and that is the case for several reasons. First, because the crimes for which this Court exists are among the most serious known to humanity. Second, such offenses are often prosecuted while the underlying armed conflict is still ongoing, and that presents certain problems for victims and witnesses and their families who remain behind. Third, often, as is the case here, the accused in these proceedings are very powerful individuals who have numerous supporters back in the home country. All of these matters when taken together support the Prosecutor's request for protective measures.

*JUDGE CRAWFORD*

Thank you, Mr. Mundis.

*MS. de BERTODANO*

Your Honors. It is the defense's contention that the total anonymity of this or any witness cannot be consistent with the rights of the accused to a fair trial as guaranteed under the Statute. We have heard a great deal from the prosecution about Article 68 of the Statute. I want to turn back to Article 67(e). It does not seem to me that there is anything in Article 68 which derogates from the rights in Article 67(e), which provides that the accused shall be entitled "[t]o examine, or have examined, the witnesses against him or her, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

And perhaps even more importantly for this case: "The accused shall also be entitled to raise defences and to present other evidence admissible under the Statute." The prosecution seeks to persuade the Court that this is evidence which it cannot obtain in any other way and that if these sort of

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measures are not granted, we may end up having no prosecution witnesses in cases. Your Honors, that is irrelevant to the rights of the accused. There cannot be an erosion of those rights simply because the prosecution has difficulty in obtaining evidence. We have heard nothing so far about perhaps the most important Article of this Statute, Article 66, which sets forth the presumption of innocence and the requirement that the prosecution prove its case beyond reasonable doubt. If the prosecution is not in a position to do that, that cannot be a ground for taking away from the defense its rights.

The defense argues that a defendant has a right to know his accusers. If he does not know who is accusing him, he is limited in the raising of his defenses and he can be open to almost any allegations without any proper challenge.

Mr. Mundis argues that there is still some cross-examination open to the defense. The demeanor of the witness can be observed, the content of a witness's evidence can be scrutinized. The defense concedes those points, but that is not, in our submission, sufficient. It is not enough to say, "well, the defense can explore some aspects of this evidence, and effectively that is good enough for you." The defense needs to be, and is entitled under the Statute, to be able to explore all aspects of the evidence and raise any defense. Identity of a witness is crucial to defenses. It is crucial to credibility. If the defendant is not permitted to know who a witness is, it is impossible to explore the following—it is impossible to explore whether the witness could have been where he said he was at the time.

*JUDGE CRAWFORD*

Ms. de Bertodano, what importance do you place upon the words "or have examined" in Article 67(e)? These words, of course, come from the International Covenant on Civil and Political Rights, which was drafted so as to cope with all forms of criminal justice systems and not just the Anglo Saxon one. Therefore, with inquisitorial instances and so on, surely the words "or have examined" imply that the accused personally need not know everything about what is going on, so long as overall the process is one in which the witnesses have been examined.

*MS. de BERTODANO*

Your Honor, in my submission those words mean that the accused need not examine the witnesses himself. It does not mean that the defense counsel does not need to have access to information which only the accused will have.

*JUDGE CRAWFORD*

There is a problem, isn't there? The allegation is made that by having regard to the background, not incredibly, that there would be a very severe danger to the witness or the witness' family if this information was disclosed to the accused. Is there any intermediate ground? You present things in stark alternatives. Is there any intermediate position?

*MS. de BERTODANO*

Your Honor, in my submission, I certainly cannot think of a situation in which the defendant should not be entitled to know the identity of the witness. There is no evidence that President Medema would pass on any information to anyone else.

*JUDGE CRAWFORD*

Let's assume that there was evidence that an accused—let's take it away from this case—had previously harassed the family of the witness. Would that be a ground for non-disclosure? Are you saying that this is an absolute right no matter what the circumstances?

*MS. de BERTODANO*

Your Honor, I am saying that I cannot see a position in which it would not be a right given to the defendant. Of course, there may be circumstances which arise which I'm not addressing here. But certainly in this case, there is no evidence of any threat to the victim's family. The accused is in custody. The victim is resident, we assume, in Beta, but there is no evidence that she or her family has been subjected to any harassment or indeed that anyone else has been subjected to any harassment.

We would require simply that the information be given to the defendant and his lawyers, not that it be broadcast. We have no difficulties with facial distortion, with keeping the identity from the general public. But if a defend-

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ant is not permitted to know the identity, he is not then in a position to challenge the account.

*JUDGE CRAWFORD*

Are counsel appearing before this Court as officers of the Court, in the way they are in some national systems?

*MS. de BERTODANO*

Your Honor, in inquisitorial systems, in my understanding, anonymity of witnesses is not allowed except in very extreme circumstances. Your Honor, I am not arguing from any national ground. I am arguing the far more simple proposition of the rights of the defendant which apply whether we are talking about a civil system or a common law adversarial system.

Your Honors, the protective measures which have been implemented by the ad hoc tribunals, have not in any case extended to total anonymity. They did not do so in the Tadiè case. The Tadiè case, as the bench will be well aware, is one that provided a very good argument for why witnesses should not be allowed to be protected in the extreme ways which were taken in that case. Your Honors will be aware of what occurred with Witness L in the Tadiè case. That his identity, although not his name, was kept from the defense. And that when the defense by chance discovered who he was, it was then discovered that he had been lying not only about his particular family circumstances—this was a witness who had said his father was dead, and his father was found by the defense and brought to court—but as a result of that, that he had been lying about the entire of his evidence. Once the defense knew who he was, they were able to prove that he could not have been in the place where he said he was. Eventually that lead to a confession by the witness that he had been trained to give evidence by the Bosnian authorities.

