

ATROCITY CRIMES LITIGATION YEAR-IN-REVIEW (2010) CONFERENCE
Center for International Human Rights
Northwestern University School of Law
Chicago
Monday, January 31, 2011

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1 SCHEFFER: Okay. Welcome, everyone, to the
2 Fourth Annual Atrocity Crimes Litigation everyone, to
3 the Annual Atrocity Crimes Litigation Year In Review
4 Conference here at Northwestern University School of
5 Law in Chicago. Our numbers will, from experience,
6 vary greatly throughout the day as students come and
7 go from classes. On Monday there's often an early
8 morning class surge and then we get them after their
9 classes. So you'll see a varied number as we go
10 through the day. We are very pleased for everyone
11 who has joined us. It's going to be an exciting day,
12 an interesting one, both in writing and by video, so
13 there's really no need for you to labor over note
14 taking. This stuff will all be up on the web within
15 a certain number of weeks and you'll all be able to
16 benefit from that.

17 My name is David Scheffer, a law
18 professor here at Northwestern University School of
19 Law, and it's my pleasure every year to moderate this
20 conference. I want to start, if I may, by
21 introducing Tom Geraghty, who is the director of the
22 Bluhm Legal Clinic, within which the Center for
23 International Human Rights resides. On this entire
24 floor is the Bluhm Legal Clinic.

1 So, Tom, if I ask you to come and --
2 are you mic'd up, by any chance?

3 MR. GERAGHTY: No. All right. Well, good
4 morning, everyone. I would like to welcome our
5 distinguished guests and all of you who have joined
6 us today for the Fourth Annual Atrocity Crimes
7 Litigation Year in Review conference here at the
8 Northwestern University School of Law.

9 Our guests have flown from around the
10 world to be here today, and we're extremely grateful
11 for that journey and for their expert contributions
12 during today's discussion. So thank you all for
13 being here.

14 As director of the Bluhm Legal Clinic,
15 I view what's transpiring here today as uniquely
16 crafted clinical experience in the field of
17 international criminal law. Today is the reality
18 check where we expose our students, faculty, and
19 others to -- not to mention a global audience through
20 our web site to the practical operations and results
21 of the war crime tribunals during 2010.

22 We learn firsthand from our panelists
23 how international justice actually works and
24 sometimes falters in the courtroom, and I view these
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1 lessons as particularly important as a longtime
2 practitioner in our courts here, and I see -- and I
3 know how important it is for us not only to read
4 about what goes on in these courtrooms, but to hear
5 from experts who actually participate in their -- the
6 deliberations that go on in courtrooms around the
7 world.

8 Professor Scheffer heads up our
9 international externship program, where we send
10 Northwestern law students to the war crimes tribunals
11 for their own hands-on experience in and around the
12 courtrooms and chambers and for academic credit, and
13 this is a unique program that we're very proud to
14 have here at Northwestern.

15 Some of the students who have
16 participated in this program are here today, and I
17 want to particularly note Kyle Olson. Kyle, will you
18 raise your hand?

19 (WHEREUPON, Mr. Olson complied.)

20 I got up this morning at 5:30 and
21 pulled out -- went out and got my Tribune and read
22 it. It unfortunately doesn't take very long to read
23 these days, so I immediately got to the op-ed page
24 where I saw Kyle's very, very well-written analysis
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1 of the importance of the international criminal
2 tribunals to the rule of law throughout the world,
3 and a copy of Kyle's op-ed has been reproduced and is
4 on our table. This is, I think, one of the messages
5 that I like to talk about and to see, as a result of
6 the work that we do here, and that is the involvement
7 of our students who, after all, will be sitting in
8 your places someday hopefully as the leaders in
9 international criminal justice.

10 The work of the Center for
11 International Human Rights is very supportive and
12 consistent with the work that the Bluhm Legal Clinic
13 does in other areas, both locally, nationally, and
14 internationally, in international, in criminal
15 justice, and in children's justice. Our Center on
16 Wrongful Convictions and our Children and Family
17 Justice Center are focused on the preservation, the
18 enforcement of human rights norms here in Chicago,
19 Cook County, United States, and around the world. So
20 the Center for International Human Rights is a key
21 component of everything that we do here in the clinic
22 and supports the mission of the Bluhm Legal Clinic,
23 and that is to provide hands-on education for our
24 students in the practice of law and in particular in
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1 the importance of human rights, and also to take the
2 practical experiences that both faculty and students
3 learn here to the academic realm and to translate
4 what we see in the actual practice of law and what
5 goes on in courtrooms, translate that into the
6 academic work that we do and the scholarship that we
7 produce here at the Bluhm Legal Clinic. So on behalf
8 of the law school, I'm just extremely proud and
9 pleased to host this conference, and I really do
10 appreciate everybody being here today and for
11 traveling so far to participate in this wonderful
12 conference. And thank you to David and the faculty
13 of the Center for International Human Rights for
14 organizing this terrific program.

15 MR. SCHEFFER: All right. Well, thanks very
16 much, Tom. Let me do a few thank-yous first. You
17 know, often at these conferences we always leave
18 these thank-yous until the very last moment, like, at
19 4:59, which I think is absurd. I think we should get
20 the thank-yous out first, because everyone has worked
21 hard on this so let me just do that.

22 First I want to thank our financial
23 sponsors of this conference, the John D. and
24 Catherine T. MacArthur Foundation, and I think at
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1 some point Eric Sears will be joining us from the
2 foundation, so I thank both him and his boss, Mary
3 Page, for helping facilitate this grant proposal
4 through the foundation.

5 Secondly, Baker & McKenzie, one of our
6 major law firms. Of course, it's headquartered here
7 in Chicago, a major international law firm. Many of
8 our students arrive at the gates of Baker & McKenzie
9 to work after law school, and one of them, of course,
10 is Kyle Olson, who is here with us, and I don't --
11 maybe some of your colleagues are here, too, Kyle,
12 but --

13 MR. OLSON: They're on their way.

14 MR. SCHEFFER: They're on their way. Yeah.

15 But thank you very much, Kyle. He was a student
16 here, a superb student, and I just -- I, too, woke up
17 this morning, totally surprised to see the Chicago
18 Tribune op-ed. He threw me a zinger, and I enjoyed
19 it tremendously. So thank you very much, Kyle.

20 And he, himself, has had his own
21 experience with the Yugoslav Tribunal, Tom. That's
22 where he cut his shards when he was a -- just after
23 law school.

24 Okay. I also want to thank the
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1 Northwestern law students who prepared some
2 background research material for this conference over
3 the months. It was very hard work, I think it was a
4 good learning experience, and I'm extremely grateful
5 to them, so thanks to them as well, although a good
6 many of them are in class this morning before they
7 can get here.

8 And then finally, Virginia Richardson,
9 our legal assistant, who all of you know up on the
10 panel, deserves special thanks. Ronit Arie, who is a
11 teaching fellow here, a clinical teaching fellow,
12 before she goes off to law firm land, and also a
13 graduate of Northwestern Law, will be helping us
14 today with some video clips; and Tim Jacobs, who is
15 somewhere out there, I know, right here (indicates),
16 who helps a tremendous amount.

17 Okay. I want to briefly -- you have
18 before you the brochures -- the brochure that has the
19 biographies of everyone, totally impressive, done far
20 more than any of us could have done in our lifetimes,
21 so I'm going to let you read the text of their bios,
22 but I'll just briefly speak of them myself here for
23 just a second before we get into the substance of the
24 conference.

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1 Adama Dieng is in the center here, and
2 he is the Registrar of the Rwanda Tribunal and has
3 been since January of 2001, which was actually the
4 month that I left the Clinton administration at the
5 end of my decade working on these issues, so we
6 didn't overlap, but I have kept track of his work
7 very closely at the Rwanda Tribunal.

8 And it's been my high honor, actually,
9 to have you with us today, Adama.

10 I think, as you'll see on his bio,
11 another incredible achievement of his career has been
12 his contribution in the building of the African Court
13 on Human and Peoples' Rights.

14 Tom Hannis is right here with us from
15 the Yugoslav Tribunal. He's the Senior Prosecuting
16 Trial Attorney in the Office of the Prosecutor for
17 the Yugoslav Tribunal, has been there as well for --
18 what is it? Seven years now? Six?

19 MR. HANNIS: Nine and a half.

20 MR. SCHEFFER: Oh, nine and a half -- I'm
21 sorry -- nine and a half years, for Pete's sake, and
22 many very significant trials, currently the Stanos --
23 Stanisic trial, before that, the Milutinovic trial
24 and the Krajisnik trial. These are big, blockbuster
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1 trials before the Yugoslav Tribunal, so you have
2 someone who has really been through the fires of the
3 Yugoslav Tribunals' litigation over the last decade.

4 And before that, he was from Arizona,
5 an assistant U.S. attorney there, prosecuting cases
6 in Arizona.

7 Then we have Jim Johnson, who is the
8 Chief of Prosecutions and head of office -- sitting
9 right next to him here -- of the Office of the
10 Prosecutor for the Special Court for Sierra Leone
11 there since January of 2003.

12 And I recall even during my visit,
13 Jim, during the year 2006 to the court, I already was
14 looking at a very seasoned prosecutor before the
15 court in his third year. And here we are now in
16 2011, and Jim, of course, is extremely involved with
17 the Charles Taylor case and all that surrounds that,
18 as well as the wrap-up of the work of the Special
19 Court for Sierra Leone. So we have someone who
20 before that had 20 years' experience as a JAG officer
21 in the Army and brought all of that experience with
22 him to Freetown, Sierra Leone.

23 Then let me point to William Smith,
24 who is sitting there with a sort of pinkish tie, I
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1 guess, right, and the International Deputy
2 Co-Prosecutor of the Extraordinary Chambers in the
3 Courts of Cambodia, so he has flown, I guess, the
4 farthest.
5 He's flown the farthest, from Phnom Penh, to join us today.
6 He did have ten years with the Yugoslav Tribunal before
7 joining the Cambodia Tribunal in 2006, so we're
8 looking at someone with an enormous range of
9 experience in the international criminal tribunals,
10 someone that I've grown to admire for his work in
11 Cambodia, and I think we're going to see some, you
12 know, very good discussions emanate from his
13 experiences.

14 And we have Alex Whiting over on the
15 far end there, who is from the International Criminal
16 Court, and he has recently joined it as the
17 Investigation Coordinator in the Office of the
18 Prosecutor.

19 He manages the investigations of the
20 court. And if you don't think that's the hot seat,
21 think again. This is the guy who has to actually
22 figure out how do they investigate, how do they
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1 organize the investigations of the increasingly
2 serious and significant workload that is -- that is
3 arriving at the doorstep of the International
4 Criminal Court.

5 Before that, Alex was a faculty member
6 of Harvard Law School, and, as you can see from the
7 bio, has already established an incredible record in
8 this field, having worked previously with the
9 Yugoslav Tribunal and publishing some very
10 significant articles, one of which I hope we could
11 talk a little bit about, your Harvard International
12 Law Journal article today, Alex, which I think is a
13 tremendous article.

14 And sitting next to him is Rodney
15 Dixon. Rodney is a special guest today because he is
16 defense counsel and he works before three courts, the
17 Yugoslav Tribunal, the International Criminal Court,
18 and the Rwanda Tribunal, and he works on the other
19 side of the courtroom from most of our guests today.

20 And, believe me, that's a tough
21 position to be in, it's an absolutely critical
22 position to be in. Many of our students go off and
23 work for defense counsel at the tribunals and come
24 back raving about the experience, and I know that a
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1 few have been in chambers with Karim Khan and Rodney
2 Dixon and speak very highly of that experience of
3 representing the defendants.

4 Also, he's coauthor with Karim Khan of
5 Archbold International Criminal Tribunals, the Third
6 Edition, which is just a basic source on the
7 jurisprudence before the tribunals.

8 And, finally, we have Professor -- and
9 I've left this purposely, Valerie, until the end --
10 we have our distinguished academic contributor today,
11 commentator, and that's Professor Valerie Oosterveld
12 from -- she's an assistant professor at the
13 University of Western Ontario in Canada. I reached
14 out to Professor Oosterveld because, actually, you
15 know, I cased around a little bit a few months ago,
16 who should be the person this year. We've had
17 luminaries in the past, and I said, "Who should be
18 the next one?" And I got back several
19 recommendations that put your name at the top of the
20 list. So a rising star here in the analysis of the
21 work of the war crime tribunals, published a
22 tremendous amount. She has a J.S.D., which means she
23 also has a J.D. and a LL.M.; now she has a J.S.D.

24 So we're very, very pleased, Professor
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1 Oosterveld, for you to be joining us here today, and
2 she's going to soon be the mother of a third child,
3 so we give you all liberties today. Anything you
4 need, we are here for you, okay?

5 All right. Now, did I miss anyone? I
6 think I've covered everyone on our panel. All right.

7 This was an extremely dynamic year in
8 the war crimes tribunals. We're talking about five
9 separate tribunals here that we're going to be
10 looking at, the International Criminal Court in The
11 Hague, the permanent court; the International
12 Criminal Tribunal for the former Yugoslavia, also in
13 The Hague; the International Criminal Tribunal for
14 Rwanda in Arusha, Tanzania; the Special Court for
15 Sierra Leone in Freetown, Sierra Leone; and the
16 Extraordinary Chambers in the Courts of Cambodia in
17 Phnom Penh, Cambodia.

18 So that's a very wide scope of
19 practice in jurisprudence for an entire calendar
20 year, from January 1, 2010, to December 31, 2010.
21 There are some dramatic events just in the last few
22 weeks, particularly with -- well, the Cambodia
23 Tribunal, with the Sierra Leone court that I want to
24 just sort of throw into the mix for a few minutes,

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1 even in the last few weeks. In fact, even today in
2 Phnom Penh, a very, very interesting hearing took
3 place that we want to talk with Prosecutor Smith
4 about as well.

5 So I think the way I will commence
6 this, this is kind of going -- you know, this is sort
7 of going Oprah style. We're going to go from one
8 person to the next here. There are no speeches.

9 I'm going to throw out some questions,
10 it's going to generate some discussion; we move on to
11 the next question; we shift occasionally then to
12 questions from the audience. So if you've got
13 questions, we'll get to you. We're going to do our
14 moderated thing here for a while, and then we'll
15 shift to questions that may arise from the audience.

16 I want to start with our distinguished
17 academic commentator, Professor Oosterveld, and I
18 want to start with a very cosmic general question
19 looking from sort of outer space down at these five
20 tribunals and what they did for the last calendar
21 year.

22 And, Professor Oosterveld, if I may
23 ask you to possibly describe 2010? Was it a year in
24 which international criminal law evolved

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1 significantly in the tribunals' jurisprudence, or did
2 international criminal law actually experience
3 muddled and less decipherable characteristics due to
4 conflicting signals from these various tribunals?

5 Did we -- did we see a consistent
6 development that was coherent in the international
7 criminal law among these tribunals for the year, or
8 did some of them go their own way?

9 MS. OOSTERVELD: Thanks, David. Before I
10 answer your question, to which my answer is both --

11 MR. SCHEFFER: Both.

12 MS. OOSTERVELD: -- I wanted to say that it's
13 a privilege to come to Northwestern Law School and
14 that there are benefits to coming to Northwestern Law
15 School, because I was -- they were giving me a bit of
16 a hard time when I was coming through customs, and
17 then they said, "So where is this conference that
18 you're speaking at?" And I said, "Northwestern Law
19 School," and suddenly he stopped being gruff and he
20 said, "Oh, welcome to the United States."

21 (WHEREUPON, there was laughter.)

22 So obviously you have an excellent
23 reputation, which I knew about beforehand.

24 There were certainly significant
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1 moments, David, in tribunal jurisprudence in 2010,
2 and there were also some muddled moments.

3 So to begin with the International
4 Criminal Court, I think one of the most significant
5 moments to me, at any rate, was the clarification of
6 the standard of proof at the warrant issuance stage
7 in the Al Bashir case, which is the Darfur case,
8 before the International Criminal Court, and that
9 resulted in the first genocide charges being able to
10 be brought before the International Criminal Court,
11 and I think that was quite significant.

12 In the ICTY, I think that the
13 continued development of crimes against humanity in
14 the Popovic judgment was quite significant, although
15 there was an interesting dissent by Judge Prost on
16 the issue of persecution in that case. But in the
17 Popovic case, what I thought was very important was
18 the continued reinforcement that genocide occurred in
19 Srebrenica.

20 For the Cambodia Tribunal, the most
21 significant thing I thought was the issuance of the
22 Duch judgment, and that was not only significant for
23 the Cambodian Tribunal, but I think for Cambodians
24 themselves.

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1 But I do think that the judgment
2 muddled on the question of cumulative convictions,
3 where the judges, in essence, telescoped almost all
4 of the charges into the persecution crimes against
5 humanity charge, which really worries me. I think
6 that I agree with the prosecution that the judges
7 misconstrued the existing law on cumulative
8 convictions and overtelescoped these charges, but I
9 think it had a significant negative impact and led,
10 in part, to the lower than average sentence in this
11 particular case.

12 The ICTR continued to develop very
13 well on issues related to genocide, but I do feel
14 that the Rukundo judgment was muddled when the
15 Appeals Chamber reversed a particular charge on
16 sexual violence as forming a part of genocide with
17 respect to a particular witness. And in that case,
18 Judge Pocar wrote, I think, a very convincing
19 dissent, pointing out the overall situation of this
20 witness who was fleeing genocide, dirty and
21 disheveled and tried to hide out in a particular
22 place, and then being taken advantage of by the
23 accused.

24 I think he made it very clear that
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1 when one looks at sexual violence in the context of
2 genocide, one has to look at the overall context in
3 which the witness is existing at the time.

4 And finally in the Special Court for
5 Sierra Leone, we heard beginning -- starting in the
6 beginning of the year, the cross-examination of
7 Taylor, which I thought was very exciting. It was a
8 very interesting way to begin the year, and then we
9 ended the year in a very interesting way when
10 Taylor's trial team refused to file its closing
11 brief, and whether -- what it's going to do in that
12 respect is still up in the air.

13 MR. SCHEFFER: All of those are subjects we're
14 going to get into much greater detail with, and
15 Professor Oosterveld has given us a good overview of
16 some of those issues. If you didn't quite follow
17 everything she was saying, that's because we're going
18 to actually get into a lot of that as the day goes on
19 and each of those major issues before the tribunals.

20 I wanted to jump over to Adama Dieng
21 as the registrar of the Rwanda Tribunal. You know,
22 we're in the ten-year mark in your -- now you're in
23 your third term as registrar. It's a remarkable tour
24 in Arusha for Adama Dieng, and I wanted to take this

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1 opportunity -- first, I don't know if in previous --
2 oh, we have once, but in previous conferences, we
3 rarely bring the administrative side of the court up
4 on the panel, but it is actually really one of the
5 most significant features of any of these tribunals.

6 In fact, some of our students make it
7 a point to go to the registrar's office for their
8 internships, because, frankly, it's a great learning
9 experience for how does this court actually function?
10 How do you make an international criminal tribunal
11 function?

12 These are still often sui generis
13 courts of unique character, and each of them have
14 very unique problems that confront them every single
15 year. And it's in the registrar's office and the
16 lawyers in the registrar's office who have to iron
17 this out day by day with the defendants, the defense
18 counsel, the prosecutors, et cetera.

19 So, Mr. Dieng, how has the Rwanda
20 Tribunal evolved over the last decade? You know,
21 what is the most significant difference today in its
22 operation from the day you began serving as registrar
23 in January of 2001?

24 MR. DIENG: Well, let me say, first of all,
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1 David, how pleased I am to be here in the beautiful
2 city of Chicago. And, as you may remember, I was
3 before joining the ICTR, the head of the
4 International Commission of Jurists, and just before
5 I was offered this position by Secretary General
6 Annan, I was appointed Ambassador of Senegal. It was
7 a big dilemma for me. Should I continue with the
8 position as an ambassador in the beautiful town of
9 Paris or continue my struggle for the strengthening
10 of the rule of law to bring an end to impunity?

11 I may say it was a big challenge, but,
12 finally, I think I made the right decision. I can
13 return tomorrow, be an ambassador of my country,
14 Senegal, but I don't think I would have ever had this
15 opportunity to work for the ICTR, and particularly in
16 what I named the most unthankful position in the
17 tribunal, the position of registrar. The registrar
18 is --

19 MR. SCHEFFER: He said, "The most unthankful."

20 MR. DIENG: Yeah. The registrar is
21 one of the three organs, and, in
22 fact, he is head of the mission, to

23 MR. SCHEFFER: Adama, we just need to -- if
24 you can speak a little bit louder for the
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1 stenographer, that would help. I'm sorry.

2 MR. DIENG: I will try. Yeah. So I was
3 saying that it's really a challenging position,
4 the position of registrar. And for me it has been
5 not only challenging, but also fulfilling for a human
6 rights activist to put his energy at the service of
7 the emerging international criminal justice.

8 And I should say that the position of
9 registrar was unstable prior to my arrival to Arusha.
10 I should say that the first registrar, unfortunately
11 he did not even complete his mandate and had
12 to leave, and the second one also faced a lot
13 of problems, and I remember Secretary General Annan
14 when he met with me the first time after I accepted
15 his offer, to me, "I expect you to really
16 bring an end to the in-fightings in the tribunal."
17 It is true that the judges and the registrar were not
18 really, I would say, in the best relationship, which
19 should govern their action, and that is why when I
20 was sworn in, my first message was, "I'm not here to
21 try to show that I am the head of this tribunal,"
22 because the big battle was between Judge Pillay, who
23 is now the current high commissioner for Human
24 Rights, and my predecessor, Okali.

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1 Of course, if you go by the criteria, the registrar
2 is the head of the mission, in fact, even if Okali is
3 CDM, Chief of Diplomatic Mission.

4 So I said simply, "I'm not here for
5 the glory; I'm here to contribute to what's the
6 administration of the International Justice System,"
7 and I did say to everybody, and the judges were in
8 the first way, "We're all privileged, from the judges
9 down to the technician in charge of the photocopying,
10 and we have to do everything possible to make justice
11 happening for the victims of genocide, crimes against
12 humanity in Rwanda.

13 But I think from that date, we were
14 able to overcome many, many challenges, and I should
15 say, therefore, I am reasonably gratified that under
16 my watch, we were able to arrest 33 indictees out of
17 the 92 indictees, and I should say that these 33 were
18 during only in the last decade, and individual
19 arrests, while prior to that time, all these arrests
20 were practically by group, large group.

21 So, in other words, if you have the
22 operation in Cameroon, you have almost the whole
23 government indicted there, another operation in
24 Kenya. That, the last decade, was I would say, was

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1 really particularly determinant because these were
2 individual arrests.

3 I should say also what is important is
4 that bridging the gap between Rwanda and the ICTR was
5 an important part of my mandate. There was improved
6 communication between Rwanda and the ICTR. The
7 relationship was very, very difficult at the time
8 when I arrived.

9 So I was able, despite the lack of
10 resources, to develop an outreach program to
11 disseminate information and to make sure that the
12 Rwandan government itself will fully understand the
13 important role of this tribunal. And I may say that
14 even I had opportunity to discuss at that time
15 with President Kagame to tell him clearly, "Would not
16 this tribunal exist in Arusha, you would never have
17 the chance to see Jean Kambanda, the Prime Minister
18 during the time of the genocide, and the entire
19 government being today in detention in Arusha. This
20 has been made possible thanks to the international
21 justice system which is in place."

22 I should say also a key component of
23 the ICTR mandate during this ten years was the
24 comprehensive program we have developed in terms of
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1 capacity building, in terms of outreach program.

2 Last year I had the pleasure to integrate about ten
3 information centers throughout Rwanda, and this is
4 is extremely important and we can be proud
5 and say that international justice is definitely
6 working, and during these last ten years, like Annan
7 was saying, international criminal law is no longer
8 deaf. It is a reality. And from Arusha for the first
9 time in history, we were able to apply the 1948
10 Genocide Convention.

11 MR. SCHEFFER: And I just want to emphasize a
12 couple of points he made. Of course, I lived through
13 the 1990s before he arrived with his two
14 predecessors, and I found myself as actually the
15 mediator between them and the judges, them and Kofi
16 Annan, and them and the government of Rwanda. It was
17 that dysfunctional.

18 So I am so grateful of what Adama
19 Dieng actually achieved in the last decade, because
20 it was dysfunctional enough in the '90s that it
21 required someone moving between the parties almost as
22 a mediator just to have communications even down
23 hallway from the registrar's office to the judges'
24 office. I would be going back and forth as a -- you

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1 know, to get the message right. So it was an
2 extraordinary experience, and I'm very grateful that
3 you were able to join us and also for what you have
4 accomplished over the last decade.

5 We're going to be talking a little bit
6 more -- in fact, lot more about that, particularly
7 the arrest issue, the relationship with Kenya on
8 cooperation, the relationship with the government of
9 Rwanda on cooperation, so much more to come.

10 I want to jump now to Tom Hannis, who
11 is our prosecuting attorney from the Yugoslav
12 Tribunal in The Hague. And I believe Professor
13 Oosterveld made note of this in her opening remarks,
14 Tom, that the Popovic judgment that was rendered by
15 the Trial Chamber on June 10th of 2010, this was a
16 blockbuster judgment regarding the Srebrenica
17 genocide of July 1995. So it took 15 years, but at
18 the end of 15 years, seven Bosnian Serb defendants
19 were found guilty and sentenced to imprisonment
20 ranging from five years to life imprisonment.

21 What I would like you to do is comment
22 upon the Popovic judgments, Mr. Hannis, but let me
23 just start by saying, remind us what the prosecution
24 emphasized during its closing arguments in early

1 September 2009 for the Srebrenica joint trial,
2 because those closing arguments, of course, then had
3 a tremendous impact on the July judgment that we saw
4 in 2010.

5 And given the historical significance
6 of the Srebrenica genocide, how did prior judgments
7 relating to Srebrenica and the trials yet to proceed,
8 Karadzic and Mladic, on Srebrenica? Karadzic, of
9 course, is underway; Mladic, we hope, is sometime in
10 the future.

11 How did this judgment in July 2010
12 influence what we're going to see unfold and
13 unfolding in the Karadzic as well as hopefully
14 someday the Mladic trial?

15 MR. HANNIS: First of all, thank you for
16 inviting me. It's an honor and a privilege to be
17 here with this group of panelists, and I think
18 Professor Oosterveld had it right.

19 In our view, it did reaffirm that
20 genocide had occurred, and after all this time, it's
21 still important and encouraging for us to have a
22 decision that does that, because in spite of our
23 position in the office and having tried some other
24 cases at the tribunal against other accused for what
25

1 happened in Srebrenica, it seemed clear to us that
2 there was genocide, but it seemed like every day,
3 every week, we still had to fight the battle of
4 making that point.

5 Because this was such an extended
6 trial, it was seven accused, and it went on for
7 almost three years, it was -- it was reassuring and
8 comforting to get a decision that yes, yes, what
9 you've been saying, the prosecution, about this being
10 a genocide is correct.

11 And because the trial was so lengthy
12 and detailed, it was good because it clearly
13 established that this wasn't a one of, or a random,
14 spur-of-the-moment kind of thing, that this involved
15 a lot of planning and a lot of coordination, and this
16 was done from the highest levels down. And because
17 we were trying not only some of the high-ranking
18 members of the VRS of the Bosnian-Serb Army, but also
19 the intelligence service branch of the Army, which
20 sometimes during the trial when things got hot, there
21 was a little pointing of fingers at each other and
22 saying, "Oh, well, I didn't know about that; they
23 didn't inform me." But because there was such a
24 detailed record, everybody knew, and nobody could

25

1 hide behind anybody else. I'm sorry. What was your
2 question?

3 MR. SCHEFFER: Well, I wanted to just ask how
4 significant will this now be possibly for the
5 Karadzic trial and even ultimately the Mladic trial?

6 MR. HANNIS: Well, for one thing, it gives the
7 prosecution team a lot of confidence. The other,
8 though, is the practical matter: How do we do that?
9 In our tribunal and our Rules of Evidence and
10 Procedure, we have a provision that you could use
11 adjudicated facts from other cases, but the record so
12 far on the use of adjudicated facts is spotty.

13 In the Lukic and Lukic case, the
14 prosecution was relying on certain adjudicated facts
15 so they wouldn't have to call certain witnesses or
16 produce certain exhibits, because there had been a
17 finding made concerning a related accused in some of
18 the killings that the prosecution was relying on.

19 The law developed out of the case, the
20 Trial Chambers found that, well, yes, that's an
21 adjudicated fact, but the defense can challenge it by
22 cross-examination of prosecution witnesses or calling
23 witnesses of their own to undo the fact.

24 What happens then was not clear. In
25

1 that case, when some of the adjudicated facts were
2 challenged by the defense and at least raised a
3 colorable issue about whether or not the fact
4 remained firmly in place, the prosecution moved for
5 leave to have rebuttal and call someone else to
6 resupport the adjudicated fact.

7 The Trial Chamber presiding judge made
8 sort of a difficult decision for us by holding, well,
9 no, this is something the prosecution should have
10 foreseen would be challenged and should have
11 presented other evidence in the case, and didn't
12 allow us to.

13 MR. SCHEFFER: These are adjudicated facts
14 that happened at Srebrenica; is that correct?

15 MR. HANNIS: Well, in Lukic and Lukic, it was
16 in Vlasenica.

17 MR. SCHEFFER: Oh, I'm sorry.

18 MR. HANNIS: But I'm just giving you an
19 example --

20 MR. SCHEFFER: Yeah.

21 MR. HANNIS: -- and why the prosecution has
22 some trepidation about how we deal with adjudicated
23 facts.

24 The trial I'm in now, Mico Stanisic
25

1 and Stojan Zupljanin, and we had several hundred
2 adjudicated facts from the Karadzic case, the
3 Burganin (phonetic) case, other cases involving the
4 same crime base, the same areas, that we sought leave
5 from the court to have adjudicated.

6 Six months into the trial, the Trial
7 Chamber decided that certain of those adjudicated
8 facts would not be allowed. Others were modified.
9 For example, the fact that non-Serb men were detained
10 in the jail in Vlasenica, were beaten by police. The
11 modification was they found that non-Serb men were
12 detained in the jail in Vlasenica and were beaten,
13 but "by the police" was removed from the adjudicated
14 fact, because the Trial Chamber took the position
15 that in our case, one of our defendants is a regional
16 police commander, and, therefore, it was too close to
17 him, and it wasn't fair to the defense to have that
18 as an adjudicated fact, that it was something that
19 needed to be proved directly in our case.

20 But halfway into the case that then
21 caused us a problem. We then sought leave from the
22 Trial Chamber to call witnesses to testify about
23 whether or not it was the police who were doing the
24 beating because we had been relying on that
25

1 adjudicated fact and did not have a witness on our
2 list for that.

3 MR. SCHEFFER: Oh. Well, let me jump
4 immediately to Mr. Dixon then, first just to respond
5 to the issue of adjudicated facts and the right of
6 the defense to rush in and challenge, but then I also
7 would also like to move on to one of your blockbuster
8 cases right now out of Kosovo.

9 But could you respond possibly to that
10 point on adjudicated facts from a defense counsel's
11 point of view?

12 MR. DIXON: Well, thank you, Dave, for the
13 kind introduction. I should add, though, so that I'm
14 not seen as the entire pariah, that I have worked in
15 the Office of the Prosecutor.

16 (WHEREUPON, there was laughter.)

17 I started there when Richard Goldstone
18 was the first prosecutor in 1994, for six years, and
19 then moved to private practice and have done defense
20 work since then.

21 I think as a preliminary point, I'm a
22 strong advocate of people being on the prosecution
23 and the defense side and the work that is done at
24 these courts, not, of course, in the same case.

25

1 (WHEREUPON, there was laughter.)

2 And you'll be surprised how much
3 opposition there is to it. But it's something that
4 you do regularly in the UK. You prosecute one day,
5 you defend the next day. It's extremely important
6 for your own independence and objectivity. You could
7 even be a part-time judge as well. So you could be a
8 judge one day, prosecute, defend.

9 And I think that is a system which
10 should be encouraged at the international level as
11 well, so that it insures that people are first and
12 foremost officers of the court, and they're not there
13 to necessarily grind one axe or the other.

14 I mean, I do a lot of work in the UK,
15 where, for example, I represent the UK government,
16 Minister of Defense, in relation to claims that are
17 being made against the government about what happened
18 in Iraq.

19 So, in some ways, it's totally
20 different from defense work before the International
21 Courts, but I think very important to be coming at it
22 from different angles, and it certainly insures that
23 you understand, you're in the other person's shoes
24 and you understand it.

25

1 Very often when you're there, you
2 realize it's not as it was made out to be, and things
3 are never straightforward. We know that it's never
4 black or white in this kind of work.

5 On adjudicated facts, first of all --
6 and then I'll come on to Haradinaj, depending on what
7 David wants to ask, too, about that. The defense,
8 yes, are generally usually skeptical of adjudicated
9 facts because you're getting a whole lot of
10 information without having to prove it.

11 But, at the same time, there are
12 advantages to that, because, you know, the evidence
13 is in without the judges necessarily having to, "If
14 you're not going to challenge it, here are all the
15 gory details," and you can focus it right down to the
16 key points.

17 So I always come from the point of
18 view of, well, if the issue really is not in dispute,
19 what is the point of having a fight over it when, at
20 the end of the day, it's probably going to be agreed
21 or admitted? And you use up a lot of your credit by
22 fighting over things that don't really count.

23 So I know this is not the case with
24 all defense counsel, and it goes back to the first
25

1 point I made about people moving around from role to
2 role. It equally applies to defense counsel. But I
3 think it's much more important to look at being able
4 to narrow down what exactly the disputes are and to
5 take on the battles that are most important for your
6 client.

7 I think equally it means -- and I've
8 come across this many times before; I'm not saying it
9 applies to all prosecutors -- but equally it means
10 the prosecution needs to notify you what their case
11 is and narrow it down as well. Putting in tens of
12 thousands of adjudicated facts, and think you will in
13 there somewhere, "We're going to be able to string
14 together a case," is also not good enough.

15 (WHEREUPON, there was laughter.)

16 It's about both parties being able to
17 narrow down what the issues are. And, at the end of
18 the day, none of these cases, even though they're big
19 and we've heard so many stories about all the
20 witnesses that are involved, none of them are magic.
21 They come down to three or four key points like all
22 cases do, and better to get to those points
23 immediately and to try to identify what can be agreed
24 between the parties.

25

1 Having said that, you, of course,
2 sometimes have to be careful acting in the interest
3 of your client, because even though an adjudicated
4 fact might not necessarily appear directly to relate
5 to their guilt or innocence, sometimes the
6 surrounding circumstances can be very important, and
7 piecing them all together is what you need to do as
8 good defense counsel to make sure at the end of the
9 day you're not agreeing to something that your
10 instructions might be the contrary to that you might
11 actually have to challenge on the evidence.

12 MR. SCHEFFER: I wanted to jump, if I could,
13 to the case that you're working on quite closely with
14 right now, Mr. Dixon, which is the Haradinaj case, if
15 I'm pronouncing that correctly, out of Kosovo. And
16 perhaps if you could -- there was an extremely
17 dramatic development in this case on July 21st, 2010,
18 in the Yugoslav Tribunal, where there was essentially
19 a reversal by the Appeals Chamber of -- what was it,
20 two or three? I think three individuals who had
21 previously been acquitted, one was convicted, of
22 course, at the Trial Chamber out of the Kosovo
23 conflict of mid-1999. The Trial Chamber had actually
24 acquitted three members of the Kosovo liberation

1 force at that point, and yet the Appeals Chamber took
2 that up and reversed it and threw it back into the
3 Trial Chamber.

4 And, Mr. Dixon, if you could just
5 bring us up to date on what happened at the Appeals
6 Chamber on July 21st, and then I would be very
7 curious and I think our audience would be as to what
8 can you tell us about the defense strategy for
9 retrial, knowing, of course, that Mr. Hannis is
10 speaking -- is sitting right here with you and would
11 love to hear what your strategy is.

12 (WHEREUPON, there was laughter.)

13 But, nonetheless, if you could give us
14 some insight as to how defense counsel are going to
15 deal with this issue now, because my guess is -- and
16 Mr. Hannis may want to jump in briefly on this --
17 this may have been quite a victory on July 21st for
18 the prosecution to get these guys back into the
19 courtroom. But for defense counsel, what did it
20 mean, and what actually happened, for the benefit of
21 our audience?

22 MR. DIXON: Okay. Thanks. The Appeals
23 Chamber didn't overrule the entire acquittal, though
24 there were over 40 counts, but overturned the
25

1 acquittal with respect of one detention facility,
2 which comes down to six counts, and said there should
3 be a retrial in order to hear two witnesses who they
4 found the Trial Chamber hadn't done enough to provide
5 them with an opportunity to come forward and testify.

6 I'm not giving away any secrets,
7 because it's on the record. I mean, we said that the
8 Trial Chamber had done everything possible. They
9 bent over backwards, to use a colloquialism, to try
10 and get these two people to come. They just didn't
11 come; there was no indication that they were going to
12 come.

13 The central issue at the moment is
14 exactly that, whether or not those two witnesses will
15 come and testify before the Trial Chamber and whether
16 it will be restricted just to those two witnesses.

17 The prosecution has made it plain that
18 they want to bring new evidence and have another go
19 at it. I mean, this is very new territory for me. I
20 think it's the same here. I mean, you don't appeal
21 acquittals. When a person is acquitted, that's it.

22

1 And now you're in a situation where not only -- or
2 the particular witnesses they said should come back
3 to be called, but now the prosecution wants to bring
4 new evidence, entirely new evidence. So that's the
5 first issue which we're trying to litigate.

6 We've been saying to the Trial
7 Chamber, "Look, let's clarify this from the outset.
8 What is the scope of this retrial? We've got to know
9 what we're in for. Is it one or two witnesses, or
10 how many? And we need all the disclosure, and then
11 let's go to trial from there."

12 But there's been no decision
13 finalizing that yet. In fact, we tried to take it to
14 the Appeals Chamber at the moment to see whether the
15 Appeals Chamber will tell us what their order meant,
16 and it's going to be a very interesting issue, that,
17 how the Appeals Chamber unravels that, because
18 previous to this ruling from the ICTR is that, well,
19 the Appeals Chamber has to actually explicitly say,
20 "Only these two witnesses."

21 However, I mean, if you care to look
22 at the overall intention of what they were saying as
23 well, and I think then there's a good argument to say
24 that that's what the prosecution wanted, they wanted
25

1 these two people. That's what the Appeals Chamber
2 gave them, so how can you now open it even wider than
3 that? So that's the first issue to look out for.

4 The other is the whole witness
5 intimidation issue, which has received a lot of press
6 in Kosovo recently. There have been a lot of
7 allegations made, and many of them have, in fact,
8 proven not to be true about witnesses who were killed
9 in this case. So that's a whole other issue we can
10 get into, how these rumors start, and they spread and
11 they spread and they spread. Even EEU officials have
12 had to come back and change their positions about
13 what they said about witnesses being killed. And
14 just to clarify, there were none murdered in the
15 trial. It keeps coming up, and I can a hundred
16 percent clarify that, and I think the prosecution
17 could do that or should do that as well.

18 But there's clearly been a big issue
19 surrounding this because the Appeals Chamber noted
20 this in the judgment and also referred to a new rule
21 is now coming, which allows people who can show that
22 they've been intimidated to have their statements
23 read into the record. It's only just come now, which
24 is surprising.

25

1 I think you probably have it here, but
2 in the UK, that's one of the first rules you have;
3 you deal with witness intimidation so that statements
4 can come in and you would have thought that in the
5 International Criminal Courts that would be one of
6 the first rules that would be adopted, but, in fact,
7 that was a most recent change, and that allows for
8 statements to come in without the witness attending.
9 So that rule might well be used. And to see what the
10 jurisprudence is on that will be fascinating, and
11 what weight, if those statements do come in, can be
12 attached to that evidence. You probably know that in
13 the European Courts of Human Rights, there is
14 jurisprudence which says you can't rely on a hearsay
15 statement on its own, but, in fact, the UK Supreme
16 Court has said, well, if it's admissible, you must be
17 able to. You know, whether that's enough to convict,
18 but in principle, you must be able to use that
19 statement because you have it written; otherwise,
20 what's the point of admitting it? So that's going to
21 be an issue which the Appeals Chamber, I think, will
22 have to deal with as well.

23 As far as defense strategy is
24 concerned, I mean, I don't want to go on too much
25

1 more now, but we can discuss this further. Our main
2 point, as I've said, and this is public, you know, we
3 want to restrict it to the witnesses that are the
4 subject of the appeal. That's the only fair thing to
5 do.

6 And I suppose our subsidiary argument,
7 which has also been made public, is that if the
8 prosecution is going to provide new evidence, they
9 must at least satisfy the due diligence threshold of
10 new evidence I mean, if they had that evidence at the
11 appeal and they had tried to introduce it then, the
12 judges would have insisted that they show that they
13 couldn't have gotten them earlier.

14 So how come if you have a partial
15 retrial, I mean, it's just a way of getting around
16 satisfying the test. You surely must have to satisfy
17 it again at the retrial level. That's a backup
18 argument. The main argument is they shouldn't even
19 be there in the first place. So watch the space. It
20 could be quite interesting in the next month or two.

21 MR. SCHEFFER: Well, thank you very much,
22 Mr. Dixon.

23 I'm going to give a one-minute
24 rebuttal by Mr. Hannis here. Is there anything you
25

1 would like to say about the Karadzic case?

2 MR. HANNIS: Well, I guess -- I'll try do it
3 quickly.

4 MR. SCHEFFER: No. I mean, you know --

5 MR. HANNIS: I agree --

6 MR. SCHEFFER: That's fine, you know.

7 MR. HANNIS: No. I agree about the due
8 diligence. That's entirely a fair point. That's
9 something the prosecution could have done earlier; we
10 should have done it. And to try and expand the case
11 now without making a showing that it wasn't available
12 to us or wasn't known or couldn't have been known is
13 entirely correct. I agree with that.