Your Honors, that may seem to be an extreme situation. The truth of the matter, however, is that these Courts operate in extreme circumstances. Defendants are in jeopardy for what has been called the crime of crimes. The fact that the crimes are more serious does not mean that the rights of the defendant should be regarded any less highly.

*JUDGE LEIGH*

May I take you into another direction? We have established that there is no textual provision in the Treaty of Rome which contemplates anonymous witnesses. And so the prosecution is driven to argue that it is derivative from other provisions in the text of the Treaty of Rome. Now, you would expect that there is possibility that that situation, that ambiguity, would be corrected in the rules of procedure which are being developed. I understand, and I would like your reaction to this, that a motion was made by the Italian delegation in PrepCom 4 that anonymous witnesses would be permitted and that proposal was rejected and was not revived. There is a possibility, I suppose, that the Assembly of States Party could revise the rules.

*MS. de BERTODANO*

Your Honor, yes. It is my understanding that there was heated debate on this matter at PrepCom 4. If the rules were to be revised to include a rule allowing anonymous witnesses, one would expect that the conditions in which that was allowed were clearly set down and clearly identified. In my submission, it should not include the situation we have in the present case where, although the witness does not allege that she was raped by the defendant, she does say that she knew the defendant because she was part of that inner circle. I cannot conceive of a situation where a rule could be drafted saying that a witness that had had personal dealings with an accused would be allowed to conceal her name from the accused.

*JUDGE CRAWFORD*

Ms. de Bertodano, if I understand your argument, any such rule must be ultra vires because it would be inconsistent with Article 67(e). It does not matter under what conditions it allowed an anonymous witness. I understand you to argue that the defense has an unconditional right to know the identity of the witnesses.

*MS. de BERTODANO*

Your Honor, under the Statute as it is currently drafted, yes.

*JUDGE CRAWFORD*

But the rules cannot be inconsistent with the Statute.

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*MS. de BERTODANO*

Your Honor, the Assembly of States Parties can debate the rules and can clearly make amendments to the rules. Your Honor, were I in a position to be taking a view on that, it would be my view that it was wrong to include a rule that allowed the anonymity of witnesses. And that perhaps might be the subject of debate, if such a rule were included, as to whether or not it was *ultra vires*.

*JUDGE CRAWFORD*

Judge Lowe?

*JUDGE LOWE*

Ms. de Bertodano, can I ask you a question about Article 68(1)? There it says that the measures for the protection of witnesses “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” Is it your case that it has to be shown that there is prejudice to the particular accused in the particular circumstances of the instant trial? Or that it is enough to show that it would be prejudice, in some abstract sense, to trials in general?

*MS. de BERTODANO*

Your Honor, I think that there are some principles which would prejudice any accused in any trial. It is not necessary to look behind that to the particular circumstances. It is my submission that the right to know one’s accusers should be protected no matter who the accused is or what the facts of the trial are.

Your Honor, I realize that we are short of time. If I may conclude by saying that if this application by the prosecution is allowed, we would face the danger of undermining the whole spirit of the Statute to bring justice to these victims of serious crimes. Your Honor, we would look towards trials in which we hear evidence from what is little more than voices in the dark. No defendant could challenge what was said against him and this, in our submission, undermines the ends of justice which this Court seeks to achieve.



*JUDGE CRAWFORD*

Thank you, Ms. de Bertodano.

THIRD ARGUMENT: NATIONAL SECURITY EXCEPTION

*MR. STOELTING*

Article 7 of the ICC Statute deals with crimes against humanity. It lists certain acts and requires that they be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” One of the enumerated acts, deportation or forcible transfer of population, is defined to mean “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under international law.” That phrase—“without grounds permitted under international law”—reflects the intense debate that this provision provoked during the drafting of the Rome Statute. Some delegations, prominently the Israeli delegation, were unwilling to support the Statute if forcible transfer was a crime against humanity. Other delegations felt that it accurately reflected the state of international law. The compromise that was struck in the crucible of negotiations was that forcible transfer would be included as a crime against humanity but that it would only be prohibited if done “without grounds permitted under international law.” All sides could then take comfort that their own interpretations of international law, whatever they may be, would be correct.

In our case, the defense offers a factual justification to the forcible transfer allegation: Beta is not forcing Marginalians out of its territory as the prosecution contends. Instead, Marginalians are recruiting Betans from within Beta to support the cause. To prove this theory the defense faces a problem that all lawyers face: how to develop admissible evidence to support its case? The defense needs documents from the Betan and Marginalian government files to prove its defense. But Marginalia has cited national security reasons from withholding these documents. As a state party, Marginalia is subject to Article 73, which is subject to Article 72 of Statute which provides a number of measures relating to the protection of national security information.

The question raised by the defense goes to the heart of international tribunals and their ability to try cases involving documents potentially protected by national security issues. Article 64(2) of the Statute states that “[t]he Trial Chamber shall ensure that a trial is fair.” If documents exist relevant to the ability of the accused to mount a defense, and if states withhold

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these documents, should there be consequences? Is the very fairness of the trial itself at stake? These are the issues arising from our third argument.