14 The witness intimidation is a
15 difficult problem, and I agree with Rod it's
16 surprising to me that we've only come around to
17 adding it to our rules, you know, 15 years into being
18 in business, because it's been a problem from the
19 very beginning. It is a provision whereby if you can
20 make an adequate showing that a witness is now
21 failing to attend or failing to testify because
22 they've been intimidated or coerced in some fashion,
23 then the Trial Chamber may be able to use their prior
24 evidence, if there's prior testimony or a prior

25

1 statement. Now, how much weight and what weight to
2 give to it I think is going to be on a case-by-case
3 basis and you're going to need to make a showing
4 about why that statement was reliable at the time it
5 was made and why you should consider it, even though
6 the person is still alive but simply not willing to
7 talk to you.

8 That case also pointed out one of the
9 weaknesses, I think, with the international
10 tribunals, because one of the witnesses, the
11 prosecution was trying to get him before it closed
12 its case, was in a jurisdiction outside the
13 Netherlands and refusing to come, and we sought
14 through the court to have that witness arrested and
15 sent back.

16 The country to whom we made the
17 request refused because they made a finding that
18 contempt, which was the only basis we had to try and
19 arrest a witness, was not part of our statute and was
20 not one of the International War Crimes, and,
21 therefore, it was not something that they need to
22 allow extradition for, and that poses a problem
23 because --

24 MR. SCHEFFER: Yeah.

25

1 MR. HANNIS: -- if the court can't enforce
2 bringing witnesses, then we could be in for a long
3 ride.

4 MR. SCHEFFER: And that is a very rebuttable
5 argument. It's open to a lot of discussion --

6 MR. HANNIS: Yeah.

7 MR. SCHEFFER: -- because the statutes of the
8 Yugoslav and Rwanda Tribunals are under Chapter 7
9 authority; states are obligated to cooperate.
10 There's been no statement that the cooperation ends
11 at the edge of the actual crime itself as opposed to
12 the actual proceedings of the court where you have to
13 have witnesses appear and document production from
14 governments as well.

15 Let me jump now to the Extraordinary
16 Chambers in the Courts of Cambodia. What I'd like to
17 do, Ronit, why don't we air -- just before you start,
18 let me just explain this. Mr. Smith will be
19 commenting on this.

20 What we're going to show is the
21 sent -- is the judgment of Duch, D-u-c-h, here, who
22 was the first defendant of the court to be tried in
23 Cambodia for the Pol Pot atrocities of the late
24 1970s. He was the head of Tuol Sleng prison, S-21,

25

1 as well as before that, S-22 prison, detention
2 center, and throughout those, well, about three and a
3 half years to four years, he had a leadership role in
4 the torture, detention, and ultimate death of
5 thousands of individuals. In this case, the
6 conservative estimate was essentially 12,000-plus
7 victims at the hands of him and his staff at Tuol
8 Sleng prison.

9 So a very prominent figure in
10 Cambodian history with respect to the Pol Pot
11 atrocities, here he is on trial. The arguments -- or
12 the trial itself was held in 2009, closing arguments
13 in November 2009, and it was in 2010 that the
14 judgment was rendered, on July 26th of 2010.

15 So what we're going to start with is
16 to show the substance of the judgment; namely, for
17 what crimes was he actually convicted, and you're
18 going to hear in this segment a little bit of a
19 description about that, and then we'll jump back to
20 Mr. Smith as well as perhaps Professor Oosterveld
21 with respect to the character of what he was actually
22 convicted of and how the judges created a sort of a
23 mosaic of crimes, particularly under the crime of
24 persecution, and that merits a lot of insight and
25

1 discussion. So why don't we roll the tape.

2 (WHEREUPON, the Videotape was
3 played.)

4 MR. SCHEFFER: Okay. And even that final
5 little passage, you may not have caught what was said
6 there, but Mr. Smith can explain to you the
7 significance of the reference to the Cambodian penal
8 code of 1956 in that judgment.

9 Mr. Smith, let's start with you.
10 This, for not only a general audience, but even for a
11 law audience, requires a little bit of explanation as
12 to what happened here, somewhat different from the
13 way we see judgments being handed down in the
14 Yugoslav and Rwanda Tribunals in terms of Duch being
15 convicted of crimes against humanity, but with a
16 particular methodology employed by the court to
17 arrive at that determination.

18 And since this is part of your
19 appeal -- Prosecutor Smith has appealed this judgment
20 now to the Appeals Chamber of the Extraordinary
21 Chambers.

22 So take it away, Mr. Smith.

23 MR. SMITH: Thank you very much, David.

24 Good morning, everyone. It's a
25

1 pleasure to be here in Chicago; it's a beautiful
2 city, the architecture and the lake, and I couldn't
3 think of a better place to discuss these types of
4 issues.

5 Also, David, I would like to thank you
6 for inviting me here today, particularly being in
7 your presence as the director of this clinic.

8 David, as you probably know, is very
9 integral in helping the ECCC statute get off the
10 ground and arriving at an agreement, and I think this
11 law school is very privileged to have someone so
12 positive-looking and outward-looking and progressive
13 and pragmatic and very intelligent, so it's a real
14 pleasure to be here today.

15 It's also a pleasure to be here in the
16 place where President Obama did his early work. I
17 mean, he's a real inspiration to many of us in our
18 work, so it is -- and also it's the place of the
19 Chicago Bulls, and my 13-year-old son is completely
20 angry and mad that I'm here without him, but,
21 unfortunately, your expenses wouldn't cover my
22 13-year-old.

23 (WHEREUPON, there was laughter.)

24 MR. SCHEFFER: Sorry about that.

25

1 MR. SMITH: So it's great to be here today.

2 In relation to the Duch trial, perhaps we can talk
3 about it more broadly and the importance of the
4 Cambodian court, the Khmer Rouge court to Cambodia,
5 and the place where it is today.

6 But in relation to the judgment, more
7 particularly, in relation to how they recorded the
8 convictions in this judgment, it was slightly out of
9 kilter or not following the majority view of the
10 Yugoslavia Tribunal, and that being that when someone
11 has committed a wide range of crimes or a number of
12 crimes that relate to specific offenses, as you
13 heard; imprisonment, enslavement, torture, rape,
14 murder, extermination, and those offenses have also
15 an associated discriminatory intent in those victims
16 being selected for those crimes, they can also be
17 charged in a catchall charge of persecution, because
18 each of those specific crimes are fundamental
19 breaches of human rights, which, if committed to a
20 certain level of severity, will support a persecution
21 charge.

22 So what the Trial Chamber did in this
23 instance is they rolled all those charges up together
24 in a sort of a convenient, packaged way, and said,
25

1 rather than convict him for all the different counts,
2 let's just convict him for persecution, because he
3 had that discriminatory intent when he selected those
4 victims for those crimes, and these other crimes
5 would be a fundamental breach of a human right, and,
6 therefore, would fall under persecution, and let's
7 just charge him -- let's just convict him with that.

8 There's nothing -- particularly in
9 Cambodia, I think there's a problem in doing that in
10 the sense that it really doesn't give a very clear
11 legal historical record about the crimes someone has
12 committed, and the reason for that is that, you know,
13 this judgment is very important for Cambodians in
14 recording a legal history or a close to the -- as
15 close to the truth as you can get, you know, aside
16 from academic books, et cetera.

17 The judgment, it's a good judgment.
18 It's a long one; it's about, you know, 300 pages, but
19 not every Cambodian will read that judgment; not
20 every non-Cambodian or an even interested
21 international criminal lawyer will read that
22 judgment, but what they will read is the disposition,
23 what was at the end of the judgment, what was he
24 convicted for. And if the prosecution's position is

1 on the appeal that, look, if all people see is
2 persecution, it's sort of in a sense a fairly
3 nebulous charge. It's very unclear what the basis of
4 that was.

5 And so for legacy for the court, for a
6 deterrent, and to uphold those social values of the
7 particular offenses of imprisonment, rape, torture,
8 which even though they occurred 30 years ago, as you
9 can imagine, in some countries more than others,
10 still occur, you know, in a great -- in great
11 abundance, then it really reduces that deterrent
12 effect, and it doesn't protect those social values
13 which should be recognized and recognized in the
14 official institutions that the country has in terms
15 of creating deterrents and accountability for those
16 crimes.

17 So the prosecution's view is that the
18 judges overlooked the importance of recording the
19 particularities of these events. They accepted that
20 they were proved, but who is going to read the
21 300-page judgment? And it's important for Cambodians
22 that, you know, justice is accessible, they
23 understand it, and that when these types of human
24 rights breaches occur even today -- of course, not on
25

1 the scale that occurred during the Khmer Rouge
2 period -- they have an understanding of their rights.

3 In Western countries, we're far more
4 advanced in terms of human rights protections, but in
5 the developing world, particularly in Cambodia, it's
6 important that discussion about human rights
7 protection is at the fore so that it can move forward
8 and join that sort of community of well-protected
9 civilians that we enjoy as Australians, Americans,
10 and for many other countries.

11 So the Trial Chamber picked up on the
12 dissent of the ICTY, saying that you can have
13 cumulative convictions, but it really wasn't the
14 majority decision, and we felt that that was not
15 really appropriate. It didn't serve the aims of
16 justice for the Cambodians. So perhaps it seems like
17 a small legal point, but it's actually important that
18 justice could be seen by the Cambodians.

19 MR. SCHEFFER: And related to that -- then I
20 want to ask Professor Oosterveld and then back to
21 you, Prosecutor Smith -- they folded the crime of
22 rape under the crime of torture in this judgment.
23 Could we get your perspective on that? Is that part
24 of your appeal, by the way, the issue of should rape
25

1 be separated out from torture as a separate crime
2 against humanity?

3 MR. SMITH: That is part of our appeal, and
4 it's the same argument. I mean, the elements that
5 would support torture -- the elements that would
6 support a charge of rape also would fit torture, the
7 elements of torture.

8 So the Trial Chamber said, "Well,
9 look, you know, even though there was a rape, because
10 it can be subsumed under torture, and torture has
11 this extra element that if a state official commits
12 the offense, then that would be viewed to be
13 torture," that it was more pragmatic and efficient to
14 subsume it under torture.

15 Now, again, I mean, we're talking
16 about protection of social values and communicating
17 what values are important to society. In places like
18 Cambodia where many crimes don't get to the
19 courtroom, and particularly the instances of rape in
20 Cambodia are quite high and the difficulties of
21 actually having them heard in a courtroom and the
22 value system of how important it is to get these
23 crimes into the courtroom and the demands of creating
24 that demand from that population for that sort of
25

1 human rights protection, if we don't sort of in these
2 tribunals and in the Duch case, if we don't recognize
3 it very explicitly, that rape is a crime, then it has
4 less of a proactive effect of making the current
5 authorities making sure that that crime is reduced.

6 MR. SCHEFFER: And, Professor Oosterveld --
7 and then we'll move to the Special Court for Sierra
8 Leone.

9 MS. OOSTERVELD: Sure. I agree completely
10 with the analysis that Bill has given. I thought it
11 was quite surprising that the judges chose the
12 minority view from the ICTY to rely upon in
13 collapsing all of the charges into the persecution
14 charge. It's important to name what happened, the
15 individual types of things that happened. And if I
16 could raise one thing that you haven't mentioned, but
17 which is part of your appeal, and that is on the
18 crime against humanity of enslavement.

19 The court here -- and, again, I agree
20 with prosecution on this, just seemed to get the law
21 wrong, from my point of view. Enslavement is the
22 exercise of powers related to ownership, and the
23 judges seemed to say there had to be a forced labor
24 component to enslavement.

25

1 I'm not sure if you have other
2 thoughts on that, but that was another concern about
3 collapsing all of these charges and misnaming some of
4 the charges.

5 MR. SMITH: Yeah, I think so. I mean, the law
6 needs to be articulated correctly. And when you look
7 at the facts of S-21, that was a former high school
8 where people that were perceived to be enemies of the
9 state or the wrong class or the wrong backgrounds,
10 they were brought into S-21; they were tortured and
11 killed. And over the three-and-a-half-year period,
12 there were at least 12,000 people killed; their names
13 were on lists at S-21, and there were many thousands
14 more.

15 Those people were kept in conditions
16 where they were starved, they were chained, they
17 couldn't -- were unable to go to bathrooms, and they
18 would hear the torture of others. We're talking
19 children, women, men, elderly, and they would hear
20 the torture of others, and they would be tortured
21 themselves, and they would be taken from there and
22 then taken to an execution site.

23 Many people were there -- the average
24 time that people were there was a couple of months.

25

1 And talking about the exercise of control when you
2 discussed the idea of enslavement, Duch and his staff
3 controlled every aspect of their living. They were
4 unable to do anything.

5 And for some strange reason, the Trial
6 Chamber, and this is the subject of appeal, said that
7 you must -- enslavement must have a forced labor
8 component, and that's -- you know, the slavery
9 conventions and the jurisprudence coming from the
10 tribunals doesn't require that. It's not an
11 essential element, but it's a significant indicator
12 of that fact, and it just really didn't represent
13 what -- the way that the people were treated. They
14 were enslaved in every meaning of the word.

15 And particularly as we go into the
16 second case, very much the theory of the case is that
17 the population of Cambodia were enslaved in detention
18 camps, in communes, forced to work, and they had very
19 little freedom at all. Families were broken up,
20 meals were controlled. Everything was completely
21 controlled. And all the freedoms that we have didn't
22 exist. So it's important that that slavery charge is
23 actually -- reflects the actual war rather than the
24 way the Trial Chamber put it.

25

1 MR. SCHEFFER: Okay. And I did want you just
2 to say a few sentences, Prosecutor Smith, about their
3 rejection of the Cambodia Criminal Code of 1956 in
4 the judgment. Why did they do that?

5 MR. SMITH: That was a preliminary motion that
6 the defense filed at the beginning of the case,
7 stating that the Cam -- the National Code didn't
8 apply. Now, the National Code for murder and torture
9 had a 20-year statute of limitations, so 20 years
10 after the crime was committed, you were unable to
11 commence a prosecution.

12 Then the ECCC statute amended that by
13 its own provisions and said basically that that
14 statute of limitations can be extended, and the Trial
15 Chamber didn't agree on whether or not that could be
16 extended or not and whether it would sort of
17 undermine that whole principle of legality, and that
18 was decided on the outside of the judgment, and that
19 was the issue there. In the closing order in the
20 Case File 2, they do have national crimes charged,
21 and that will come up again.

22 MR. SCHEFFER: I might just add there that in
23 the negotiations for the statute for this court, this
24 was a key issue, and we literally and very
25

1 specifically negotiated that there would be an
2 extension of the statute of limitations. That was an
3 integral part of the negotiations, and, as I recall,
4 it went to the Constitutional Court in Cambodia and
5 was validated by the Constitutional Court in Cambodia
6 as a legitimate extension of the statute of
7 limitations so it will be interesting -- did you make
8 this part of your appeal or not?

9 MR. SMITH: No, this wasn't --

10 MR. SCHEFFER: Okay.

11 MR. SMITH: -- part of the appeal.

12 MR. SCHEFFER: Well, it will be interesting in
13 Trial Number 2 whether it has any survival
14 characteristics to it.

15 Okay. Now I want to move -- I know it
16 takes time to get through all the tribunals, and I
17 apologize, Alex, for you waiting, waiting, waiting
18 over at the end there, but we have the Honorable Jim
19 Johnson with us here, who is at the very top of the
20 prosecution team in the Charles Taylor case before
21 the Special Court for Sierra Leone.

22 I wanted to -- because the Charles
23 Taylor case is so significant; here is the former
24 President of Liberia ripped out of his office and
25

1 ultimately arrives in The Hague to be prosecuted for.
2 Crimes that did not technically occur on his
3 territory but rather on the territory of a
4 neighboring country, Sierra Leone.

5 If you could give us an overview of
6 the Charles Taylor case, the nature of your
7 allegations and strategies, Mr. Johnson, I think that
8 would be a good way to set up the discussion for the
9 day, because we're mostly going to be talking about
10 the Charles Taylor case today when we talk about the
11 Special Court for Sierra Leone, because all of its
12 other cases have been concluded, including through
13 the appeals process.

14 So this is the end game now, and 2010
15 was part of the end game, so it would be interesting
16 just to get sort of a cosmic view from the
17 prosecutor's office.

18 MR. JOHNSON: Okay. Thank you very much.
19 I'll try. First of all, let me bring greetings from
20 my prosecutor, Ms. Brenda Hollis. She would very
21 much had liked to have been here with you today, but,
22 of course, Brenda has -- if you've been following the
23 case, you know that Brenda has taken a very personal
24 involvement in the case from the beginning. It was
25

1 Brenda who initially drafted that indictment in 2003;
2 Brenda came back to the office in 2002, before
3 Charles Taylor came into our custody, very
4 fortunately, maybe not from his perspective, but
5 certainly from ours, and then she took over as the
6 principal trial attorney on the case, and, of course,
7 just about a year ago from right now, with the
8 departure of the former prosecutor/ambassador rep,
9 became the prosecutor. So she would very much like
10 to be here with you today, but I fortunately get to
11 represent her.

12 She is very, very busy right now, and, as
13 indicated earlier, our final trial brief was very
14 recently filed, and closing arguments are supposed to
15 take place, prosecution's closing argument is next
16 Tuesday, on the 8th of February. On the 9th of
17 February, or maybe the 8th, we'll know if defense is
18 indeed going to give a closing argument or not, but
19 we'll probably get into that a little bit later.

20 Before I talk a little bit about the
21 case, I just want to mention, of course, the Special
22 Court for Sierra Leone is located in Freetown, but,
23 as you all know, the trial of Charles Taylor was
24 moved to The Hague. The other trials were able to
25

1 take place in Freetown, and I think that we all would
2 have very much liked to have see the Charles Taylor
3 trial take place down in Freetown.

4 There were obviously some very, very
5 good reasons for moving that trial out of the region,
6 and, of course, the Security Council found that for
7 the trial to remain in the region, that is posed a
8 regional threat to international security, and so the
9 trial was moved up to The Hague. That created some
10 logistical challenges, needless to say, for both the
11 prosecution and the defense. The Registry rose to
12 those challenges, and we were able to transport all
13 of the witnesses who testified to The Hague from
14 their homes in Sierra Leone, in Liberia or elsewhere,
15 whether it be a prosecution witness or a defense
16 witness, and took place in The Hague.

17 We borrowed the courtroom of the ICC
18 initially, and the trial has finished out borrowing
19 the courtroom of the Lebanese Tribunal. Often, I
20 think we were unfortunately reported as the ICC
21 trying Charles Taylor, or others, but obviously it
22 never was; it was the Special Court for Sierra Leone,
23 and we were just borrowing their facilities.

24 To try to put -- of course, as you've
25

1 indicated, we never claimed that Charles Taylor set
2 foot in Sierra Leone; that has never been part of our
3 case, and we don't claim that he ever set foot in
4 Sierra Leone. But, of course, what we claim is that
5 he was, or that he, whether in a joint criminal
6 enterprise or elsewhere -- or through other modes of
7 liability, that he did indeed -- he was responsible
8 for the crimes that took place in Sierra Leone; that
9 indeed through terrorism and other means, and other
10 means that are crimes under the statute, that he
11 sought to take control of the people and resources of
12 Sierra Leone and to pillage those resources for his
13 own needs.

14 In a sense, bringing this trial
15 together was really putting together the -- bringing
16 together the RUF, the trial against the leaders of
17 the Revolutionary United Force; the trial against the
18 leaders of the AFRC, the Armed Forces Revolutionary
19 Council; bringing those two trials together with the
20 added element of proving the linkage, proving Charles
21 Taylor's linkage to the crimes that took place in
22 Sierra Leone. So you're kind of bringing together
23 those aspects, and which, in many ways, made it a
24 much -- a bigger and a much more complicated trial
25

1 than any of the previous trials before the Special
2 Court for Sierra Leone. We, of course, had to prove
3 the crime base all over again in the trial. We would
4 have liked to have done that through possibly means
5 without having to bring all the witnesses to The
6 Hague, but it did require us to bring 90-some
7 witnesses to The Hague and to prove that crime base,
8 and then, of course, a big reliance on linkage
9 witnesses, on insider witnesses to then create the
10 linkage between Charles Taylor and the leaders of the
11 RUF and the AFRC, and to prove our case in that
12 respect.

13 Our case, although our opening
14 statement was in June of 2007, our first witness was
15 not until January of 2008, when Charles Taylor, I
16 guess for lack of a better way to put it, fired his
17 defense counsel in June of 2007. That might be
18 oversimplifying it, but essentially that defense
19 counsel left, new counsel were found, and our first
20 witness took the stand in January of 2008. Our last
21 witness testified a year later, at the end of January
22 of 2009, and once some outstanding motions were
23 decided, we were able to close our case in February
24 of 2009. After a Rule 98 motion, the defense case,

25

1 Charles Taylor was the first witness to take the
2 stand in his own behalf; that took place in -- he
3 began his testimony in July, middle of July of 2009.
4 the defense estimated his testimony, including
5 cross-examination, to last four to six weeks. Four
6 months later when his examination-in-chief ended, the
7 prosecution's cross-examination began, and I believe
8 we finished in February, if I remember right.
9 There's a lot of dates here, so I hopefully won't get
10 them confused, but we finished in February. So he
11 was on the stand for seven months, or nearly seven
12 months. That did include the holiday recess and some
13 time off, but about seven calendar months that he
14 testified.

15 He then -- 20 witnesses, 20 additional
16 witnesses, came and testified in his behalf, and
17 he -- and they finished up, the last one finished up,
18 in November, and their case closed, I believe it was,
19 on November 12th of last year.

20 So that's where we stand. As you
21 said, I know we're going to be talking about his case
22 later, so we'll be getting into more prosecution
23 strategies and where we went through the case, but
24 that is a very, very brief overview.

25

1 Before I finish, if I could --

2 MR. SCHEFFER: Sure.

3 MR. JOHNSON: -- just comment about one thing.

4 Really with the end of the Charles Taylor case
5 coming, and maybe we'll have time to talk about some
6 of the issues of closing, and the court's closing
7 today; I don't know, we'll see --

8 MR. SCHEFFER: Yes.

9 MR. JOHNSON: -- how the --

10 MR. SCHEFFER: Of course.

11 MR. JOHNSON: -- day develops --

12 MR. SCHEFFER: Yeah.

13 MR. JOHNSON: -- but we're there. In other
14 words, we're the first tribunal closing down, and all
15 of the tribunals are looking to those issues as we go
16 down the road, but we're going to be getting them
17 first.

18 We're looking at, of course, the
19 residual court and the platform that that will take;
20 we will deal with that. We have already transferred
21 many of our -- well, really all of our records in
22 December, with the assistance of the Dutch Air Force,
23 were flown out of Sierra Leone to The Hague, and
24 they're now in The Hague, where, of course, those

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1 records, some have been archived, some are being
2 prepared for archiving as we go down the road.

3 The presence that will remain in
4 Sierra Leone as far as the residual court and after
5 the court closes to ensure that all public records
6 and documents are available to the people of Sierra
7 Leone, which, of course, that was one of the most --
8 I think one of the best aspects about this court, was
9 that it was in Sierra Leone.

10 And so, of course, as we looked to
11 closing the court, transitioning to a residual court,
12 and the legacy that the court leaves behind in Sierra
13 Leone, that those benefits remain behind, and that
14 what the court has done over these years remains very
15 accessible to the people of Sierra Leone in the form
16 of a peace museum and other ways. So maybe we'll get
17 to some of that.

18 MR. SCHEFFER: Thank you --

19 MR. DIENG: I have --

20 MR. SCHEFFER: -- very much.

21 MR. DIENG: -- one question. Are you
22 contemplating to return those archives to Sierra
23 Leone?

24 MR. JOHNSON: Right now that is not -- I won't
25

1 say it's not being contemplated, but there's no plans
2 in the works for the original archives to return to
3 Sierra Leone. That, I'm aware of.

4 Certainly all of the public copies of
5 all of the archives and all of the public records
6 are -- will be in Sierra Leone, will be available to
7 the people of Sierra Leone, but I can't tell you
8 right now what the long, long-term plans are or if
9 they're looking at someday being able to return the
10 originals of those to Sierra Leone. I can't answer
11 that question for you.

12 MR. DIENG: Thank you.

13 MR. SCHEFFER: May I just ask: Are there
14 plans afoot for the Rwanda Tribunal to convey
15 original documentation to Kagali ultimately, or is
16 that under discussion?

17 MR. DIENG: Well, I mean, for the time being,
18 the Security Council, just last December --

19 MR. SCHEFFER: Right.

20 MR. DIENG: -- decided under Resolution 1966
21 that, for the time being, the archives will remain
22 both at The Hague and in Arusha, close to the
23 residual mechanism.

24 But the reason I was asking the
25

1 question is that both the victims of the Balkan
2 crimes and the Rwanda genocide have been claiming
3 that these archives should remain in the Balkan
4 region and in Rwanda, and I should say that I have
5 sympathy for the idea that the archives be close to
6 the victims of the genocide in Rwanda.

7 MR. SCHEFFER: Be close to them?

8 MR. DIENG: Yeah, for the simple reason I
9 think we need to have very secure environment for
10 those archives. So I could understand for Sierra
11 Leone that they believe that the situation in Sierra
12 Leone is not yet secure for the conservation of the
13 archives --

14 MR. SCHEFFER: Um-hum.

15 MR. DIENG: -- for the same reason they
16 decided that the convicts of the Sierra Leone court
17 will not serve their sentence in Sierra Leone, for
18 the same reason they decided that the trial of
19 Charles Taylor should take place at The
20 Hague. And I should say in that regard,
21 that personally I was of the view that it would have
22 been much better to have the trial of Taylor taking
23 place in Africa, in Freetown, so that this really
24 adds a deterrent to most of those leaders in the
25

1 region. And when we know what is happening today in
2 Cote d'Ivoire, in the same region of West Africa, one
3 could certainly see a reason for having the trial of
4 Taylor in Freetown.

5 MR. SCHEFFER: And I'll just -- as a little
6 anecdote from the negotiations on Sierra Leone's
7 court, we sought to have an alternative location in
8 West Africa for security purposes in the event
9 Freetown could not sustain a viable security
10 environment. We didn't really want to take it up to
11 Europe, so I actually flew to Bamako, Mali, and the
12 Mali government actually offered a very nice site in
13 Bamako, which was already built but not occupied.

14 The U.N. shot that down because they
15 felt that if it took place in Mali, you would have a
16 whole new language that would have to be dealt with,
17 French, in terms of cost of translation, et cetera,
18 that some of us argued, well, just because it's in
19 Bamako doesn't mean all the court proceedings have to
20 have the French component, although French, of
21 course, is the European language in Mali. But that
22 cost reason alone shut down the proposal, so it was
23 then left to linger.

24 Then ultimately when the Charles
25

1 Taylor trial commenced, the decision was made that
2 proper security is available in The Hague. And, of
3 course, Bamako had never geared itself up, you know,
4 for being an alternative site if they weren't
5 originally asked to do so. I --

6 MR. JOHNSON: Can I --

7 MR. SCHEFFER: Oh, I'm sorry.

8 MR. JOHNSON: Well, if I could just add to
9 that, please. Certainly at the time when they were
10 looking to hold the Taylor trial in the spring of
11 2006 --

12 MR. SCHEFFER: Yeah.

13 MR. JOHNSON: -- and even talked to some in
14 Rwanda, without going into details, on the places
15 that were looked at. Other options in Af -- Africa
16 was always the first -- the preferred option, to find
17 another location in Africa to do it, and there were
18 several places that were checked out and it was
19 looked into, and ultimately, of course --

20 MR. SCHEFFER: Yeah.

21 MR. JOHNSON: -- it came to The Hague.

22 MR. SCHEFFER: Yeah. Now, I know that I am
23 violating all sorts of rules of civilization by not
24 having our coffee break yet.

25

1 (WHEREUPON, there was laughter.)

2 Substance over coffee is sometimes my
3 rule, but there's a tremendous amount of coffee back
4 there. Everyone is free to get up at your leisure to
5 go back, munch, drink, but I would like to, if
6 possible, keep going a little bit at the severe pain
7 of our panelists, and I'm wondering if that's okay
8 with you all, at least for another few minutes. If
9 you want a cup of coffee, I might ask if -- oh, I see
10 Virginia has stepped out, but I was going to ask
11 maybe coffee could be brought to you, or just get up
12 if you wish to and go get a cup of coffee; it's no
13 big deal, because I want to keep moving here a little
14 bit. We're going to be breaking in exactly an hour
15 for lunch, and if we've taken a coffee break, we'll
16 lose 15, 20 minutes, so I think I'll make that
17 command judgment. But if you want coffee, please
18 either -- just feel free to get up and just get it.
19 It's no big deal. But not Alex.

20 Alex Whiting is now going to speak to
21 us on one of the hottest issues out there, which
22 Professor Oosterveld actually, I think, commenced her
23 talk about at the opening of our session today, and
24 that is the International Criminal Court and the

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1 Darfur situation and the fact that President Al
2 Bashir of Sudan is actually an indicted fugitive of
3 the International Criminal Court.

4 But the character of the indictment
5 against him was the whole ballgame in 2010, and the
6 year began on February 3rd with the Appeals Chamber
7 reversing the Pretrial Chamber on the scope of the
8 indictment against Al Bashir, which did not include
9 genocide, and the Appeals Chamber said, "Wait a
10 minute. Hold on, let's take another look at
11 genocide," and then on July 12th, 2010, the Pretrial
12 Chamber actually delivered a very, very significant
13 decision relating to indictment of President Al
14 Bashir in Darfur.

15 So, Mr. Whiting, if you could bring us
16 into the Al Bashir indictment, of developments of
17 2010, I think that would be a good place to start.

18 MR. WHITING: Okay. So before I do that, let
19 me add my thanks to the others for -- to you and to
20 your staff for organizing this conference.

21 In addition to all the other reasons
22 articulated by the others before me about why this is
23 a great conference and you've done a great thing
24 bringing everybody together, and I agree with the
25

1 Chicago Bulls, I have a personal interest and
2 appreciation of being here. I grew up in Chicago, in
3 Evanston. My father taught at Northwestern for more
4 than 35 years, so for me it's coming home.

5 It's also, I should say, a treat
6 really, I think, for us to come and hear one another,
7 because, you know, the reality is when you're at your
8 tribunal, you tend to kind of get tunnel vision on
9 the work of your own tribunal, so it's terrific to
10 hear -- I mean, that's not true for Rod, he gets the
11 picture of everyone, right? But for the rest of us,
12 we have a little bit of tunnel vision, so it's great
13 to hear kind of what's going on at the other
14 tribunals.

15 I think, I mean, the one thing I take
16 away from this, you know, your first question was
17 sort of: What are some of the extraordinary or
18 significant developments of 2010? And the thing I
19 hear is that it's range and quantity of work that has
20 been done at these tribunals, so it is really
21 extraordinary. That's certainly true at the ICC.

22 I think if you look at 2010, the thing
23 that stands out is that was an extraordinarily
24 productive year for us at the ICC. We have three
25

1 trials going now, and we had a range of important
2 decisions, confirmation hearings, arrests, new cases
3 starting, across the board it's really an incredibly
4 busy, productive year, and I think the significance
5 of that for the ICC and for all the tribunals is,
6 again, something that David mentioned at beginning,
7 that, you know, now I think we can say this field is
8 here to stay, which has always been a question mark
9 as to whether this would continue or fall away and
10 die.

11 So respect to the Al Bashir case, as
12 Professor Oosterveld said, there were decisions about
13 that case with respect to genocide. And just to kind
14 of bring you up to date a little bit without getting
15 too much into the weeds about what happened when the
16 prosecutor presented the case, the prosecutor asked
17 for war crimes genocide, and they confirmed the war
18 crimes and crimes against humanity, and the reasoning
19 of the Pretrial Chamber was while the evidence
20 supported an inference, it was not the only inference
21 that could be drawn from the evidence; other
22 inferences could be found with genocide.

23 The prosecution appealed, saying that
24 at the stage of an arrest warrant, that was too high
25

1 a burden to require of the prosecution, but that was
2 a more appropriate analysis to be done at the trial
3 stage than at the arrest stage, and it should be
4 sufficient for the prosecution to show that the
5 evidence supports the inference even if it's not the
6 only inference that could be supported, even if
7 genocide was committed. In due course, the Appeals
8 Chamber sent it back to the Pretrial Chamber for
9 reconsideration and approved the genocide charge.

10 The decision is significant for two
11 reasons: First, it's significant for the case
12 itself, the Al Bashir case itself, the genocide
13 charge, and so it is a significant development in
14 this unfolding case against Al Bashir which will,
15 without a doubt, have Al Bashir facing these
16 questions in The Hague. Without a doubt, that will
17 happen, at least in my mind.

18 MR. SCHEFFER: He's from the prosecutor's
19 office. Remember that.

20 MR. WHITING: And the broader reasoning here
21 is that the -- a case goes through progressive stages
22 and gets checked by the court at each stage, and
23 there are essentially three stages: There's the
24 arrest warrant stage, the confirmation of the
25

1 charges, and then the trial. And it's important that
2 the check at the arrest warrant stage was held to an
3 appropriate level, was not allowed to be overly
4 stringent, because the reality is at that stage the
5 prosecution may not be able because of security
6 considerations -- and this sort of ties back to the
7 issue that Rod and Tom were talking about with
8 respect to witness security -- that the prosecution
9 may not be able to show its full hand at the arrest
10 warrant stage because witnesses are protected,
11 there's continued insecurity, instability.

12 So if the pros -- if the test at the
13 arrest warrant stage were too stringent, then the
14 prosecutor would either face the choice of having to
15 show more of his hand or drop the case.

16 So in order to make these cases viable
17 and to be -- that they can progress, it was an
18 incredibly important decision that that check be
19 preserved at the arrest warrant stage -- of course,
20 there must be a check -- but that it not be too
21 stringent.

22 MR. SCHEFFER: And just remind us when the
23 Pretrial Chamber actually arrived at its decision on
24 July 12th of 2010, they broadened the indictment to
25

1 include the charge of genocide against President Al
2 Bashir, but there was actually an interesting, you
3 know, sort of matrix of what they looked at there. I
4 mean, why is President Al Bashir being charged with
5 genocide? What happened in Darfur that leads the
6 prosecution to even seek that and now achieve it
7 within the indictment?

8 MR. WHITING: Well, the case the prosecution
9 has put forward at this stage, the theory of the
10 case, is that Al -- President Al Bashir was in charge
11 at the top of both government of Sudan and forces
12 which allied with Janjaweed forces and which attacked
13 various ethnic groups in Darfur with the intent to
14 eliminate those groups, and there are various
15 approaches that the forces used under the command of
16 Al Bashir; direct killings of these populations.

17 But also, in addition, and maybe this
18 more captures what happened, creating conditions that
19 would make it impossible for these populations to
20 continue. So displacing them to places where they
21 could not survive, destroying their ability to have a
22 livelihood, destroying any ability to have crops.
23 When they were in these locations that were
24 incredibly unstable, if they tried to go out to -- to

25

1 get firewood or food, they would get attacked,
2 killed. Rapes were part of these attacks.

3 So the strategy of the government
4 forces aligned with the Janjaweed has been to create
5 these conditions of life, or really conditions of
6 death, to make their continued existence impossible.

7 MR. SCHEFFER: Let me pursue this just a few
8 steps because this is so important. I know that the
9 prosecutor was hoping that there would be a clear
10 acceptance by the Pretrial Chamber under what's
11 called Article 6, subparagraph (c) of the statute
12 which covers genocide, and this is the part that
13 reads, "Deliberately inflicting on each target group
14 conditions of life calculated to bring about the
15 group's physical destruction," which Mr. Whiting was
16 talking about; that, in fact, rape would be clearly
17 seen as genocide. In other words, that there would
18 be a direct relationship between rape, which takes
19 place outside of these camps, as the women and girls
20 go to get the firewood and water, because if the men
21 do so, they get killed. If the women and girls do
22 so, they don't get killed, they get raped, but at
23 least they survive. So somehow the camp has to get
24 fire and wood -- I mean, wood and water, so that's

25

1 the tradeoff essentially.

2 And what the prosecutor was hoping
3 was, I think, that the Pretrial Chamber would clearly
4 say that instrument of rape is actually a very
5 clearly identifiable instrument of genocide, and they
6 think the Pretrial Chamber left it somewhat vague.
7 They sort of threw it under the notion of torture
8 inferentially, and they didn't clearly go as far as
9 the prosecutor wanted them to go on that issue.

10 MR. WHITING: Yeah. I think that may
11 overstate a little bit the concern of the prosecution
12 in the case, at least at this stage, bearing in
13 mind --

14 MR. SCHEFFER: Yeah.

15 MR. WHITING: -- that these are --

16 MR. SCHEFFER: These are arrest warrants.

17 MR. WHITING: These are the early stages when
18 Al Bashir is brought to The Hague, as he will be,
19 then he will face confirmation of the charges and
20 there can be further amplification.

21 But it is true that the way the PC
22 reasoned in the rape allegations was not under the
23 6(c) prong, which you talked about and which I was
24 talking about, creating condition of life to make

25

1 unbearable and unsustainable conditions of life, but
2 under 6(b), inflicting mental --

3 MR. SCHEFFER: Yeah.

4 MR. WHITING: -- and bodily harm. That's
5 where the rape -- but that was not completely
6 inconsistent with the way the prosecutor presented
7 the case to the Pretrial Chamber, and it's also
8 significant that the Pretrial Chamber considered rape
9 with respect to the mens rea, the intent of Al
10 Bashir.

11 It was one of the factors that the
12 Pretrial Chamber noted in support of a finding that a
13 reasonable inference could be drawn that Al Bashir
14 had the requisite genocidal intent to commit these
15 acts. So maybe a little bit of disquiet, but I --
16 but not something we think will be a problem
17 ultimately.

18 MR. SCHEFFER: Okay. Does anyone want to
19 comment on that?

20 MR. DIENG: Yes, partly. I mean, I would like
21 you, if you can, maybe just remind to the
22 participants the decision of -- the Appeals Chamber's
23 decision on Rukundo, because I do believe that the
24 issue of rape as --

25

1 MR. SCHEFFER: Yes.

2 MR. DIENG: -- she did mention earlier, and it
3 came again with the Al Bashir case. I may say that I
4 was a bit frustrated with the decision made by the
5 Appeals Chamber in the Rukundo case where --

6 MR. SCHEFFER: He's talk -- Mr. Dieng is
7 talking about Rukundo, which was an appeals judgment
8 of October 20th, 2010, before the Rwanda Tribunal and
9 had a -- it's a genocide case, but it has the issue
10 of rape as part of it, so that's why there's a
11 connection here.

12 MR. DIENG: Yeah. And, in fact, our Rukundo
13 appeals judgment was, I would say, dealing with the
14 evidence of the case and not the principle of legal
15 ingredients for the crime of genocide.

16 My personal view is that this judgment
17 is indeed undoing part of the gains from the Akayesu
18 judgment, and, as you know, the Akayesu judgment was
19 the first judgment ever rendered, equating rape
20 to genocide when committed under certain
21 circumstances. I think that was really a landmark
22 decision, which was later followed by the ICTY.

23 I remember my frustration when the
24 world press said that this is a premier in the
25

1 history of the world. Likely one of our
2 colleagues, a human rights activist, on BBC
3 corrected, and I had personally asked Kofi Annan at
4 the noon briefing also to correct it.

5 I mean, that is to say, it was not an
6 ego problem, but it was really at Arusha, with the
7 bench composed of Judge Laity Kama, Judge Pillay, and
8 Judge Eric Mose.

9 I'm not sure that we need proof that
10 what was going on in Rwanda at that time at the
11 national level did influence the individual criminal
12 behavior, and was even the main factor. And that's
13 why I think if I were a judge, I would have certainly
14 sided with Judge Fausto Pocar on this important
15 issue.

16 MR. SCHEFFER: Now, if I may explain -- and
17 you correct me if I'm explaining this incorrectly.
18 This Rukundo decision out of the Appeals Chamber of
19 the Rwanda Tribunal, it reduced Rukundo's sentence
20 from 25 to 23 years appearance -- imprisonment from
21

1 the Trial Chamber, and it reversed his conviction of
2 committing genocide by causing serious mental harm to
3 a young, female, Tutsi woman by sexually assaulting
4 her. And the way they got to that was exactly what
5 Mr. Whiting was saying, which is at the arrest
6 warrant level, it's too high a burden on the
7 prosecutor to show that the only inference is a
8 genocidal inference, so give the prosecutor a little
9 bit of slack there; thus, the Appeals Chamber and
10 then the Pretrial Chamber gave that slack in the
11 International Criminal Court, so the arrest warrant
12 goes forward on a genocide charge.

13 Now we come to the merits and the
14 trial itself and the Appeals Chamber, and they
15 actually raise the bar so that the only inference
16 must be a genocidal inference in connection with the
17 rape charge.

18 MR. DIENG: Yes.

19 MR. SCHEFFER: So I guess I would ask,
20 because, I mean, as an academic, I still have a
21 problem with raising the bar that high even at the
22 merits stage, and I would be just curious what
23 Mr. Dixon might say about that and anyone else on the
24 panel. Should the bar -- and Professor Oosterveld.

25

1 Should the bar be that high at the
2 trial stage for proving rape as genocide, meaning
3 that it's the only inference you can draw from the
4 circumstances? You can't draw the inference that it
5 was part of a crime against humanity or a war crime
6 or a common crime in the jurisdiction of that
7 country.

8 It has to be a genocidal intent, which
9 requires specific intent to be proved in order for
10 rape to be proved as an instrument of genocide. I
11 don't know if I'm overstating things, but I want to
12 be a little provocative.