*MR. KAY*

Your Honors, the application by the defense at this stage is to dismiss the charges against the accused, President Medema, due to the impossibility of this defendant of having a fair trial within these proceedings at this Court. The ground of this application is due to the nondisclosure of relevant material by two separate government authorities, the government of Marginalia and the government of Beta. This material would advance issues relating to the defense of the accused. The Court knows that the allegation against the President is that he was responsible for causing the raids by Betan forces into Marginalia and that orders were given by him that caused the human rights abuses which are cited within the indictment against him.

Requests have been made to both Marginalia and Beta to deliver up documents to the defense to enable us to look at material and thereby develop our defense. We had also requested to be able to go to Marginalia and Beta to see documents that are in possession of the governments that they may not want to transport or ship beyond their borders. These requests have been denied.

With regard to the law on this matter, I would like to refer the Court, first of all, to Article 64(2) of the Statute. This is in the section that deals with the functions and powers of the Trial Chamber. Article 64(2) states: "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses." The key expression here is that it requires the Court to have "full respect for the rights of the accused." Moving on from Article 64(2), I would like the Court to look at Article 64(6)(b). This is an enabling power to this Court and it states that "[i]n performing its functions prior to trial or during the course of a trial . . . the Trial Chamber may, as necessary . . . require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute." Moving to Article 64(6)(d): "also order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties." And for completeness, if we look at Article 64(6)(f), it states that the Trial Chamber may

“rule on any other relevant matters.” There is plainly power in this Court to consider the dilemma that the defense are faced with today.

*JUDGE CRAWFORD*

Where in the Statute does the Tribunal have the power to stay the proceedings on the grounds of a non-delivery of a document?

*MR. KAY*

You can rule on “any other relevant matters,” which was the point of citing Article 64(6)(f). That provision permits Your Honors to govern the proceedings and to ensure that the principle of fairness set out in Article 64(2) is applied to the proceedings so that this defendant receives a fair trial.

*JUDGE CRAWFORD*

Surely the difficulty you face, and I am sorry if this is cutting through the argument, but let us look at Article 72, which addresses specifically, the problem of national security information. The Statute envisages that where there has been a refusal by a state on national security grounds to disclose documents, the Court “may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.” So doesn’t the Statute specifically envisage that the remedy for non-disclosure is an inference in favor of the accused?

*MR. KAY*

It is important for justice to be seen to be done. We cannot advance in this case on the belief that any inference would be in our favor. We would require this Court to say that that inference, before a trial started, was in our favor in relation to these factual issues because they provide this accused with a defense to the charges.

We have to be very careful here in that we do not only consider it at the start of the trial, the issues that are raised by the prosecution. We must remember that Article 66 provides that there is a presumption of innocence to an accused person. That cannot be forgotten. In order to convict the accused, “the Court must be convinced of the guilt of the accused beyond reasonable doubt.” We say this Court could not be convinced in these circumstances with this evidence being prevented from being disclosed because the Court would forever have a doubt about the validity of the prosecution allegations against the accused. And we cite lastly, Article 67(1)(e).

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*JUDGE LOWE*

Could I take you back to Article 64(6)(b), where you referred us to the provision enabling this Court to require this production of evidence by states? That refers to obtaining “the assistance of states as provided in this Statute.” Part 9 of this Statute refers to the obligation of states parties to cooperate. What reason is there for interpreting Article 64(6)(b) as entitling the Court to demand the documents from non-state parties?

*MR. KAY*

It is a power that the Court could have that would only be advisory to a state. This goes for the whole issue of this Court’s jurisdiction that was the basis of my primary submission earlier today. A court trying someone can only try them fairly if they validly have jurisdiction. That requires a state to be a party to the proceedings. If that state is not a party to the proceedings, the whole validity and fairness of a trial is undetermined. That is why the jurisdiction of this Court can be called into question.

I would just like to cite here, the words of Justice Jackson at the Nuremberg trial dealing with this particular issue: “We mustn’t forget that the record on which we judge the defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well.” This Court must be very careful about being manipulated into a political situation whereby it is forced to make rulings and determinations based only upon those parties who are interested within this particular treaty. States that lie outside the Treaty have to be considered within the context of valid international law.

*JUDGE CRAWFORD*

Is it possible at this stage of the proceeding to identify with precision the inference that you would want us to draw in favor of the accused from the absence of these documents?

*MR. KAY*

It would be a complete defense to the charges of the prosecution. The prosecution could not proceed with such important details, in relation to their indictment that they have had confirmed, being taken out of the process.

*JUDGE LEIGH*

I would like to follow up on that. Article 72 sets forth a rather devious and complicated set of procedures. At what stage is this Court now under Article 72?

*MR. KAY*

You cannot take away the rights of the accused within the Statute. They are not rights that can be chipped away. He has a right to a fair trial. He has a right under Article 67 to examine witnesses, produce witnesses, and produce material relevant to his defense. Any erosion of those rights by other Articles within the Statute creates a state of affairs that is incompatible. It states quite clearly within Article 67(1) that "in the determination of any charge the accused shall be entitled to a public hearing having regard to the provisions of this Statute, to a fair hearing conducted impartially and to the following minimum guarantees, in full equality." These are guarantees.

Article 72 simply is a matter of procedure before the Court. National security interests and their guarding and non-disclosure are matters of procedure. It is a matter that can be relied upon or not. The rights of the accused within Article 67 always have to be granted. They cannot be taken away. The prosecution, Your Honors, and indeed myself have no power to take those away.