13 Professor Oosterveld, do you want
14 to --

15 MS. OOSTERVELD: I --

16 MR. SCHEFFER: -- take that on?

17 MS. OOSTERVELD: I think that regardless of
18 how one would interpret the bar -- but I do agree
19 that in this case the Appeals Chamber set the bar too
20 high -- what happened, I thought, was the Appeals
21 Chamber took too narrow a lens in looking at
22 reevaluating the evidence. And so what they did was
23 they looked at Rukundo, had decided to go back to a
24 seminary, and at that seminary, there were Tutsis that

25

1 sought refuge, including this young girl, and her
2 entire family was being hunted down because they were
3 associated with someone who was viewed as an Inyenzi,
4 someone who was against the Hutu power.

5 So she was in this very precarious
6 situation, kind of camped out, dirty, disheveled,
7 trying to live at the seminary. And he arrives and
8 she decides she's going to ask him to hide her in his
9 room, and so she accompanies him, and she's very
10 pleasant to him on the walk up to his room and helps
11 him carry some beer that he had. Now, he was a
12 priest, and I'm not sure what he was doing -- anyway,
13 carried it up to the room.

14 Then as he unlocked the door, she'd
15 started to become afraid -- sorry. As they went into
16 the room and then he locked the door, she started to
17 become afraid. And the judges really focused and the
18 fact that she wasn't -- she hadn't said that she had
19 been afraid before.

20 And then in the room, what transpired
21 is he attempted to rape her, and that was what the
22 charges were about related to the genocide. As he
23 was -- had her in the room, he said, "I can't hide
24 you because you're assoc -- because you're Tutsi and
25

1 you're associated with your family, and they all have
2 to be hunted down because they are associated with
3 this Inyenzi."

4 So what happened was they started to
5 focus just on the fact that, oh, she wasn't afraid
6 prior -- she didn't say that she was afraid prior to
7 locking the door, so another explanation might be
8 that he was a friend of her family and that he didn't
9 actually intend to do any harm to her in the context
10 of the genocide.

11 Then that was the alternative
12 explanation that they gave to it, and said, well,
13 because there was an alternative explanation, it
14 therefore didn't fit within the context of the
15 genocide. But Judge Pocar said, "Wait a minute here.
16 She's afraid, she's hiding out, she's Tutsi, she's
17 extremely vulnerable, and here is somebody who was
18 involved in the genocide and then took advantage of
19 this young Tutsi woman. We need to step back and
20 look at her larger context to see whether or not this
21 sexual assault fit within the targeting of the Tutsi
22 in the genocide." And that, I thought, was the right
23 way to look at it.

24 MR. SCHEFFER: Yes, Mr. Dixon?

25

1 MR. DIXON: I agree, and I think it turns a
2 lot on the facts more than the legal principle. But,
3 as a matter of principle, I do think it's very
4 important that for cases of genocide, the specific
5 intent requirement is maintained for all acts.

6 I don't think we should be obsessed at
7 always feeling we must make everything genocide and
8 turning it into what sometimes becomes a celebrity
9 crime. Initially you've got genocide in the
10 indictment, you're not going to get enough media
11 attention, you're not going to get people pushing for
12 the rest of the people.

13 The situation that was described as a
14 war crime or a crime against humanity, leaving aside
15 how one interprets the facts, but what is really the
16 problem with that being characterized in that way? I
17 don't think we should always try and fit, as far as
18 we can, all of these crimes into neat genocide boxes,
19 to feel that then we've somehow, you know, got to the
20 apex or we've achieved something very special,
21 because all of these crimes are very, very serious,
22 and genocide should be preserved for only those
23 situations where the specific intent has been shown.

24 And that does bring me to what Alex
25

1 was saying, which I did want to comment on, if I may.
2 I think, looking at it now from the point of a
3 prosecutor, and I'd be interested to know what other
4 people think, I mean, surely you don't want to start
5 off your case with the judges saying, "Well, genocide
6 could be one reasonable inference, but there are a
7 whole lot of others as well," and they set them all
8 out, well-reasoned arguments why this is not
9 genocide.

10 Surely, as the prosecutor, you want to
11 make sure before you try and take down a head of
12 state on genocide, that you can prove it beyond a
13 reasonable doubt, and you're confident that you can
14 do that.

15 And I remember when we started in the
16 OTP when Bill was there as well, largely as the
17 result of the fact of a U.S. lawyer coming in, he
18 would never allow an indictment to be confirmed, to
19 go out, unless we felt we could prove beyond a
20 reasonable doubt.

21 And you do the same in the UK. If the
22 CPS comes and asks you, "Is it enough evidence to go
23 ahead?" as a barrister looking at it, you'll always
24 only say yes if you know you can get a conviction on
25

1 this case. You won't say, "Oh, well, it doesn't
2 really matter. Just get it past the first hurdle and
3 then we'll try and build it up over time." I think
4 it's a very dangerous route to take.

5 And, you know, try and put yourself,
6 again, in the other person's shoes. I mean, how
7 would you respond if that was going on in relation to
8 your country or other countries that you know of much
9 more closely where political leaders were in the
10 spotlight when maybe the evidence simply wasn't
11 there.

12 I mean, I should say, I must declare
13 my interest in this. I have been acting on behalf of
14 groupings from Sudan who have challenged the
15 intervention of the ICC and challenged the genocide
16 charges on the basis that there isn't any evidence or
17 sufficient evidence of this, and have asked the
18 judges to look at the wider body of evidence out
19 there, because, as you know, only the prosecution --
20 it's an ex parte hearing -- can bring the evidence
21 before the judges.

22 What we've been saying is for these
23 kinds of important cases, when you're talking about
24 heads of state, surely you should allow a broader
25

1 environment but shouldn't really be saying only one
2 person, the prosecutor, can come there with evidence.
3 You should allow people to put forward what their
4 views are. What's the harm? Why don't you look at
5 all the evidence?

6 Basically the prosecution has got a
7 duty under the ICC statute to bring forth both
8 inculpatory and exculpatory evidence, and I wonder if
9 that actually is a formal part of the investigative
10 process. Maybe that's something we're going to have
11 to discuss. So I think it's incredibly important for
12 transparency purposes when you're talking about such
13 important decisions. Yes, it's not your state, but
14 it's another state. Try and look at how they're
15 going to view it, and especially when the state
16 hasn't signed up to the ICC as well, to make sure
17 that you have got enough evidence to put before the
18 court. You can do it ex parte. All of this is done
19 confidentially, so why not put all the evidence
20 before the court and ensure that you avoid the
21 criticism coming?

22 I'm trying to look at it now from the
23 interest of international justice as a whole. Avoid
24 the criticism coming, which is out there, whether you
25

1 agree with it or not. It is a highly-politicized
2 process in that it is celebrity prosecuting, choosing
3 crimes with certain -- George Clooneys, and, look,
4 not basing it on the law, the evidence, and being
5 real lawyers' lawyers about doing this. And
6 long-term credibility of the institution is at stake
7 when you start, I think, going into those gray areas,

8 And we're going to come up to discuss
9 this. But, yeah, there's a lot out there at the
10 moment, especially in African countries, whether it's
11 right or wrong, but it exists. There's a huge voice
12 which is going to have to be dealt with, otherwise,
13 these institutions are simply going to be seen as too
14 one-sided, favoring a few interested countries and
15 not looking at a level playing field.

16 MR. SCHEFFER: I think that's extremely
17 important, all that Mr. Dixon has said. If I weren't
18 moderator, I would engage in an instant rebuttal.

19 (WHEREUPON, there was laughter.)

20 Mr. Whiting, yes?

21 MR. WHITING: I both -- I mean, I actually
22 agree with some things you say. I agree that the
23 prosecution has to proceed responsibly, has to
24 proceed under the law, and should have confidence

25

1 when it starts a case, any case, whether it's against
2 a leader or lower-level commander, that it's going to
3 be able to prevail ultimately in the case.

4 But I don't think -- I think the
5 mistake is -- would be to turn the arrest warrant
6 stage into a minitrial, at which point the
7 prosecution would be required to establish that it is
8 the only reasonable inference and put forward a
9 broader range of evidence available to it.

10 Yes, it's ex parte, but if the accused
11 shows up, then he is entitled to have access to all
12 that information, because he can challenge his
13 arrest, he can challenge the -- his conditions of his
14 release, so it gets out there; it becomes part of the
15 record.

16 And these issues, as you yourself
17 alluded to, the difficulty about genocide -- and I
18 share your view about genocide being the marquee
19 charge to the detriment of crimes against humanity
20 and war crimes. But the thing about the genocide
21 charge, what makes it hard is it is legally a very
22 technical and complicated charge.

23 The genocides that we've been talking
24 about in the Balkans and Rwanda, particularly in the
25

1 Balkans, remain controversial. There continue --
2 even after verdicts, there continue to be disputes
3 about whether it's really a genocide and so forth.

4 So to plunge into those issues at the
5 arrest warrant stage and to require the prosecution
6 to satisfy that higher burden would be, I think,
7 would -- would kill the project. Then, finally, I
8 don't think there should be separate standards and
9 more rigorous standards just because he's the head of
10 state.

11 MR. SCHEFFER: Now, well, let's take one
12 intervention, and then I'm going to be dictatorial
13 here. I'm actually going to jump right into -- it's
14 time for another video clip, so we've just got to get
15 to the video clip and that's -- just give me one
16 second.

17 Ronit, if you could set up Sierra
18 Leone, the next one, Naomi's.

19 And we're going to go into that in
20 just one a second, Mr. Johnson.

21 Yes?

22 MR. DIENG: No, no. I just wanted to support
23 what Alex did say. I mean, you can be a head of
24 state, you can be a prime minister. I mean, you are
25

1 simply an individual. And when it comes to these
2 serious crimes, I mean, you have to face justice.
3 And, of course, as Mr. Dixon was saying, one may
4 wonder if the strategy of Prosecutor Ocampo was the
5 correct one, and one may wonder if he did not try to
6 be going too fast, I mean, or one may wonder if he
7 did not try to vindicate the fact that President
8 Bashir did not cooperate on the case of Harun, but,
9 instead, decided to promote Harun after (inaudible)
10 issue.

11 The African Union just concluded its
12 summit in Addis Ababa. The issue of criminal justice
13 was at the heart of the discussion, Sudan, but also
14 Kenya, you know. You know the situation in Kenya,
15 postelection violence. And what is happening, Kenya
16 is now trying, and the Council of Security and Peace
17 of the African Union passed a resolution requesting a
18 deferral of the case. In order what they're trying
19 now is to say, "ICC, you stop. We Kenyans, we are
20 going to try our people who are responsible of this
21 postelection violence." Of course, in Kenya, they
22 are divided. Also, the Prime Minister, Odinga, is --
23 may even challenge the President, because President
24 Kibaki is trying to say, "Now we are going to have a
25

1 new judicial system, a new chief justice is being
2 appointed, a new attorney general, a new director of
3 Public Prosecution. Then we have now the capacity
4 and willingness to try these people."

5 So that's where I'm really a bit
6 concerned, including the fact also that the African
7 Union is trying to set -- or to expand the
8 jurisdiction of the African Court on Human and
9 People's Rights to include a Criminal Division --

10 MR. SCHEFFER: Hmmm.

11 MR. DIENG: -- which, to my view, I mean, is
12 not a good idea because it comes as a defiance to the
13 ICC.

14 A long time ago
15 when I was chairing with Prosecutor Jallow, a group
16 of experts, in Addis, we did recommend the
17 establishment of a Criminal Division to deal
18 with corruption, the fraudulent enrichment of top
19 state officials detrimental to the public interest.
20 We wanted that to be considered as a serious crime by
21 the African leaders. So the idea was rejected.

22 So now, to my view, although to have a
23 Criminal Division in Africa is not a bad thing, but
24 not as a response to the current Al Bashir situation
25

1 or to the Kenya current situation.

2 MR. SCHEFFER: That's a very interesting
3 perspective, what Mr. Dieng has just said, and I'd
4 love to pursue it, but here's what I wanted to
5 achieve before we break for lunch.

6 I have three goals prior to 11:50: I
7 wanted to deal with an interesting episode in the
8 Special Court for Sierra Leone, I want to come back
9 to the Cambodian Tribunal, Prosecutor Smith for a
10 moment; and then I want to end up with the Yugoslav
11 Tribunal and the Karadzic trial, if I may. So I've
12 got those three goals before we break, so let's see
13 if we can do it.

14 What we're going to do now is show an
15 episode from the Charles Taylor trial in 2010 that
16 involved some new prosecution witnesses that were,
17 shall we say, rushed to the courthouse in 2010, long
18 after the prosecution had rested its arguments, and
19 Mr. Johnson, Prosecutor Johnson, very, very briefly
20 set this up for us. Why are Naomi Campbell, Mia
21 Farrow, and Carol White in a courtroom in The Hague?

22 (WHEREUPON, there was laughter.)

23 MR. JOHNSON: Well, it wasn't about publicity.
24 Let me open with that.

25

1 (WHEREUPON, there was laughter.)

2 Certainly during Charles Taylor's
3 testimony, he claimed that he had never been in
4 possession of rough diamonds. He certainly claimed
5 that, and I believe he said that the only diamond he
6 ever possessed was on a watch or a piece of jewelry
7 or something like that. So that's certainly
8 important.

9 Secondly, we certainly attempted to
10 link Charles Taylor with some arms shipments, and
11 particularly an arms shipment in October of 1997, so
12 these were very, very important as aspects. We, of
13 course, came in -- some information through some
14 confidential sources was given to us about a dinner
15 that took place in Nelson Mandela's home in South
16 Africa, where in attendance was Charles Taylor, Naomi
17 Campbell, Mia Farrow. And we came into -- the
18 information we came into said that at that dinner or
19 after that dinner that he had provided some -- a
20 large diamond or some rough stones to Naomi Campbell.

21 So that set the stage. Indeed, we did
22 not have this information during our case in chief,
23 we would have not been able to get this information
24 through due diligence, and the Trial Chamber agreed
25

1 with us on that. So although we were not able to use
2 in cross-examination a declaration from Nao -- from
3 Mia Farrow in January of that year, we did come
4 across additional information in the May time frame
5 where Carol White came to our attention, provided us
6 with some additional information in the May time
7 frame.

8 At that point, we believed we had
9 enough to go forward with the request to reopen, or,
10 in the alternative, to present some rebuttal
11 evidence. We did that. We brought that motion as
12 soon as we could from the time that we felt we had
13 the evidence to go forward with the motion, and, of
14 course, Mia Farrow was -- all three of them, we
15 were -- our motion was granted. All three of them
16 were called in early August of 2010.

17 It is very important and significant,
18 I think, to point out that whereas we were able to
19 talk to Mia Farrow and Carol White before their
20 testimony, Naomi Campbell refused to see us before
21 she testified, and so the first time that we talked
22 to her was indeed when she took the stand.

23 MR. SCHEFFER: Okay. And I don't think I gave
24 this to you beforehand, Mr. Johnson, but -- so do you
25

1 want to start with that little slide that you have
2 with the -- is that a final thing or an initial slide
3 that you want to show?

4 This, we're just showing the audience.
5 What we did was we juxta -- I'm sorry the panelists
6 can't see this very clearly, but we juxtaposed the
7 testimony of Naomi Campbell, Mia Farrow, and Carol
8 White on the same set of alleged facts, and, of
9 course, all of them gave different answers as to what
10 happened that evening at dinner with Charles Taylor.
11 And so this just gives you a little bit of an idea of
12 the contradiction between all of these witnesses.
13 How do I best describe Carol White? She's some kind
14 of manager or something?

15 MR. JOHNSON: Yeah, she was Naomi Campbell's
16 manager --

17 MR. SCHEFFER: Yeah.

18 MR. JOHNSON: -- or agent at --

19 MR. SCHEFFER: Right.

20 MR. JOHNSON: -- the time.

21 MR. SCHEFFER: And then they had a falling out
22 of incredible proportion.

23 (WHEREUPON, there was laughter.)

24 So Naomi Campbell doesn't like Carol
25

1 White, and vice versa. Okay. So there's the little
2 grid that I'm sorry we have to show this so quickly
3 to you, but there it is and --

4 AUDIENCE MEMBER: One point of --

5 MR. SCHEFFER: Yes?

6 AUDIENCE MEMBER: -- clarification.

7 Mr. Johnson, could you explain why the
8 possession of rough diamonds by -- by Taylor was
9 relevant to charges against him?

10 MR. JOHNSON: In many aspects. But in this
11 particular Case 1, this is -- this is to his
12 testimony. In his testimony in chief, he claimed he
13 never had possession of any rough diamonds, and so
14 this, of course, contradicts that, and this, of
15 course, brings -- calls his evidence into question
16 and is he telling the truth.

17 And, of course, second, it's always
18 been a -- now, I probably should preface this as --
19 with if some of my comments, if you feel like I'm
20 holding back a little bit, I do need to say that, as
21 a prosecutor, I am under some restrictions on what I
22 can say. One of those is I can't speak to matters
23 sub judice, and so this is obviously very important
24 in that, so I have to be careful with what I say.

25

1 Also, as a prosecutor, I can't make
2 any comments or express any opinions as to the guilt
3 or innocence of the accused, so please keep that in
4 mind in the things that I say. But certainly I can
5 say that one our -- certainly one of the tenets of
6 our case is that rough -- that the diamonds coming
7 out of Sierra Leone, the rough diamonds, were indeed
8 used to fund the conflict.

9 They were indeed used to buy, to
10 purchase, arms and ammunition, and a very public --
11 the very tenet of our case is that they were funneled
12 through Charles Taylor, and Charles Taylor received
13 rough diamonds, and this is in our evidence
14 throughout the trial, that Charles Taylor received
15 rough diamonds to -- and he used those rough diamonds
16 to purchase arms and ammunition and give back to the
17 RUF and the AFRC in Sierra Leone.

18 So this directly supports that tenet
19 of our case and contradicts his own testimony, and it
20 very much ties into an arms shipment that we claim
21 rough diamonds were used to purchase and Charles
22 Taylor arranged and was delivered to Sierra Leone in
23 October of 1997.

24 MR. SCHEFFER: And I -- I should also say
25

1 everyone here obviously speaks in their personal
2 capacity and not as official spokesmen of their
3 tribunals. They are here in their personal desires
4 and -- and capacity.

5 Okay. Now, Ronit, if you could run
6 this, could you tell us how many minutes we're going
7 to be watching?

8 MS. ARIE: This is about three and a half
9 minutes of the prosecution asking Campbell a number
10 of questions.

11 MR. SCHEFFER: Okay. Fine. If you want to,
12 you can step down, everyone, and take a look at this.

13 All right. Let's go ahead, Ronit, and
14 let's get the sound up, way up. Sorry.

15 (WHEREUPON, the Videotape was
16 played.)

17 MR. SCHEFFER: That's Brenda Hollis.

18 (WHEREUPON, the Videotape
19 continued.)

20 Now we move to defense cross, right?

21 MS. ARIE: Right.

22 MR. SCHEFFER: Okay.

23 (WHEREUPON, the Videotape was
24 played and concluded.)

25

1 MR. SCHEFFER: Is that it? Really?

2 MS. ARIE: Yes.

3 MR. SCHEFFER: Yeah. Okay. Good. If you
4 don't mind -- okay. We've got --

5 I just want to ask Mr. Johnson, is
6 there anything you'd like to explain from what you
7 just saw there in terms of the veracity of the
8 testimony of these individuals on the stand?

9 MR. JOHNSON: Okay.

10 (WHEREUPON, there was laughter.)

11 MR. SCHEFFER: Or is there anything you can
12 say?

13 MR. JOHNSON: Well, certainly in our final
14 trial brief --

15 MR. SCHEFFER: Yeah.

16 MR. JOHNSON: -- that -- which a public
17 version will be filed soon, we certainly felt that in
18 many of the details, and we argued that in many of
19 the details, Naomi Campbell may not have been
20 completely honest --

21 MR. SCHEFFER: Um-hum.

22 MR. JOHNSON: -- or that her recollection may
23 not have been completely correct, and that the
24 recollection of Mia Farrow and Carol White in many of
25

1 these details are more reliable for the court, and
2 that's what we argued.

3 I guess the only other comment I would
4 make is, I mean, certainly in the press and
5 everywhere, you look at -- you know, they like to
6 point out the inconsistencies between their
7 testimonies. And even looking at the inconsistencies
8 between their testimonies, you might get down to look
9 at the details where they're not inconsistent.

10 And we certainly know from all of
11 their testimony that someone delivered something to
12 Naomi Campbell that night, and we know that Charles
13 Taylor was at the dinner. So there are some very
14 interesting points where they are consistent
15 throughout their testimony.

16 MR. SCHEFFER: Um-hum.

17 MR. JOHNSON: And so I just make that point.
18 But, again, these are things we've discussed in our
19 closing brief, so. . .