*JUDGE CRAWFORD*

Mr. Kay, the general inference you asked us to draw in favor of the accused, if I may say so, is in the nature of a general plea, almost like an acquittal in advance. Surely, the point on which you are seeking this evidence relates to the recruitment of persons across the border into Marginalia as distinct from their expulsion? And yet the evidence, at least the evidence that is to be led, implies that there were very significant numbers of women and children who forced across the border. Surely, we are not to draw any inference in relation to that fact, are we?

*MR. KAY*

There would be a mistake here in just considering that it was an application only in relation to Marginalia. It is also the Betan government records and the Betan policy documents created within the tenure of office of the President and the various measures taken at the time by Beta in relation to its

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security and safety and policy in dealing with the matters that are complained of today.

*JUDGE CRAWFORD*

And the inference as to Beta, what inference is drawn there? That the defendant did not have knowledge of these policies?

*MR. KAY*

Not a question of knowledge. These were acts committed by others within the state that were not governmental acts, that were acts of a lesser nature as between those who were influenced by Marginalia and those that were within Beta, who were attempting to protect themselves from the Marginalian insurgence. These two are linked issues, and they do go essentially to the heart of the propriety of this case.

*MR. NICE*

In a time when we are having a little time warp, it may just be helpful to start by reflecting on what, for example, people might have been thinking at the time of the bringing in of this Statute, the competing ideas they then had. For they may be ideas from which we have all got to detach ourselves when we look at the jurisdiction and practice of the International Criminal Court. So let's remember, if Your Honors would be so good, that this Court is not a nanny Court. It is not a bossy Court. It is not a Court that designs to take the jurisdiction of others. It is a complementarity Court. It works together with the jurisdiction of other states. Also, as part of that complementarity, there is an assumption that states will, for the most part, perform their duties and perform them honorably. It is probably important to have that in mind.

Another feature is that this Court is presided over by professional judges, not by lay juries. We have to detach ourselves from all notions that are built or all practices that were built on the idea that lay jurors were not able to make careful, balanced decisions about evidence from which they have to be kept in the dark. It is probably an unfair assumption about jurors, but it is not made for judges. Judges are able to deal with evidence and they are able to deal with the lack of evidence.

And a final general point is this. Supposing all the documents were in a truck, being delivered by a cooperative state, and the truck blew up and the documents were damaged. Would the argument be the same? It should be. The argument is not, in reality, about the refusal to provide documents, but about the lack of documents. This is commonplace in trials with judges and indeed juries. They have to deal not with the best evidence that there ever could be, but with the best evidence that there is at the time of trial. We, on behalf of the prosecution, accept completely that the defendant has a right to a fair trial.

Mr. Kay has taken you to some of the provisions, and I would like to identify others. Article 64(8)(b), the Presiding Judge's duty, the burden of proof, the public hearing, the right to raise defenses. I shall come back to Article 72, of course, in a minute. The unequivocal right to a fair trial, no prosecutor would want it otherwise. Yes, under Article 86, there is a general obligation on the states that are signed up to this Statute to cooperate. There is no duty on others, consistent entirely with the position that is understood and referred to in the first argument we have had.

Article 93 is then the Article to which we have to have some reference, for that is the ability of states to deny the provision of assistance where matters concern, or rather, as the terminology of the section is, relate to national security. There are terms slightly different from that used as we shall see in Article 72, where the phrase "prejudice its national security interests" is relied upon.

So going back to what I said in the beginning, an assumption that people will work together is a first working step that states will behave honorably, if and when they decline to provide materials. We better have a quick look at the detail of Article 72 although, as His Honor Judge Leigh correctly said, it is pretty complex and would take a full five minutes to go through or more. But what Article 72 and Article 73 does, in short form, is to recognize that the documents of the type required by any defendant or by a prosecutor for the thing is mutual as between defense and prosecution, may lie with the interested party claiming prejudice, may lie with another party. The combination of Articles 73 and 72 effectively brings the Court in, gives it jurisdiction, whenever a claim is made by either that particular type of party, a party whose documents they are, or a party into whose hands they have fallen. We then see, very quickly, that the first approach to the problem is to resolve it by cooperative means. Various means or methods of cooperation are referred to. If, at that stage, by cooperation it is not solved, and if the Court determines that the documents are relevant, then further orders may be made under Article 72(7)(a). As you can see, under Article 72(7)(a), where disclosure of the information is sought and national security has been invoked, the Court

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may request further consultations and it may conclude that by invoking national security “the requested State is not acting in accordance with its obligations.” It may then refer the matter being the ultimate sanction to the other state parties or to the Security Council. But in either case, whether it makes that sort of order or whether it is simply faced with the failure to disclose by some other party, appropriate inferences may be drawn.

*JUDGE CRAWFORD*

Surely, Mr. Nice, there could conceivably be a situation where the Court came to the conclusion that, notwithstanding the referral by a state, it was in effect being set up because the information before it was so powerful and so incomplete that no drawing of inferences would substitute. Surely, there must be an inherent power in those circumstances to stay the proceedings?

*MR. NICE*

We do not challenge that for one minute, but we do not actually accept that the Article relied on by my learned friend had this particular problem in mind. The Yugoslavian Tribunal found it was seized of an ability to the stay proceedings, and we would not challenge your ability to do that. It would be wholly wrong to stand in the way of judges saying we do not think there can be a fair trial. No, of course, you could stay the proceedings.