20 MR. SCHEFFER: Okay.

21 MR. JOHNSON: Yeah.

22 MR. SCHEFFER: I'm going to move very smartly
23 now to Prosecutor Smith. Let's go back to the Duch
24 judgment of July 26, 2010, in Phnom Penh. You have

25

1 appealed this judgment, and one of the reasons you've
2 appealed it is on the issue of the actual sentencing,
3 the number of years for which he was sentenced for
4 further imprisonment.

5 And I'm wondering if you could address
6 that particular issue in terms of how you have argued
7 this in appeal. Give us a little bit of background,
8 or I'll just quickly say it was a 35-year sentence
9 that was delivered by the Trial Chamber of the ECCC,
10 and yet five years were taken off of that 35-year
11 period because of a mitigating circumstance of the
12 illegal detention that he had in a military court for
13 a number of years, and then there were other reasons
14 why it came down to 19 years effectively.

15 And really I should throw the ball
16 into your court, Prosecutor Smith, to explain what
17 happened between 35 and 19 years for the sentence of
18 such horrendous crimes at Tuol Sleng prison, and then
19 what are you trying to achieve on your appeal, and
20 why is this significant, the sentencing of Duch?

21 MR. SMITH: Firstly, I would say that, I mean,
22 the prosecution were generally pleased with the
23 judgment for a Cambodian court. It is a Cambodian
24 court; it's a hybrid court with international
25

1 assistance. To issue a judgment that's
2 well-reasoned, applying international humanitarian
3 law from crimes to responsibility, and creating
4 historical records, so we're very pleased with the
5 judgment generally.

6 But we did decide to appeal a number
7 of points. We talked about the cumulative charging,
8 how that that didn't have the historical record
9 recorded, and also the idea of enslavement. But the
10 main reason why we decided to appeal the judgment was
11 in relation to the sentence. We've appealed on the
12 basis that we believe it's an inadequate sentence.

13 The prosecution asked Trial Chamber to
14 start off with a life sentence because of the
15 aggravating factors of the crime, and then secondly,
16 to reduce that to 45 years. The reason why we asked
17 for that reduction is that, as David has said, Duch
18 was held in custody for eight years prior to being
19 transferred to the ECCC, and under Cambodian law,
20 only three of those years are allowed in pretrial
21 detention.

22 So for another five years, he was
23 illegally detained on the basis the Cambodian
24 government heard the -- obviously knowing the
25

1 negotiations were -- were going on about the court
2 and didn't want to let him go until the courts could
3 take over jurisdiction. So that illegal detention
4 wasn't under the authority of this court, but it was
5 under the authority of the national court.

6 But, nonetheless, when you look at the
7 jurisprudence from the ICTR and the European Court of
8 Human Rights, there must be some remedy or some
9 discount from sentencing if someone is being
10 illegally detained for a significant period of time.
11 The European Court of Human Rights have said that
12 there must be an expressed and measurable discount in
13 relation to the sentence so that -- to provide a
14 deterrent for this to happen again, of course, and
15 also to give a small remedy to the accused.

16 So as much as we would have liked to
17 keep it at the life sentence, it was important that
18 we reflected the international standards and
19 practices of recognizing illegal detention should not
20 be mandated or not -- nor confirmed by the court. So
21 then we went to 45 years, and then we said, "Look,
22 for a small amount of cooperation and small amount of
23 remorse, that should be put down to 40 years."

24 The Trial Chamber came back, and they
25

1 said that, "Look, in relation to some mitigation, the
2 cooperation with the prosecution, and remorse, the
3 starting point shouldn't be a life sentence, but a
4 35-year sentence, and they said they would reduce it
5 to 30 years, taking into account a discount for that
6 illegal detention.

7 The prosecution's view was that the
8 starting point of 35 years was too low. The crimes
9 that Duch committed were, really, when you look at
10 other crimes in other countries, they're some of the
11 most horrific crimes committed by someone in a
12 personal capacity as a superior and also as a
13 perpetrator. Over twelve and a half thousand people
14 were killed and tortured and kept in terrible
15 conditions, and when you look at the jurisprudence of
16 the other tribunals, people in a similar situation,
17 people in a superior position being involved in the
18 killing of over a hundred people over a period of
19 time have been getting on average 45 years at the --
20 say, the Yugoslavia Tribunal, or 42 years at the
21 Rwanda, and about 37 years at the Special Court for
22 Sierra Leone, on average.

23 So our view was that it didn't -- the
24 penalty was inadequate in sort of not taking into
25

1 account the absolute sort of grave and perverse
2 nature of the crimes, of which Duch, who argued with
3 the court that he was acting under duress, acting
4 under superior orders; therefore, was just an
5 instrument of the state and had no choice. The court
6 didn't find that. The court found that he believed
7 in what he was doing, he believed in the cause, and
8 he believed in committing the crimes.

9 On that basis, we said he should have
10 received that higher penalty. So we said the penalty
11 was inadequate. They took too much into account of
12 mitigating factors and not enough into account of
13 aggravating factors. So that's why we've appealed.

14 Also, the, you know, victim community
15 in Cambodia, many Cambodians were extremely unhappy
16 with the sentence. I mean, they could not believe
17 that, you know, someone committing the murders,
18 obviously with others, of so many people could only
19 receive a 30-year prison sentence.

20 And when David referred to 19, he had
21 served 11 years already, he'd been in custody for 11
22 years, so obviously that 11 years had to be taken
23 into account, and then he would serve 19 more years.
24 But, you know, the sentence is a 30-year sentence,

25

1 and so the victim community were in an uproar about
2 the sentence.

3 And that .wasn't the only reason why
4 we appealed. We appealed because it didn't conform
5 with international sentencing practices of crimes so
6 severe.

7 There was a dissent in the case, and
8 the dissent came from one judge who is a civil law
9 judge. As you probably know, the Cambodia court is a
10 civil law system, and it's set up by agreement and by
11 Cambodian statute, stating that the sentencing regime
12 would be a minimum of five years or maximum of life.

13 Now, under Cambodian law, if a life
14 sentence is not given and a fixed-term sentence is
15 given, the only fixed-year term sentence you give, or
16 the maximum can be 30 years. And the dissenting
17 judge, Judge Lavergne, said, "Look, the statute of
18 the court can't be read in isolation; it must be
19 looked at in relation to Cambodian law and practice,"
20 and so he said that the two must be read together,
21 whereas the majority judges said, "Look, no, we don't
22 need to go to the provision of maximum fixed-term
23 sentences because the ECCC statute is a sui generis
24 statute; it's a mutually exclusive and independent
25

1 statute that relates to sentencing."

2 And when the Trial Chamber looked at
3 the ICTY, ICTR, the Special Court for Sierra Leone,
4 they said there was no such requirement that if it
5 wasn't a life sentence, the maximum could only be 30
6 years, which, I believe, is the situation in the ICC.

7 So they looked at international
8 practice and standards in interpreting what the
9 sentence should be, and they said it wasn't necessary
10 that that sentence only be the 30 years as it is in
11 Cambodian law, because the statute overrides that
12 because it's dealing with unique accused, dealing
13 with crimes that are not really dealt with in the
14 Cambodian court, and so the court shouldn't look
15 outside of the statute.

16 So the difference in opinion was one
17 really of statutory interpretation about what the
18 drafters meant when look -- when discussing the
19 regime of sentencing. Is it exclusive to the
20 legislation, or should it be read together with the
21 Cambodian law? The majority of the judges said it
22 shouldn't be read together and they're able to put a
23 maximum sentence of higher than -- you know, higher
24 than 30 years.

25

1 Nonetheless, the prosecution has put
2 forward that we think the sentence is inadequate and
3 it doesn't meet the sentences of people committing
4 similar crimes of similar gravity, and, I think, you
5 know, amongst the panel here, I think they -- we
6 agree that the killing of over twelve and a half
7 thousand people in a detention center over three and
8 a half years certainly is one of worst cases in
9 international criminal law.

10 And that's why we felt we had to
11 appeal, to set the standard right, particularly as we
12 move into Case File 2, where we had the -- what we
13 allege to be the main architects and orchestrators of
14 the Khmer Rouge regime, where 1.7 to 2.1 million
15 people were killed, and that's Pol Pot's second in
16 charge, Nuon Chea; his third in charge, Sary; and his
17 wife, Ieng Thirith, who was the head of the Ministry
18 of Social Affairs; and also Khieu Sampan, who was the
19 president of the state.

20 It's important that as we moved into
21 Case File 2, talking about setting the law straight
22 and setting it right, so that that case has the best
23 chances of reflecting international criminal law, how
24 it should be, and have it applied properly to set a
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1 good precedent for the record, whether it be guilty
2 or not guilty.

3 MR. SCHEFFER: I know we could pursue that,
4 but I want to quickly come to Mr. Hannis on the
5 Karadzic trial. And then, of course, I've been
6 terrible at this: I need to open it up for, like, a
7 few minutes of questions from the audience.

8 But, Mr. Hannis, bring us up to date
9 on the Karadzic trial. I mean, for so many years,
10 Karadzic was, of course, at large. In 2008, he's
11 apprehended in Belgrade; his trial has proceeded
12 through the year 2010, we haven't really been reading
13 much about it in the newspapers. So I think this is
14 a good opportunity to just bring us up to date on the
15 fate of Mr. Karadzic before the Yugoslav Tribunal.

16 MR. HANNIS: Well, Mr. Karadzic is acting as
17 his own lawyer, which always presents particular
18 problems for us, although you could compare his
19 conduct in being his own lawyer versus Mr. Milosevic
20 or Mr. Seselj, three different men, three different
21 styles, three different kinds of problems.

22 (WHEREUPON, there was laughter.)

23 His trial began in April 2010, and in
24 the early days, the trial was only sitting sometimes

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1 maybe two or three days a week because acting as his
2 own attorney, he needed more time to prepare. He has
3 requested and been given the opportunity generally to
4 interview witnesses outside the courtroom before
5 those witnesses come in to testify.

6 That's created particular logistical
7 problems for the Detention Unit in how and where to
8 arrange those interviews, and, you know, if he spends
9 four hours a day in court, then when is he going to
10 be able to interview tomorrow's witness; does he need
11 a day off, et cetera.

12 I see from the prosecutor's report to
13 the Security Council back in December that it noted
14 that the prosecution to date, in December, had taken
15 about 20 percent of the total court time during the
16 trial to present its part of the case.

17 The judges had used about 7.7 percent
18 of the time for procedural matters and questioning
19 witnesses, which compared to other cases is very
20 good. The typical range for administrative kinds of
21 things in the court, in the ICTY, is more in the
22 neighborhood of 15 to 20 percent. So they've been
23 very efficient in that regard.

24 That means that Mr. Karadzic has used
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1 71.7 of the time during the prosecution's case,
2 because he's been given tremendous-- again, speaking
3 in my personal capacity, he's been given tremendous
4 leeway in the number of hours he's allowed to
5 cross-examine witnesses. The judges have commented
6 several times that -- that he's suggested that he's
7 going rather afield on his cross-examination and
8 getting into things that maybe aren't so pertinent or
9 necessary and have tried to start setting tighter
10 limits on how long he's allowed to go and how far
11 he's allowed to go on cross-examination, and
12 hopefully that will speed up the trial.

13 The prosecution's estimated time to
14 present its case in chief is 300 hours. At our
15 tribunal, a court day is about four hours of
16 testimony. So if you sit five days a week, you get
17 20 hours a week, so that gives you some idea of how
18 long it's estimated to take to complete the
19 prosecution's case. Current estimates are that the
20 trial may end at the end of two-thousand --

21 MR. SCHEFFER: Twelve?

22 MR. HANNIS: -- thirteen.

23 MR. SCHEFFER: Oh, thirteen. Wow.

24 That -- if I may, let's -- when we
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1 come back, Mr. Whiting, maybe you can then provide us
2 with the rationale from your Law Review article of
3 why that's just fine, you know, 2013 is fine. So
4 we'll get into that a little bit.

5 I know I've been absolutely terrible
6 with the audience. My apologies. I think we still
7 have time for at least one or two questions before we
8 rush down to lunch. Does anyone have a question they
9 would like to ask quickly?

10 Yes, Mr. Sawyer?

11 MR. SAWYER: Why is 2013 not fine? I hear
12 some -- I heard some comments during the morning
13 about the values conserved by criminal prosecution,
14 deterrents, the implication of certain societal
15 values in people.

16 And there's certainly an argument to
17 be made that when a case runs over such a long period
18 of time, that there's some potential that those
19 values of bringing the process to the attention of
20 the affected peoples around the world and in the
21 countries where the crimes occurred is possibly
22 diminished.

23 So the basic question is: Why is 2013
24 not fine or a three-year or a four-year trial not

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1 fine? And if you go in the other direction, then
2 what's to be done? Maybe nothing, given the
3 complexity of those cases.

4 MR. SCHEFFER: Well, why don't we just take
5 the opportunity? Mr. Whiting?

6 MR. WHITING: Okay. In the article I wrote,
7 it wasn't -- I don't defend trials that are overly
8 long --

9 MR. SCHEFFER: Yeah.

10 MR. WHITING: -- and it was actually inspired
11 by my time at the ICTY, because the thing that I was
12 struck by at the ICTY is just at the time that the
13 ICTY was really humming and really developing sig --
14 obtaining significant evidence, obtaining access to
15 witnesses, really getting to the truth, that was just
16 at the same moment when the international community
17 started to get fed up with the ICTY, started to feel
18 like the tribunal was taking too long, and started
19 pressuring the ICTY to wind down their affairs.

20 So what I wrote about is that, in
21 fact, in these international criminal cases,
22 oftentimes the truth, getting to the truth requires a
23 lot of time, not -- not three-or-four-year trials,
24 that's not what I mean, but time after the events,

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1 some distance from the events, because when these
2 events, these atrocities occur, these societies are
3 completely turned upside down.

4 And in order to get countries to
5 cooperate, to provide information, to give access to
6 witnesses, in order for witnesses to feel secure
7 enough to come testify, in order for witnesses to
8 have enough distance on the events, because all these
9 witnesses are -- are implicated in the events, and
10 they're highly-charged political events. In order
11 for them to have some distance, in order to be able
12 to come forward and have perspective and tell the
13 truth, sometimes a significant amount of time is
14 required.

15 So we have this paradox that we are --
16 for reasons that you properly identify, there are
17 important reasons to have expeditious trials, to try
18 to get to justice quickly for deterrence purposes to
19 send a message, because there are victims out there,
20 as Bill was talking about. There are victims that
21 require justice. So there are very powerful reasons
22 to move quickly and to have expeditious justice.

23 But the reality is that because of the
24 way these cases occurred, because of the
25

1 circumstances under which these crimes occurred, the
2 truth often requires a lot of time before it can come
3 out. So the appeal of the article was that sometimes
4 patience is required.

5 MR. SCHEFFER: Just -- Prosecutor Smith? Yes.
6 We'll try to --

7 MR. SMITH: Okay. I'll be very, very quick.
8 I mean, two issues arise for me, and one is the
9 question of trial management. Tom talked about sort
10 of Karadzic talking for 60 or 70 percent of the time.

11 In the Duch case, the -- in Cambodia,
12 Duch spoke for a large amount of the time. And I
13 think it's important that there is proper trial
14 management, and I think people have the right to be
15 upset and the right to be annoyed.

16 I'm not particularly talking about the
17 Duch case at the moment, but when a trial is not
18 managed properly, when a trial goes for eight years
19 or five years, I mean, that's a lot of money, that's
20 a lot of taxpayers' money, that's paying for that,
21 and do I think the standards of trial management need
22 to be very, very high so they are the most efficient
23 and expeditious trials.

24 But one other thing I would like to
25

1 say is particularly in the Cambodian situation, in
2 the Duch situation, took six months, and it was very
3 interesting that each day of that six months, for
4 Cambodia, for these victims that haven't been able to
5 speak out about the crimes in any sort of safety,
6 even though it's been about 30 years since they
7 occurred, and now the court has come and provided an
8 umbrella to talk about human rights and how they were
9 breached and affected back in that period, each day
10 of the court was a day of, I would say, therapy,
11 reconciliation, a day when people stopped and
12 listened to a different type of witness; detainees,
13 guards, the accused, and it was sort of an outlet for
14 people to see that history is being recorded, and
15 that was very, very powerful for the Cambodians, and,
16 I mean, I can only say this because when the curtains
17 opened every day, there were 500 people in that
18 courtroom for six months, and two million people
19 would watch on the TV. Good or bad, we can't not
20 appear in the Cambodian papers every day. And
21 particularly when the trial was going on, they would
22 have the testimony in the papers, and the victims'
23 testimony was so impacting, and I think so many
24 Cambodians sort of identified with that person

1 because so many of them were affected by it.

2 So I think it's important for some
3 situations for the trial to take time for the truth
4 to sink in, but that is very different, and I
5 completely agree with you with trial management. I
6 think, you know, in all these international
7 tribunals, there have been cases where they haven't
8 been managed very well, and the trials have gone on
9 for six months or a year or a year and a half or even
10 years longer than perhaps they otherwise would. So I
11 think that sort of demand of efficiency and
12 effectiveness is quite appropriate because they're
13 very costly.

14 MR. SCHEFFER: Thank you.

15 Mr. Dixon, final word?

16 MR. DIXON: Yes, just two quick points, and
17 the first is: It is important that it's not too
18 long, because sometimes the person gets acquitted.
19 There was a case, I think, we were talking about
20 early on, Milutinovic, who was really in custody for,
21 I think, four years --

22 MR. SCHEFFER: Milutinovic.

23 MR. DIXON: -- yes, before he was acquitted.

24 I mean, it was a long time in anyone's life. And

25

1 you've got to look at it from the individual
2 accused's point of view. I mean, those rights are as
3 paramount as any of the other rights we've been
4 talking about here today.

5 But, secondly, I also think that, as
6 you say, it does lose its legitimacy in the eyes of
7 ordinary people when it drags on for so long. I
8 mean, we haven't been talking about the Lebanon
9 court, for example, but in contact with people there
10 in Beirut, I mean, they just don't believe that
11 that's going to produce anything anymore because it's
12 been how long since it was set up to the point where
13 now we're talking about indictments for the first
14 time.

15 And if people don't feel as though
16 it's open and transparent and it's going to happen,
17 then they -- they'll -- I think they begin to
18 question the outcome itself, and that can have a
19 negative impact, it can, in fact, serve to deepen
20 some of the tension as opposed to heal.

21 I also think, picking up on what Bill
22 said, you have to understand the limits on tribunals
23 being truth commissions. They simply can't be that
24 and rather have a separate institution as opposed to
25

1 using the court for that.

2 And then just lastly, the third thing
3 is, I think, more flexible Rules of Evidence to admit
4 evidence is essential. I know they tried to do it
5 over time, but I don't think we're there yet. I
6 think it should be much more in the nature of an
7 inquiry where everything is available to the judges.
8 They're not a jury, they can look at everything, but
9 then it's dependent on the parties to identify their
10 cases very narrowly.

11 MR. SCHEFFER: Excellent. I do have to stop
12 it now. We need to move to Strong Hall over in the
13 McCormick building, first floor, 195, I believe,
14 where we have lunch, box lunches for you, and
15 Professor Bassiouni will deliver a speech.

16 And these individuals can finally
17 rest. Our stenographer can rest for a bit, I hope.
18 We owe her so much today because we put her on double
19 duty, frankly, with no coffee breaks.

20 Okay. Let's break. We'll come back
21 here at 2:00 o'clock, okay?

22 (WHEREUPON, the above-entitled
23 cause was continued to January
24 31, 2011, at 2:08 p.m.)
25

1 MR. SCHEFFER: Okay. We'll get started again.

2 This is our Fourth Annual Atrocity Crimes Litigation
3 Year In Review Conference, looking at the practice
4 and jurisprudence of five war crimes tribunals during
5 the calendar year 2010, the International Criminal
6 Court, the International Criminal Tribunal for the
7 Former Yugoslavia, the International Criminal
8 Tribunal of Rwanda, the Special Court for Sierra
9 Leone, and the Extraordinary Chambers in the Courts
10 of Cambodia, so a very full agenda.

11 We have an absolutely stellar cast of
12 top officials with us, and those are all identified
13 in your brochure. If you didn't pick up the
14 paperwork, you can just easily get up on your own,
15 walk around; it's on the front table of the other
16 entrance to the Bluhm Legal Clinic, just around the
17 corner. Feel free during the afternoon to get
18 coffee. I am going to try to enforce a coffee break
19 on myself for ten minutes or so, so we're going to
20 try to make that happen this afternoon. We will
21 break right at 5:00 o'clock; we will not go beyond
22 5:00 o'clock. And for those of you who are from
23 outside of Northwestern, anyone here earning CLE
24 credit, et cetera, welcome, and any newcomers to the

25

1 law school, welcome as well.

2 We had an extraordinary discussion at
3 lunch, a speech delivered by Professor Cherif
4 Bassiouni, which I know is still resonating with a
5 lot of us. I do want to start with the International
6 Criminal Court for the afternoon session, and with
7 the head coordinator for Investigations at the ICC,
8 Alex Whiting, who is on our far right over here, and
9 I wanted to ask him: There is a phenomenon with the
10 ICC which we're all now very familiar with, but it
11 would be good to get your inside view of it, because
12 we're all on the outside speculating, pondering;
13 you're on the inside actually doing it.