*JUDGE CRAWFORD*

And then there is the second question, which is the inference. Now, taking the evidence that is not being disclosed because two governments have refused to disclose it, and if we were to draw an inference in favor of the accused from that failure, what should that inference be?

*MR. NICE*

First of all, with great respect, it is far, far, too early to start articulating inferences that should be drawn one way or another. This day, Your Honors are simply seized of the issue of whether the trial be stayed. The answer to that is absolutely not. Why? Because with this trial as with any other trial, there is a huge mass of material in various categories that will be laid before you from which inferences one way or another may properly be drawn. Now



is not the time to articulate what they may be. Certainly it is not the case that the inferences should all be drawn one way.

And to give you an example. Going back, I think to, yes, it was, the year 2000, in those cases involving Croatia with the Yugoslavian Tribunal. For most of the duration of those trials, the state of Croatia withheld the documents on the change of government, at the change of the century indeed. Documents suddenly started to emerge, but did they emerge wholesale or did they emerge selectively? Were the public and the Courts being fed with documents that the state of Croatia wished to advance because it had its own agenda to serve? The judges did not throw up their hands in horror and say, my goodness we can't deal with mendacity of this sort. Of course they didn't. In the earlier stages, it was minded accorded to the judgements later delivered. It was minded to infer that the suppression of documents was in order to protect the defendant and therefore the absence of documents would give rise slightly and only with great caution to inferences adverse to the accused. When documents were then being produced that were favorable to the accused it may be different inferences had to be drawn from the earlier failure to disclose.

But the one thing that the judges did not say was, my goodness, this is too difficult for us. With great respect Your Honors, you have not been appointed by the international community to do something that is easy. So now is not the time to be identifying the inferences. In due course you will be able to deal with this particular problem. A few racing points, as I see Your Honor looking at the watch.

First, it is important to bear in mind that states do not have a single shot at the problem of prejudice. It is explicitly set out that they can come back, whenever prejudice is raised. Consistent with the complementarity approach, we are working not against the states, but in harmony with them and broadly speaking, we trust them. That is an important point to have in mind.

Second, the sorts of material that you are dealing with in this case are going to be: 2,000 witness statements so far, only three of which are in question, and they of course have already been disclosed to the defense. Some statements support the defense he is going to argue, particularly two of those witnesses first being caught looting, and then came across the border and giving an account arguably favorable. Well, which way will it go? It is not an uncommon problem. The third witness appears to have some psychiatric difficulties that he has disclosed and his material is being fully investigated, as is his claim of relationship both to President Medema and the late President Khadaffi. So the material upon which you will be making your decision is all there. We, as you know, are under a duty to disclose to the defense immediately, as we have done with anything that is favorable to their case. And let it

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be quite clearly understood that under Article 67(2), not only do we have that duty, but you have the power really to supervise our failures. If there is any doubt about whether we are making the right material available that supports the defense case, you can step in.

*JUDGE LEIGH*

May I ask you the same question I asked your learned friend earlier? At what stage in the procedure, which is step-by-step in Article 72, are we now? It is important in order to answer the question, as to when we may draw the inference against the prosecution, if at all?

*MR. NICE*

The Registry has not been furnished as yet with the full details of the history of the intervention of Marginalia. I take it that they have yet to make a formal appearance. They can, of course, do so and I cannot speak for them. Neither can I be an advocate for secrecy. Nor can I be an advocate for those who wish to withhold documents as secret on the grounds of their own privilege or whatever it may be. So Marginalia should itself at some stage make full use of the provisions of Articles 72 and/or 73, whenever that becomes relevant, and have a hearing before you.

As to the substance of Your Honor's question: when do we consider what inferences should be drawn? At the end of the case.

*JUDGE CRAWFORD*

And the position is that the state can intervene under Article 72, irrespective of whether it has custody of the documents and at any time prior to the close of the procedure?

*MR. NICE*

Your Honor is correct and I should have made that point myself. Absolutely right. And of course, the bald assertion by the defense that they cannot advance a defense is simply wrong. President Medema himself, over there, he can give evidence if he wishes to. And in any event, it is never been beyond the wit of counsel from the body of evidence that they have to invite Courts to make this inference and to find material to support it. But then it has never

been beyond the wit of judges and jurors to see the truth and the falsity of various arguments.

*JUDGE CRAWFORD*

Thank you, Mr. Nice.

#### JUDGES' DELIBERATIONS

*MR. BEKKER*

That concludes the presentations of the prosecution and the defense on the three arguments. We are now privileged to sit in with the deliberations of the ICC Trial Chamber which normally, of course, would not be public but would be held in camera. We have the benefit of such great expertise today and hope to get many insights on what a typical deliberation session would look like.

*JUDGE CRAWFORD*

The Court has provisionally allocated each of the issues to one member of the Court. That member will outline some thoughts on the particular question and the others will then contribute as seems necessary. There is no element of pre-judgment in this allocation. Judge Lowe?

*JUDGE LOWE*

First, it is plain that the Court determines its jurisdiction regardless of what arguments were raised by the parties. Second, the argument that this is, in some sense, an inter-state matter, where we have to weigh the interests of Beta, is misplaced. This is a criminal trial of an individual. If there are international law implications that the Betan government wants to raise, they can be raised by that government.

As far as the formal procedures under the Statute are concerned, it falls on the interpretation of Article 12 as to whether the pre-conditions for the exercise of jurisdiction are satisfied. When Mr. Kay says that Beta does not accept that the treaty is binding on the people of that state, that seems to me to confuse the questions of the creation of crimes, a question of the venue of the trial of those crimes. It is Article 5 that creates a substantive criminal liability under the Statute. There is no question that anyone can be tried for offenses which were not offenses at the time that they were committed. And Article 22 of the Statute, drafted under a jurisdiction which still permitted the use of

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Latin in those times, provides that *nullum crimen sine lege*, and there is no suggestion here that anyone would be tried for any offensive act which was not an offense at the time that it was committed. It seems to me plain that the Article 5 offenses are not novel offenses. They are crimes already established under customary international law. So what the Statute is creating is not new crimes, it is a new venue.

Mr. Kay argued that Marginalia, once it transferred Medema out of its jurisdiction, waived its right to try the defendant. But whether or not that is right, it is a separate question from the question of whether Marginalia could waive the right of this Court to adjudicate upon this case. It is very similar, as Judge Leigh pointed out, to the circumstances in the context of extradition. The question is whether the tribunal to which the accused was transferred had jurisdiction. Article 12 says that this Court has jurisdiction if the offense was committed within the territorial sovereignty, territorial jurisdiction, of the state from whom the transfer, in loose terms, has occurred. That is a privilege within the Statute which binds this tribunal. It is a privilege within the Statute which binds this tribunal. It is a privilege which was satisfied in the context of this case in relationship to some but not all of the offenses. There is, it seems to me, neither a right nor an obligation created for Beta by the transfer of the jurisdiction to try this offense from Marginalia to this tribunal.

The accused is charged with five offenses: (1) crackdown on the MDV within Beta; (2) murders of Marginalians in Marginalia; (3) rapes in Marginalia; (4) the mass killings of Betans of Marginalian heritage in Betan concentration camps; and (5) the forcible transfer of women and children from Beta into Marginalia. The second and third—murders and the rapes within Marginalia—plainly took place within Marginalian territorial jurisdiction, and I am quite satisfied that the fifth of the counts (forcible transfer) also falls within Marginalian territorial jurisdiction as a matter of international law, since although the offenses may have been commenced outside Marginalia they were completed within it.

On that basis, I would hold that counts two, three and five are within the jurisdiction of this tribunal. Counts one and four are not within Marginalia's territorial jurisdiction nor are they within its nationality jurisdiction, so there is no basis under Article 12 on which Marginalia could transfer those cases to this Court. Now it might be arguable that states are, as a matter of international law, entitled to organize their courts and tribunals as they wish, and that there is no obligation under international law either to have courts sitting

within the territory or to have courts staffed by judges having the nationality of the state in question. There are several such examples in everyday practice. It might therefore be argued that if Marginalia has jurisdiction on the basis of some other jurisdictional type from under international law, for example, universal jurisdiction over the crimes listed in Article 5 of the Rome Statute, then it would be open to Marginalia to nominate any tribunal that it might choose in order to hear those charges and to try the accused and that that would give the ICC jurisdiction over counts one and four. Marginalia would of course remain responsible for what would be in effect a delegation of its own jurisdiction to another tribunal for whatever the tribunal did. Now, whatever the force this argument might have in general, it seems to me to fall. If the ICC could have jurisdiction both under the Rome Statute and under this additional delegated jurisdiction outside the scope of the Treaty, it seems to me vital that it be made plain at the beginning of the litigation because of procedural formalities and the safeguards which attend the prosecution may vary under the Rome Statute procedure and the additional procedure.

Now, here we are clearly acting under the Rome Statute. For that reason it seems to me to follow from Articles 22 and 23 of the Statute—which say that a person shall not be criminally responsible under the Statute unless the conduct in question constitutes a crime within the jurisdiction of the Court, meaning jurisdiction under the Statute, and in Article 23 that a person convicted by the Court may be punished only in accordance with this Statute—that any such additional basis of jurisdiction could not be exercised in this case. Marginalia, of course, could conceivably recommence proceedings in respect to the first and fourth counts.

*JUDGE CRAWFORD*

Could I ask Judge Leigh to comment on that if he wishes to do so?

*JUDGE LEIGH*

Well, I would agree with the formulation which Judge Lowe has just recited so ably. I think I might even go further and say that since jurisdiction would have existed on a territorial basis under international law irrespective of the existence of the treaty, I would have no difficulty in founding the jurisdiction on that aspect of it also.

*JUDGE CRAWFORD*

I agree with Judge Lowe. I agree that this Court in the circumstances of this case has no jurisdiction over the allegations which relate to crimes committed solely in Beta, that is to say counts one and four. It is implicit in that that we reject the allegation that a crime can be brought within the jurisdiction notwithstanding that it occurred substantially outside the jurisdiction because of its connection with other crimes.

I would not exclude the possibility in other cases that evidence of what occurred outside the jurisdiction was nonetheless relevant in characterizing acts that occurred within it, but there is no indication that that is a problem in this case. However, I would, with great respect, not agree with the proposition that the ICC could exercise any, as it were, extra-statutory or extra-curricular jurisdiction notwithstanding that the referring state might have had that jurisdiction. It seems to me that this Court is a court of strictly limited jurisdiction. That jurisdiction is defined by the Statute and none other and that, accordingly, unless the preconditions to the exercise of jurisdiction in Article 12 are met, the Court cannot exercise jurisdiction. It follows that the jurisdiction of this Court is a subset of the possible jurisdiction that a state might have under its national law, but the Statute makes it clear that this is the case.