14 You have five situations now at the
15 ICC, all of which are based in Africa. You've got
16 the Democratic Republic of the Congo, the Central
17 African Republic, Uganda, Darfur, and most recently
18 and we will, I hope, talk about this, Kenya, is now
19 on deck during the year 2010 as an official
20 investigation of the prosecutor.

21 And yet you have preliminary
22 examinations underway in Colombia, Georgia,
23 Palestine, Afghanistan, Honduras, and very recently,
24 Korea, North Korea.

25

1 Can you give us a sense, particularly
2 in light of what Professor Bassiouni said when I
3 asked him about the reaction of the African leaders
4 and the African Union to the focus of the court's
5 work, which is now so much in an operational sense on
6 Africa, what's the big picture on the Investigations
7 desk?

8 Are we all to assume that there's an
9 objective standard being applied here, or is
10 something more, including politics, constantly
11 pressing down on your office?

12 MR. WHITING: Before I get to that, can I have
13 just have a moment to respond to Professor
14 Bassiouni --

15 MR. SCHEFFER: Absolutely.

16 MR. WHITING: -- if I might.

17 MR. SCHEFFER: Be my guest. Yes.

18 MR. WHITING: I was itching to say a few
19 words. Here's my paper (indicating) with all my
20 notes during it.

21 (WHEREUPON, there was laughter.)

22 Okay. So just a couple things: I
23 have enormous respect for Professor Bassiouni; I've
24 known him for a long time. He actually -- oddly
25

1 enough, he testified in a case of mine in Boston when
2 I was -- even before I got into this work, an
3 extradition case, he came and testified for the
4 defense.

5 But, you know, I agree with some of
6 the things he said. You know, I think no one can
7 pretend there haven't been some mistakes made. Of
8 course, that's true. It's a new institution. And I
9 appreciated the fact that he said, you know, the
10 mistakes have been in all the organs of the court;
11 it's not just been the prosecution, but there have
12 been sort of shared mistakes.

13 I also think they're fair debates
14 about what strategy should have been adopted, right?
15 And they're reasonable debates about whether you
16 should go for the top person, whether you should go
17 for the middle person and how you should approach it,
18 whether you go fast, whether you would charge a lot
19 of people. Those are -- those are fair debates. I
20 will say that I think no matter what the prosecution
21 does, there's going to be criticism.

22 When -- when the prosecution charges
23 cases too broadly and they take too long, then people
24 say, "Well, you should charge more narrowly." The
25

1 prosecution has charged cases more narrowly, the
2 Lubanga case, and people say, "That case is too
3 narrow; it's not capturing all the crimes."

4 MR. SCHEFFER: Um-hum.

5 MR. WHITING: When we charge mid-level people,
6 they say, you know, you're charging small fruit; you
7 should be charging the big people. When we charge
8 the big people, they say, "Oh, you should have gone
9 after the little people." So that can be, you know,
10 kind of frustrating. Where I think he kind --

11 (WHEREUPON, there was laughter.)

12 MR. SCHEFFER: So feel free to express that
13 frustration.

14 MR. WHITING: Just a little. Do you have
15 something a little harder to drink (indicating
16 water)?

17 (WHEREUPON, there was laughter.)

18 Where I think he's unfair, and, I
19 think, really profoundly unfair with his remarks, and
20 I will say it like that, and I -- and I already said
21 this to him afterwards, I went up and told him
22 afterwards that that was unfair, is, first of all, I
23 think in many ways, while not perfect, the ICC has
24 been very successful in building itself as an
25

1 institution. It started at nothing in -- really in
2 2003, 2004 and in ten years it has constructed a
3 credible institution that is functioning. Five
4 situations being investigated, three trials going on
5 right now, a number of indictments, a number of
6 investigations, as you have said.

7 So, you know, of course, everybody
8 would like those numbers to be maybe higher, you can
9 quibble, but given the challenges that the
10 institution faces in doing its work, that's a pretty
11 remarkable achievement in my view.

12 The second thing is that I thought
13 there was a -- a tension in what Professor Bassiouni
14 said, because he started off talking about how these
15 institutions are almost constructed to fail. And he
16 said then, "Okay, not constructed to fail, but there
17 are incredible restraints on them, and they're
18 dependent on the international community to succeed,
19 and oftentimes the international community is just
20 not there to support them."

21 Yet when it came time to kind of take
22 a count that the ICC has done, the fingers were only
23 pointed at the institution itself and the failures of
24 the institution itself rather than the international
25

1 community.

2 And the truth is, the courts were --
3 the first courts, the first indictments were in
4 Uganda, a very strong case against members of the
5 Lord's Resistance Army, including Joseph Kony.
6 Back -- those indictments have never been acted on.
7 The international community has never acted to
8 produce those accused, even though they could. That
9 could be done.

10 In the Sudan, we did start with
11 mid-level commanders, and nothing happened, right?
12 And across the board, there -- there has been too
13 frequently a failure of will in the international
14 community to support the work of the International
15 Criminal Court.

16 You know, I wish, I wish that we had
17 our own police force and we could go arrest people
18 and go and do our own searches and stuff. That would
19 make my job a lot more fun, right? That would be a
20 really cool job.

21 (WHEREUPON, there was laughter.)

22 But I don't have that, and so we're
23 dependent on the international community, and that
24 is -- more support is going to have to come from the
25

1 international community if the court is going to
2 ultimately succeed. Okay. Now that I've gotten that
3 off my chest, I can answer your question.

4 With respect to Africa, this has
5 become a -- a theme about the court, that the court
6 is only focused on Africa. And you put -- the way
7 you put -- it was interesting the way you put the
8 question, whether it was political pressures that
9 were pushing it in that direction, and I think it's
10 just the opposite. If the prosecutor responded to
11 political pressures, I think he would go the other
12 way and would try to accomplish balance in the -- in
13 the selection of cases and would go looking for some
14 case and charge it just so that he could say, "Well,
15 we're not just doing Africa."

16 It's been a -- I think it has been
17 really looking at the most serious cases, looking at
18 the numbers, the most grave, serious cases in the
19 world, choosing to focus on those, and those cases
20 are in Africa.

21 The scale of the crimes and atrocities
22 committed, for the most part -- there's some, you
23 know, you might -- Kenya perhaps is in a different
24 category, but in all the cases, the scale of the
25

1 cases in Africa just far exceed the cases in other
2 parts of the world.

3 MR. DIENG: I disagree.

4 MR. WHITING: You disagree?

5 MR. DIXON: I disagree as well.

6 MR. WHITING: Okay. Well, that's good. The
7 other thing is to go back to what David Scheffer was
8 saying at the beginning about the creation of the
9 International Criminal Court, Africa, of course, was
10 at the center of the creation of the International
11 Criminal Court. Why? Because too often crimes and
12 atrocities in Africa were ignored by the
13 international community. Nothing was done.

14 That was the complaint of the '90s,
15 that in Rwanda, in the Congo, the international
16 community was doing nothing. So now -- I think
17 that's much worse, and the -- the important thing is
18 to focus on these crimes and to bring the
19 perpetrators to justice, and that is why of the five
20 cases, the five situations that are in Africa, three
21 of them were referred by the countries themselves,
22 they asked the ICC to come in; one was referred by
23 the U.N. Security Council.

24 So those are on the plate of the
25

1 court. What is the -- the court is not really going
2 to say no to those. Only one of the five, Kenya, did
3 the prosecutor choose to do on his own.

4 MR. SCHEFFER: Now, before we open this up to
5 the naysayers, can I just ask you, Mr. Whiting, to
6 tell us just a little bit about the prosecutor's
7 working paper on preliminary examination, the comment
8 period for which ends today, January 31st, too late
9 to e-mail in, but, nonetheless, it's been under
10 commentary now since October, this draft paper on how
11 the prosecutor intends to set out guidelines for
12 preliminary examinations and situations that would
13 lead him or her ultimately to request indictments, or
14 to open up the situation for an official
15 investigation, I should say.

16 So could you tell us a little bit
17 about how important this paper is and what you see as
18 the dynamic around it right now with the court?

19 MR. WHITING: Yeah. So just to step back for
20 a moment about this paper and these sorts of papers
21 of the court, one thing that this prosecutor has
22 undertaken to do in the last couple of years of his
23 term, because he has 18 months left of his term, is
24 to issue a number of policy papers to set out the
25

1 policy of the prosecutor's office in approaching all
2 sorts of -- all manners of issues, selecting cases,
3 victim representation, witness protection and so
4 forth. And he's done that to be transparent and to
5 create predictability about how the prosecutor's
6 office exercises its discretion. It's in the context
7 of issuing this policy papers that this policy on
8 preliminary examinations has been issued.

9 The -- the paper sets out a number
10 of -- a range of decisions about how the prosecutor
11 is going to approach his discretion in terms of
12 examining countries, doing a preliminary examination
13 of a situation of a country, of a set of crimes or
14 alleged crimes, to determine whether the court will
15 take it on.

16 So the paper addresses things like how
17 will it measure gravity, what will -- because gravity
18 is a consideration. How will the court look at
19 gravity and if the prosecutor has adopted a sort of
20 complex way of looking. You start with the numbers
21 but also think about the impact and the nature of the
22 crimes, interest of justice. How is the prosecutor
23 to think about those things?

24 So the paper sets out all of those,
25

1 and I don't know if there are any particular issues,
2 but it is -- and the paper, by the way, says that the
3 prosecutor will not artif -- one thing that he will
4 not try to do is try to chief geographic balance for
5 the sake of achieving geographic balance. He comes
6 right out and says that.

7 MR. SCHEFFER: Right.

8 MR. WHITING: So he's using this policy and
9 this approach to approach all situations in the
10 world, the new ones and the current ones.

11 MR. SCHEFFER: I wanted to give you a shot, if
12 you wanted, to our -- to Mr. Dixon and Mr. Dieng.
13 Did you want to talk a little bit about has there
14 been an imbalance in what the ICC has been focusing
15 on?

16 MR. DIXON: Yes.

17 MR. SCHEFFER: Okay. Mr. Dixon?

18 MR. DIXON: It's plain to see. I mean, you
19 don't want to make this sort of hack point, which I
20 know people make all the time, that Africa is being
21 picked on. But at the end of the day, you know, when
22 you look at the figures, that's what it amounts to.
23 You can't escape that.

24 And I think what's important in this
25

1 is to be more frank and honest about that that has
2 happened and why it has happened. I mean, their
3 prosecutor has made certain selections. I'm for much
4 more greater transparency on this, explaining to
5 people why are certain selections made.

6 I mean, part of the filings I was
7 referring to earlier on, I -- I think there should be
8 a greater review by the court at an early stage of
9 the decisions that are made where more parties other
10 than the prosecutor can be involved in that, and I
11 don't see how that could harm the court in any way.

12 I mean, in the UK, and you might have
13 it here, you, as a private citizen, can challenge the
14 prosecution's decision not to prosecute somebody or
15 to prosecute somebody you could take it before a
16 court and have it judicially reviewed, and the
17 prosecutor then has to give the reasons why they've
18 taken the decision. It's not for the court to decide
19 whether that's the right decision, but it has to be
20 rational and reasonable and comply with basic human
21 rights norms.

22 So recently we had a case in the UK
23 where the DPP decided not to prosecute somebody in
24 relation to the Saudi arms deal, not to go and seek
25

1 fraud charges. And he said, "Look, I'm going to be
2 honest with you. The reason why I'm doing this is
3 because we need them to help us with insurgents so
4 that people don't die on the Tube, on the
5 Underground." Simple as that.

6 And it was then reviewed from a number
7 of different angles, but in the end it was upheld,
8 but all the way up to the Supreme Court, saying, you
9 know, this sticks in our throats, but we've been able
10 to look at it, it's open, it's there for the public
11 to view.

12 And I don't see why something like
13 that shouldn't be strived for at the international
14 level. I mean, if -- we can't go off to the Russian
15 generals for Georgia, because can you imagine a
16 Russian general ever being charged and brought to the
17 ICC? Well, if we can't, then we should just say that
18 explain the reasons why. If it's impossible to move
19 on Israel, these things should come out.

20 I think where the anger begins to grow
21 is when people just pretend it's not an issue and
22 say, no, no, no. Africa wants us to come there, it's
23 not that we're biased. Well, then I think you do
24 have to explain what the reasons are for the
25

1 differences, and especially, I think, even more so
2 when there are massive alleged war crimes being
3 committed elsewhere.

4 I mean, we've seen recently what's
5 happened in Sri Lanka, for example, I mean, nothing
6 was -- was done there. In South America, Colombia,
7 FARC; the examples that Professor Bassiouni gave, I
8 mean, there are stark,
9 stark contradictions that have to be explained;
10 otherwise, you simply don't cut the basic logic test
11 anymore. So I'm just asking for more transparency as
12 a start.

13 MR. SCHEFFER: Right. And I think one way
14 just to sharpen this for the audience: The
15 International Criminal Court took on through the
16 prosecutor himself and his initiative with the
17 government in Kenya, the situation in Kenya, the
18 electoral violence that occurred over a fairly short
19

1 period of time in Kenya.

2 It's an interesting exercise to
3 compare the embrace of that jurisdiction with
4 situations such as -- the situation in Palestine, the
5 situation -- even in Sri Lanka, why wasn't there a
6 Security Council initiative by some permanent member
7 of the Security Council to have a Chapter 7 referral
8 of Sri Lanka to the court, just as Darfur had been
9 referred to by the court.

10 And if you look at the situation with
11 FARC in Colombia, that has lingered on for many
12 years. There's a lot of compliment charity stuff
13 going on there that factors into decision-making
14 about Columbia. It is a state party, however.

15 And I think what Mr. Dixon is trying
16 to point out is, you know, if you start doing this
17 comparative exercise, it can be get extremely
18 interesting as to what are the dynamics at play, and,
19 of course, I deferred to Mr. Whiting as well as -- I
20 mean, there are reasons obviously that the prosecutor
21 has in every strategy, in every prelim examination,
22 but those are the kinds of things that can play back
23 and forth.

24 Mr. Dieng, did you have any comments
25

1 on this, particularly from the African perspective?

2 MR. DIENG: I would say thank you to both of
3 you and Dixon by saying why I disagree when you were
4 saying that Africa is the continent where priority
5 should have been given.

6 But, I think, as we both indicated,
7 the situation in Sri Lanka, the situation in
8 Colombia, deserve it certainly to be looked up, and
9 it's not a matter of numbers. I mean, you may have a
10 situation where you have millions of people killed;
11 you may have a situation where you'll have a small
12 number, let's say 20 people, but who deserve to be investigated.

13 Having said so, I think it is
14 important to remind people that Luis Moreno-Ocampo
15 did not choose personally to target Africa. That was
16 the government of Central African Republic, the
17 government of Uganda, the government of DRC, who
18 requested him to interview ene.

19 And in the situation of Kenya,
20 following the mission of Annan, the imminent
21 personalities, he kept also in there. The only
22 situation -- and I say, "Bravo, Luis" -- was Sudan,
23 which whereas finally referred through the Security
24

1 Council. So that's why I think it would be unfair to
2 say that Ocampo is only focusing on Africa.

3 Sometimes perception is worse than
4 reality, and I can say that he is looking right now
5 into other situations. Maybe you will not say it,
6 but I can say that's looking into other situations.
7 But this is the way -- this is something we have to
8 say.

9 But now what Professor Bassiouni was
10 saying: I don't think was saying that one should not
11 go after the big fish, like Al Bashir. I think he
12 was just saying one has to go step-by-step, and
13 that's what he was referring to as the middleman.
14 And here the question is: Did the prosecutor wait
15 the time necessary before hunting after Bashir, but
16 this is only the prosecutor who can respond. But my
17 view, I do defend the prosecutor.

18 I think, as I said this morning, it
19 was not proper that Sudan refused to cooperate in the
20 case of Harun. I think that was an insult to all
21 humanity. That's why I was saying also to the
22 African people let's not forget why we are talking
23

1 about international criminal justice. Let's not
2 forget the victims, because we are fighting for the
3 victims.

4 At the end, what I realized today in
5 Africa is the focus has shifted from the victims to
6 the suspect, to the perpetrator, and I think that is
7 something which is not correct. And, unfortunately,
8 that's where one has to also realize that
9 international criminal justice is unfortunately
10 closely linked with the international politics.

11 And I do remember those days when we
12 were campaigning for the situation in Cambodia to be
13 dealt with. Even the United States was against.
14 I remember that we were saying that there was a
15 genocide in Cambodia, and the U.S. government was
16 saying, "No, there is no such."

17 Today, we have the court in Cambodia
18 thanks to international support, and that is to say,
19 things have to move, and what is happening today is
20 extremely important. I mean, Bashir can no longer
21 travel wherever he wants. You all remember seeing
22 him in Egypt, sitting with President Mubarak. I
23 mean, the body language of Bashir that day showed
24 really that the man was scared. That's all I wanted

25

1 to add.

2 MR. SCHEFFER: Scared.

3 MR. DIENG: -- say. Yes.

4 MR. SCHEFFER: Well, thank you very much,
5 Mr. Dieng.

6 Yes, Mr. Whiting?

7 MR. WHITING: Just to follow up, I agree with
8 what -- with everything you say. Just to emphasize
9 that the prosecution is looking at cases outside of
10 Africa, monitoring the situation in Columbia. Sri
11 Lanka, of course, would require a Security Council.
12 We --

13 MR. SCHEFFER: Exactly.

14 MR. WHITING: -- can't do anything without --

15 MR. SCHEFFER: No.

16 MR. WHITING: -- a Security Council referral.
17 Afghanistan is being very actively monitored;
18 Georgia; and Palestine, there are, of course, some
19 very tricky legal issues with regard to the referral
20 from Palestine, whether it's a state or not, whether
21 it can be referred. So those are all being actively
22 monitored.

23 So far there's been in a number of
24 places, in Georgia, for example, or Colombia, the
25

1 countries involved have been engaging in the process
2 and have been trying to deal with it themselves, so
3 the prosecutor is continuing to give them time, but
4 could move on one of those.

5 MR. SCHEFFER: And, by the way, I know you're
6 using shorthand, but just so our audience fully
7 understands what you just said, even in the case of
8 Palestine, it really has no right of referral.

9 What it has is a right to -- what it
10 is attempting to do is exercise the filing of a
11 declaration under Article 12, subparagraph (3), of
12 the Rome Statute, but the presumption is that when
13 you file such a declaration, saying that you're
14 opening yourself up to the scrutiny and jurisdiction
15 of the court, you're not actually, literally -- you
16 don't have the power to refer yourself. You're just
17 saying if the court wants to come after your
18 territory for investigation or your nationals, that
19 is fair game now as a nonparty state.

20 The problem, of course, is the very
21 difficult issue of whether or not Palestine, the
22 Palestinian Authority, actually can claim statehood
23 for the purpose of exercising an Article 12(3)
24 privilege as a nonparty to the Rome Statute. And you
25

1 can just imagine how that gets tied up in legal
2 back -- legal argumentation back and forth, and the
3 prosecutor has an open line on that.

4 Anyone who wants to file their views
5 can do so through a web portal to the ICC that's run
6 by UCLA law, I believe. Yeah. Can I --

7 Yes, Mr. Dixon?

8 MR. DIXON: Just a very small --

9 MR. SCHEFFER: Yeah?

10 MR. DIXON: -- issue, because we were looking
11 at countries being referred to or countries coming
12 forward --

13 MR. SCHEFFER: Yes, yes. Self-referrals, they
14 call them.

15 MR. DIXON: -- which -- yeah, I agree entirely
16 that that's not the way it should be looked at. It
17 should probably be looked at, well, what other
18 countries are being investigated and what is
19 realistically going to happen there? But I think
20 even in the countries that come forward from -- from
21 Africa, what we've seen, and I'm just reflecting;
22 perceptions that -- that I've picked up, is that the
23 selections made within those countries as to which
24 sides is investigated.

25

1 I've done some work in Uganda recently
2 where a lot of people say, "Well, it's all very well,
3 ICC was invited, but they really only investigated
4 one side." And there they've got their own War
5 Crimes Division now and trying to look at
6 investigating the government side, and it's very
7 difficult when the ICC hasn't initiated anything on
8 that side.

9 So, yes, you get permission to come
10 in, but sometimes the question marks are raised,
11 well, was the ICC invited in but only really to look
12 at the person's opponents as opposed to the
13 government itself? And I'm talking here about
14 general perceptions of -- of people who are serious
15 about war crimes investigations taking place. So
16 there's also that dynamic that comes into it, how you
17 make selections within those countries.

18 MR. SCHEFFER: And regardless of the
19 intentions of those self-referred states, once it's
20 within the prosecutor's office, of course -- and I
21 think he's demonstrated this to some extent -- he
22 clearly has the authority to look at both sides and
23 their culpability, so. . .

24 MR. DIXON: Absolutely. But then people say,
25

1 "But why isn't it happening, that he's looking at
2 both" --

3 MR. SCHEFFER: Yeah.

4 MR. DIXON: And, once again, it might be a
5 perfectly rational answer, but I think those things
6 need to be talked about more.