The other concern I have, although in the end I am not satisfied by the argument, is the inference that might be drawn from Article 11(2) that there is certain jurisdiction which is particular to a state. It seems to me that you cannot say that merely because the national of the state did something, somewhere, that the state somehow owns the crime. But I think it might be possible to construct a narrower argument that where the head of state does something in the exercise of power *jure imperii*, whether lawfully or unlawfully, the crime has a specific relation to the state. That act is somehow an act of state and protected by Article 11(2). That is an argument which might have considerable significance in debates going on in certain countries as to the applicability of the Statute vis-a-vis third parties. In the circumstances, I prefer not to express a view. It is clear that these acts were committed within the jurisdiction, within the territory of *Marginalia*. If there is a sovereign immunity exclusion lying under the Statute by reference to the rules of international law which were referred to by counsel, then that must be invoked by the state concerned. It has not been in this case; therefore, any inference from

Article 11(2) does not preclude our jurisdiction over counts one, two and five. Perhaps we now move to the second of the arguments. Judge Leigh?

*JUDGE LEIGH*

As my questions will already have revealed, I find it difficult to accept any derogation from the express provisions in the minimum guaranty section of Article 67, which guarantees not only a fair trial but also the right to examine witnesses or to have witnesses examined. It doesn't seem to me that there is any escape from the text of the treaty. As I have indicated there is not a word in the Treaty of Rome about anonymous witnesses. The argument that has been made by able counsel is entirely derivative from other more general provisions. In view of the importance of the minimum guarantees it seems to me impossible to make a derogation from the guaranty in Article 67 of the right to examine or to have examined witnesses against the accused. Therefore, I would have no difficulty in reaching the conclusion that we must exclude testimony from such witnesses.

*JUDGE CRAWFORD*

Judge Lowe?

*JUDGE LOWE*

I agree with that, but might base the decision on this case on the rather narrower ground that evidence is not essential. However, I do find it difficult to imagine any circumstances in which it would be proper to admit the evidence of an anonymous witness.

*JUDGE CRAWFORD*

I also agree, in particular on that ground. It appears that the evidence that is sought to be protected by anonymity is not essential to the case, notwithstanding that it is part of the case. At the very least, the Court must bend over backwards to ensure the most complete information to an accused in respect of the conduct of the defense. Only the most compelling arguments could persuade the Court to allow anonymity at the time of the trial. There is, I think, much less difficulty about allowing anonymity to a witness in the pretrial investigations. But by the time of the trial there must be at the very least a very strong presumption in favor of the disclosure of the identity of the witness. The case for doing so has not been made in these circumstances.

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Therefore, it is not necessary for the Court to consider whether, as ably argued by counsel for the defense, the relevant right is an absolute one.

So we move to the third point. This concerns the implications of the nonavailability of certain state documents in terms of the conduct of the trial. It is worth pointing out that the Statute actually goes a very long way to the protection of national security information, the plea of privilege, as it were, because it allows any state to make that claim on grounds which seem to be apparently subjective to the state, whether or not that state has or ever has had custody of the document and it requires the Court in certain circumstances to rule on the claim. Article 72(7) goes on to say what shall happen: if the evidence is relevant and necessary, the Court may undertake various actions and those actions include specifically the drawing of inferences.

It could be argued from Article 72 that the Statute by necessary implication excludes any inherent power of the Court to stay proceedings on the ground of the nonavailability of the document. Counsel for the prosecution did not take the argument that far. He expressly conceded that the Court did have inherent power by virtue of the general power, the general duty to conduct a fair trial, but he said that the circumstances did not exist for the exercise of that power in this case. In light of the stage of this the trial, I agree that we have not yet reached the stage in which the Court might be called on to exercise that power.

The second question is the drawing of inferences. It would be unusual for a Court which still has to hear evidence to announce what inferences it was to draw in advance. I think the word unusual may be an understatement. In due course, in the course of the argument, and even possibly prior to the final submissions, it might be appropriate for the Court to say what inferences it was inclined to draw so as to allow counsel to comment on them. But it is premature to do that. The inference which counsel for the accused asked us to draw was of a very general character and it is clearly premature for us to draw that or any other inference. So notwithstanding the solicitude for state security which is revealed in Article 72, the Court does have inherent powers but in my judgment the time is not yet reached at which we should contemplate exercising them. Judge Leigh?

*JUDGE LEIGH*

I thoroughly agree with Judge Crawford.



*JUDGE CRAWFORD*

Judge Lowe?

*JUDGE LOWE*

I agree with both Judge Crawford and with Judge Leigh.

*JUDGE CRAWFORD*

In that case I agree with you and we can finish.

#### COMMENTS OF THE DEFENSE AND THE PROSECUTION

*MR. BEKKER*

Thank you very much. Finally, several minutes have been set aside for brief comments by the ICC Prosecutor and his assistant and by the defense team. This is not meant to be a rebuttal and a sur-rebuttal, but merely to give some insight from their particular viewpoints as practitioners.

*MR. KAY*

There is always an appeals chamber anyway. And no judge I have ever known has ever voted himself out of a job. They did not in The Hague and they did not here, so we were not surprised.

My particular concern with the International Criminal Court is the rights of the accused. If you look at this Statute you will only see defense counsel mentioned twice. The office of the prosecutor has a vast text and array of powers available to them and since the passing of the treaty they've spent hectic sessions at PrepComs trying to redress the wrongs that they have done. I have been privileged to receive some of the information relating to these debates because it has been suggested that, although they have given rights to a defendant, there is no point in giving rights unless you can use them. There is no point in saying, oh, you got right to a fair trial, have got right to question witnesses, unless you can go in and see the documents and you can go in and interview witnesses and you can spend a few weeks in Mr. Nice's room looking through his files. It is very important that all practitioners do take this onboard. These cases involve very subtle and dramatic political events and when you are dealing with them you have to be very sure that the material that is being produced is not of a political source but is of a more genuinely factual source.

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My great concern has been that the defense rights are spoken of within these treaties but when it comes to taking effect there is no power at all. We have had experience of this in the Yugoslav and Rwanda Tribunals where we have attempted to provide a defense but found ourselves against a brick wall because we were not able to speak to anyone in the country. In Rwanda, if you go around looking for witnesses, you won't last very long and neither will your witnesses if you ever get one. In Yugoslavia, access to documents was very difficult because you were dealing with a power and a government from the Serbian side of Yugoslavia who simply had their own interests to serve and would not release information that we wanted and felt was relevant to the defense of the accused.

I think too little time is spent actually thinking through how the rights of an accused that are within all the international covenants and statutes are actually going to be implemented. We go along to court whilst trial is underway, or just before, and say, sorry judge, no one will come out of Yugoslavia to become a defense witness, we need some help here. Sorry judge, we have not been able to look at documents within a police station. The powers of the prosecutor are so much stronger—with the will of many states to provide support and assistance—that when you are defending someone on these charges you simply do not have the same support because it is not fashionable and the whole world is against you. It does not mean to say that the charges that are being brought are based and true and honest evidence. They may not be, and that is my concern.

*MR. NICE*

I think that I will confine myself to about five very short points. This Statute and the exercises that we have gone through today probably make good the suggestion widely heard that in the early days of this Court there will be few real trials and nearly all the issues determined will be issues of jurisdiction. It is actually quite hard to think of real trials of the scale that are being tried by the ad hoc tribunals coming quickly to the judges of the ICC.

Second, one of the consequences of having procedures so developed and complicated as you have here, rather again like the system you have in the ad hoc tribunals, is that because of the conformation requirements and so forth, is that people are indicted only very carefully. It is probable therefore that this Court, when it has people to try, will convict most of them. There is always a problem associated with this, which is the perception of courts that

are convicting courts, even if there are good reasons for their returning high rates of convictions. But that is very much for the future.

Third, this Statute, for whatever reason, is built on the assumption that the adversarial system is satisfactory. And so it may be for some types of trials, particularly, for example, for trials of camp commanders, people who are charged with identifiable murders of one kind or another. But we ought to remember that the system was originally designed for dealing with sheep stealers and the like. It was not designed for unraveling huge and complicated political histories. Only time will tell, after there has been sufficient time to analyze the results of the ad hoc tribunals and the work of this Court, whether that system really is appropriate. And, as we saw with the examples today, there will inevitably be selection by the parties of the materials that are laid before the judges rather than an easily identified universe of evidence to which any decider of the facts would turn. Getting a true picture of a political military history that may cover months or years with the focus on criminal responsibility is, I suspect and suggest, an extremely difficult thing to do.

Fourth, and connected to the previous point, is that although in this case we were not going to get much material because of Beta's and Marginalia's separate reasons for not producing material, these trials are likely to generate, as do most of the trials at the ad hoc tribunals, unmanageable quantities of material. It is simply important to have that in mind, and I do not use the word "unmanageable" lightly. Whatever the duties of disclosure are, and however honorably they are discharged, once you open the doors to incoming material you also close the door on the possibility for any legal team fully to marshal it. That is a reality that has to be faced.

Lastly, just to deal with the point that Steven was making about the comparable resources of prosecution and defense, which I have no doubt is absolutely right and reflects his experience in trials he has been involved in. It is also worth bearing in mind, though, that it can be the prosecutor who is comparatively the minor figure, because he or she is prosecuting not just an individual but it may well be an individual backed by a state that is both distributing documents when they are helpful, suppressing them when they are not helpful and for all one knows using its various resources to do all sorts rather more wicked things than that in an effort to corrupt the result. Of course, I do not say that has happened in any of the cases currently before either tribunal, but with the strong passions that can be generated by any trial that affects national pride or national history, it can be the case. It may already have been the case that the prosecutors end up prosecuting effectively not only individuals, but individuals and interested states. Thank you.

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## CONCLUSION

### *MR. BEKKER*

Thank you very much, Geoffrey. I am sure that everyone in this special Common Room agrees with me when I say that we have been very privileged indeed to have been in the presence of such eminent practitioners and scholars on the International Criminal Court. I would like to thank the ABA Section of International Law and Practice, in particular the International Courts Committee and the International Criminal Law Committee, for sponsoring this event and all the participants for giving very generously of their time. I will leave the last word to David.

### *MR. STOELTING*

Thank you everyone. Thank you to the panelists. This was a wonderful experience.