7 MR. SCHEFFER: Okay. Well, I'm actually going
8 to jump to a very different issue right now just
9 to -- to move on in our agenda today.

10 I want to bring in Professor
11 Oosterveld, but also Mr. Dieng in particular, and
12 talk about a very -- you know, this is the future of
13 at least two of the war crimes tribunals, which are
14 coming to a close.

15 Jim Johnson has already talked about
16 the Special Court for Sierra Leone coming to a close
17 at the end of the James Taylor trial, and that has
18 its own particular characteristics to it, the end
19 game for the Special Court for Sierra Leone. There's
20 also an end game for the International Criminal
21 Tribunals for the Former Yugoslavia and Rwanda.

22 And the Security Council, as mentioned
23 just briefly by Mr. Dieng in the morning, took a
24 huge, major step in December, just a -- well, a month
25

1 ago, for Pete's sake, with a Security Council
2 resolution that created what we call an International
3 Residual Mechanism for Criminal Tribunals.

4 It is with particular focus now on the
5 ICTY and ICTR. It answers a lot of questions we used
6 to raise at this conference almost every year about
7 what is actually the end game for these two
8 tribunals, and now at least we have an organizational
9 end game.

10 And I'm wondering, Professor
11 Oosterveld, if you might give a little bit of comment
12 on that, and then I'm sure -- I know, Mr. Dieng, that
13 you were in the trenches on this one, so it would be
14 good to get your perspective on a subject that is so
15 often raised by students and so often written about
16 by law professors.

17 How do you -- how do you complete the
18 task, given that you have certain constraints on
19 funding, mandates, but also the realities of appeals,
20 of parole issues under sentencing, how does all this
21 get worked out?

22 Professor Oosterveld?

23 MS. OOSTERVELD: The issue of the closure of
24 the tribunals is, I think, a fascinating one, because
25

1 there are legal and practical obligations that
2 continue after the closure of any particular
3 tribunal. Just think about things like victim
4 protection. Victim protection can't just end because
5 the ICTR and the ICTY closed their doors.

6 It's the same with the tracking of
7 fugitives. Their indictments remain valid. What
8 happens if they get captured after the closure of the
9 tribunals? They need to be tried somewhere, and the
10 same with monitoring the sentence enforcement of
11 those who have been convicted. Think about the
12 Special Court for Sierra Leone. One of the indictees
13 was sentenced to 52 years' imprisonment, and the
14 Special Court is going to close next year. So there
15 needs to be tracking of the sentence enforcement to
16 make sure it's fair, et cetera, et cetera.

17 These things are called residual
18 issues that continue after the closure of these
19 tribunals. So not only did we need to think about
20 the actual ending, how are we going to get things to
21 the end of the current trials of the tribunals; we
22 had to think beyond that, and it had to be a sui
23 generis legal setup.

24 So there was discussion happening in
25

1 two different places, within the tribunals, which
2 Registrar Dieng will talk about, and at the Security
3 Council, because it was the Security Council that
4 created the ICTY and ICTR, and, therefore, it's the
5 Security Council that had to deal with the residual
6 issues that came after the closure of those
7 tribunals.

8 So the ICTY and ICTR are on track for
9 closing within the next few years, and the -- there
10 are still some very important variables that have to
11 be dealt with before or as they move toward March
12 closure, which I'm sure Registrar Dieng will comment
13 upon; one of which the tribunals are losing staff at
14 an alarming rate, and that is having an impact on how
15 soon they can close. As well, the ICTR Office of the
16 Prosecutor has asked to transfer some cases to
17 Rwanda. If that doesn't happen, can the ICTR still
18 close on time?

19 And then another question: Will
20 high-level indictees be arrested soon; Mladic for
21 the ICTY, for the ICTR, Kabuga, if Kenya decides to
22 cooperate. So within the Security Council, there
23 were discussion over many, many years, but really it
24 only became, from my point of view, serious once
25

1 Austria stepped into a chair of the informal working
2 group on international tribunals, and Austria worked
3 very, very hard to get agreement on what happens
4 after the closure and the creation of what's called a
5 residual mechanism.

6 Austria, to its credit, overcame very
7 serious opposition from China and Russia and got a
8 Security Council resolution, as we said, on December
9 22nd. So this resolution will set up residual
10 mechanisms, which will embody the legal reality of
11 the ICTY and the ICTR after their closure, and the
12 branch for the ICTY of the residual mechanism will
13 begin to operate on July 1st, 2013, and the one for
14 the ICTR on July 1st, 2012.

15 The ICTY and ICTR will complete the
16 current trials as themselves, and the residual
17 mechanism will address issues that arise after the
18 closure of -- or after those particular dates I just
19 mentioned. The locations have been left to be
20 determined, but at the moment, discussions are for
21 Arusha and The Hague.

22 MR. SCHEFFER: And can you address the issue
23 of where do we find judges to try people who are
24 indicted fugitives who ultimately are apprehended
25

1 after the closure of the formal tribunals.

2 What does the mechanism tell us as to
3 who will be the selected judges, and, of course,
4 you're free to comment on whether they fit the
5 Bassiouni test for judgeship.

6 (WHEREUPON, there was laughter.)

7 MS. OOSTERVELD: I think they probably do fit
8 the Bassiouni test in that the roster will be created
9 by existing judges of the ICTY and the ICTR with the
10 idea that they already understand the statute, they
11 already understand the situation of those two
12 different tribunals, and so --

13 MR. SCHEFFER: Remember, they're in retirement
14 in Norway --

15 (WHEREUPON, there was laughter.)

16 -- and they're called back to wherever
17 this residual mechanism will be located.

18 MS. OOSTERVELD: Dave, they will. Exactly.

19 MR. SCHEFFER: I'm sorry. Go ahead.

20 MS. OOSTERVELD: I just wanted to mention the
21 Special Court for Sierra Leone. I know that Jim had
22 mentioned it earlier, but we really shouldn't forget
23 about it because --

24 MR. SCHEFFER: Um-hum.

25

1 MS. OOSTERVELD: -- all of these discussions
2 going on within the Security Council at a relatively
3 high level and all of the preparations going on with
4 the tribunals, did -- they have been, in some sense,
5 separate from that of the Special Court for Sierra
6 Leone. The Special Court was sort of left high and
7 dry in some respects to just figure out its own way
8 to deal with its residual mechanism.

9 MR. SCHEFFER: And this is the individual who
10 has to do it, right here --

11 MS OOSTERVELD: Exactly.

12 MR. SCHEFFER: -- Jim Johnson. Sure.

13 MS. OOSTERVELD: And the Special Court has
14 been doing it. The Special Court is very advanced in
15 its completion mandate, if you look at how many
16 things have already been closed down in Freetown, how
17 much has already been prepared, and all of the plans
18 that have been put into place, the Special Court,
19 even though it has had fewer people to do it with,
20 has made substantial progress in this, and it will
21 have its own residual mechanism, which maybe --

22 MR. SCHEFFER: Um-hum.

23 MS. OOSTERVELD: -- Jim would like to talk
24 about at some point. But I wanted to stress
25

1 something. There's a difference here in the funding
2 mechanisms at the moment between the residual
3 mechanisms for the ICTY and ICTR and the Special
4 Court for Sierra Leone.

5 The Special Court for Sierra Leone was
6 rescued in December with the contribution of \$12.3
7 million by the United Nations so it could continue
8 through to the end of the Charles Taylor trial. This
9 is because it's based on voluntary mech -- voluntary
10 funding, and it's been having severe difficulties
11 raising the money as of late to fund itself.

12 The various senior officials of the
13 court had 171 fund-raising meetings this past year
14 alone, and did not raise enough money just to get to
15 the end of the Charles Taylor trial. The residual
16 mechanism is going to be funded in the same way,
17 through voluntary funding, and I have serious worries
18 about how it's going to raise that money after the
19 Taylor trial and appeal is over.

20 MR. SCHEFFER: And let me just -- Jim, I do
21 want you to jump in at some point, maybe after
22 Mr. Dieng, if you would like to make a few comments.

23 This is just such a significant
24 development that I want to spend a little bit of time
25

1 on it. It sounds a little bureaucratic, but this is
2 actually a future. For those of you who are
3 students, you may find yourself, if not interning, if
4 you decide to pursue a career in this field, you may
5 end up being part of this court -- or this mechanism,
6 this residual mechanism.

7 Mr. Dieng?

8 MR. DIENG: Well, I should
9 really congratulate Valerie for being very exhaustive in
10 presenting the residual mechanism, and this is no
11 surprise. Valerie was among the first people to
12 really help the tribunals and the U.N. to really look
13 into this issue.

14 I mean, during the first meeting, the first
15 brainstorming session on this issue of the legacy
16 she was very instrumental through the Canadian
17 mission in New York and here we are
18 finally with Resolution 1966, which establishes this
19 residual mechanism.

20 And the residual mechanism is composed
21 of two branches, as she said. And its
22 objective is really to, I would say, take care of the
23 unfinished work of both tribunals, and ICTR should
24 normally finish its cases by the end of this year,

25

1 let's hope. But even if we assume that we have some
2 further slippage for the first quarter of 2012, which
3 I would not exclude, you would never know what could
4 happen. I mean, one judge can get sick, or like last
5 year, we had a defense counsel who died. I mean,
6 these are some events beyond the control of the
7 tribunal.

8 So even if we have slippage in our
9 current trials, there will be some six additional
10 months, prior to the
11 commencement of the residual mechanism. For ICTR, that will
12 be 1st July 2012, and for ICTY, 1st July 2013. And I
13 may say that, as Bassiouni was saying earlier, when
14 diplomat meet -- and this is not a criticism to
15 Belgium nor to Austria, but there was really a need
16 for the Security Council to get a resolution to be passed at the end
17 of 2010.

18 Was the reflection, I would say, enough to
19 reach that decision? I'm not sure.

20 And that is why I already asked my
21 counterpart at the ICTY that we embark immediately
22 upon a series of consultation, we are having one
23 consultation already next week, and from that time
24

1 also we will have a series of exchange, a series of
2 brainstorming session, in order to leave no stone
3 unturned for the preparation of a smooth transition,
4 a smooth transition, because once, as I said, if, for
5 instance, Kabuga -- Kabuga is considered as the
6 financier, the one who funded the genocide -- and
7 he's one of the priority target of the prosecutor
8 among the three targets.

9 One is Mpiranya, the other one is
10 Bizimana, the former chief of the Presidential Guard
11 and the former Minister of Defense. So those three
12 are fugitives. If they are arrested, now they will
13 be tried by the ICTR current, so which mean at some
14 stage we will have alongside the residual mechanism,
15 a tribunal which will continue existing, let's say,
16 with a double hutting.

17 You will have a double hut; on one
18 side, the residual mechanism, and on the other side,
19 the tribunal to continue, for instance, to try the
20 case of Kabuga. So this means that there is a
21 possibility to create the necessary bridges between
22 the tribunals and the residual mechanism; the reasons
23 being that you will have one president, one
24 prosecutor, one registrar, and the president, the
25

1 registrar, the prosecutor, they can be based
2 according to the necessity of their work, either at
3 The Hague or at Arusha.

4 And the Registry
5 which have the
6 administration, will have a senior admin official,
7 one at The Hague and one at Arusha.

8 MR. SCHEFFER: Can I ask one point of
9 clarification? I'm just trying to recall my reading
10 of the residual mechanism. You know, the ICTR
11 literally has a shutdown date of July 1st, 2012, and
12 if Kabuga is then apprehended after July 1st, 2012,
13 he would be prosecuted by the residual mechanism,
14 right?

15 MR. DIENG: Yes.

16 MR. SCHEFFER: You're saying that if Kabuga is
17 captured -- and Kabuga is the big Rwanda indictee out
18 there in Kenya, we're fairly certain, right?

19 MR. DIENG: Yes.

20 MR. SCHEFFER: If he's apprehended before July
21 1st, 2012, then that's where your dilemma comes,
22 right?

23 MR. DIENG: Exactly.

24 MR. SCHEFFER: You don't know whether Jallow
25 or whoever heads up --

1 MR. DIENG: Right.

2 MR. SCHEFFER: -- the residual mechanism is
3 going to be the actual prosecutor --

4 MR. DIENG: Exactly.

5 MR. SCHEFFER: -- right? Okay.

6 MS. OOSTERVELD: It's unclear. It says the
7 prosecutor, current prosecutor, would prepare the
8 case--

9 MR. DIENG: Yeah.

10 MS. OOSTERVELD: -- and then the residual
11 mechanism would take it over as of the cutoff date,
12 but it doesn't say how.

13 MR. SCHEFFER: Yeah.

14 MR. DIENG: And that's why I would say that in
15 the future, we depend upon our ability to really
16 plan. And that's why we need from
17 now to have a roster, a roster even of staff, because
18 we need to keep the best staff to assist with
19 this residual mechanism.

20 MR. SCHEFFER: Okay.

21 MR. DIENG: We need to also have the roster of
22 judges. Most probably, the general assembly
23 will end by electing, if they are nominated, current and former
24 judges of ICTY and ICTR. Why not SCSL,
25 as well?

1 MR. SCHEFFER: Yes.

2 MR. DIENG: The Secretary general will have to put a
3 list of 30 nominees after consultation with the
4 Security Council, and then refers the list to the
5 General Assembly, which will have to elect 25 of
6 them. So those 25 judges will constitute the roster,
7 and the Secretary General will appoint one of them as
8 president of the residual mechanism after
9 consultation with the judges and the Security
10 Council.

11 So that's why I said it is extremely
12 important that we prepare, one, our records and our
13 archives for their smooth migration to the residual
14 mechanism, for it was extremely important that we do
15 it, and next week, the Joint Archive Working Group,
16 composed of representatives of both tribunals; and
17 ARMS, ARMS is the division in New York in charge of
18 the archives, you know, they hold U.N. archives, and
19 also Legal Affairs. They'll be meeting this time at
20 The Hague; the last meeting was at Arusha, to look
21 into this migration of the archives. for --

22 MR. SCHEFFER: From New York. Yeah.

23 MR. DIENG: -- this residual mechanism. But I would
24 say that one of the difficulties I really foresee
25 is the difference of the starting date for the two branches of the

1 residual mechanism.

2 MR. SCHEFFER: Let me just ask: Tom Hannis,
3 do you want to just jump in on this point for the
4 Yugoslav Tribunal? Then I want to go to Jim Johnson
5 for a few minutes, not only on this point, but we
6 want to get back to the trial work, something that
7 you've been working on.

8 MR. HANNIS: I have a hard time visualizing
9 exactly how it's going to work in real life with one
10 residual mechanism starting a year earlier than the
11 other. Also, we have great hopes that Mladic will
12 come in sometime before the residual mechanism goes
13 into place. It's -- lots of questions. It's not
14 something that's been done before. It's a
15 fascinating name.

16 "Where do you work?"

17 "I work at the residual mechanism."

18 MR. SCHEFFER: I know. I did wonder about
19 that, you know. It just sounded like the U.N. had
20 taken hold of this whole process.

21 (WHEREUPON, there was laughter.)

22 Now, Jim Johnson, obviously you've got
23 a slightly different situation because you're not
24 folded into the residual mechanism. Can you just say
25 a few more words about that? Then I want to get back

1 to the Charles Taylor trial, please.

2 MR. JOHNSON: Okay. Briefly, first of all, I
3 think you gave me a little more credit than I
4 deserve. Certainly the work that's been done, I'll
5 be the -- as we move into that, I'll be the OTP focal
6 point in residual issues.

7 But certainly the things that have
8 been done so far in the Special Court as we move
9 towards that direction has been under the registrar,
10 and she is, of course, taking great steps and to get
11 all of this started, particularly with little or no
12 help is kind of what it amounts to, in doing it on
13 her own, in trying to go down this road without a
14 course.

15 At one time there had been talk about
16 a joint residual mechanism and a lot of different
17 things, and right now it certainly doesn't appear
18 that the Special Court will be folded into something
19 like that. So that's a very big concern for us as we
20 go down this road.

21 But, in the meantime, until our
22 platform is decided on on what our RMM will look
23 like, we know that funding is an issue, and how will
24 it be funded, and will it be voluntarily funded? The
25 court has been taking as many steps as they can to

1 get that way with the remaining trial going on in The
2 Hague, Freetown has been closing down in every
3 possible way it can.

4 But we can't forget that Freetown is
5 the seat of the Special Court. Freetown is the
6 Special Court for Sierra Leone. That's our seat; we
7 can't close down Freetown and move to The Hague,
8 we've got to stay in Freetown, but we are closing
9 down to the extent that we can. Those things that
10 can be archived have been moved to The Hague, and,
11 actually, for the time being, the Registry archives
12 are being stored with the Dutch archives, or they
13 have taken them in and they are currently storing
14 them.

15 The -- and some of the Mongolian Guard
16 Forces with the Special Court in Freetown will be
17 leaving within the next month, since with all the
18 records gone, they will be moving on.

19 Our presence will be down from -- for
20 those who have seen pictures of Freetown where we had
21 26 container cities --

22 MR. SCHEFFER: Yep. Yep.

23 MR. JOHNSON: -- or container blocks will be
24 down to about five.

25 MR. SCHEFFER: Wow.

1 MR. JOHNSON: The courtroom -- the courthouse
2 will be turned over to the Sierra Leone government,
3 our detention facilities will be turned over to the
4 Sierra Leone government.

5 MR. SCHEFFER: Are there any more Mongolian
6 peacekeepers?

7 MR. JOHNSON: Well, there's -- we're in the
8 last few weeks of --

9 MR. SCHEFFER: Really?

10 MR. JOHNSON: -- their presence in -- yeah.

11 MR. SCHEFFER: Those guys --

12 MR. JOHNSON: They were part of --

13 MR. SCHEFFER: -- are tough. I've confronted
14 these Mongolians.

15 MR. JOHNSON: Yeah.

16 MR. SCHEFFER: You don't want to mess around
17 with them.

18 MR. JOHNSON: We felt very comfortable with
19 the Mongolians there, let me say that.

20 So we've certainly -- we're certainly
21 reducing our presence, and, of course, under the
22 Management Committee pressure to do so, to cut -- to
23 cut funds.

24 As Valerie indicated, we were saved
25 for the last year of op -- operations by the recently

1 approved subvention grant from the U.N. The UK and
2 U.S. contributions came through earlier than normal,
3 but late last year that really managed us to -- you
4 know, enabled us to keep in operations until the
5 subvention was approved.

6 MR. SCHEFFER: Yeah.

7 MR. JOHNSON: So we do have that, and so we're
8 certainly taking as many -- we've certainly come a
9 long way in getting there, and the final picture is
10 yet to come on how it will sort out.

11 MR. SCHEFFER: Okay. Now, back to the cases.
12 I'm going to do Charles Taylor and then we're going
13 to go back to Cambodia. What I would like to do is
14 play a tape of the BBC show "Hard Talk," where
15 Courtenay Griffiths, who is defense counsel of
16 Charles Taylor and who you saw briefly this morning,
17 examining Naomi Campbell this year.

18 He had an interesting discussion in
19 November 2010, just a couple of months ago, on "Hard
20 Talk," and it's all about his perception of what
21 constitutes fairness with the trial being in The
22 Hague as opposed to Freetown, and also the
23 prosecution's alleged practice of paying witnesses
24 and offering other inducements.

25 Now, Courtenay Griffiths was in this

1 conference last year. He's exceptionally -- he's an
2 English barrister, as articulate on any day of the
3 week as Rodney Dixon is, and a very, you know,
4 dynamic force to be dealt with. So I'm glad to see
5 he's in "Hard Talk" because, I, you know -- watch.

6 (WHEREUPON, the Videotape was
7 played.)

8 MR. SCHEFFER: That was a little bit tougher
9 when last year we saw Bensouda, the deputy prosecutor
10 of the ICC, decide to talk about Africa with
11 Courtenay Griffiths. But, nonetheless. . .

12 Jim Johnson, can you respond to both
13 of those points? One, was there an inescapable
14 security issue that had to be dealt with here in
15 terms of taking that trial out of Freetown. You
16 mentioned this briefly in the morning in terms of you
17 looked at other places in West Africa. Can you just
18 elaborate a little bit about taking it to The Hague,
19 and then move on to the second point, which is about
20 the payment to the witnesses.

21 MR. JOHNSON: I thought he did fine on there,
22 the moderator.

23 MR. SCHEFFER: Yeah.

24 (WHEREUPON, there was laughter.)

25 MR. JOHNSON: Yeah. We did touch on moving

1 the trial out of West Africa. I mean, I can't go
2 into -- and we talked a little bit more. There were
3 other places looked at in Africa to keep the trial in
4 Africa, because that always was the first choice,
5 and, unfortunately, there was not another courtroom
6 available, there was not another facility available
7 that was up to the standards necessary to hold the
8 trial in elsewhere in Africa that could either have
9 the proper courtroom facility with all of the things
10 required or all of the security required or
11 everything like that. So the trial was moved.

12 You've got to remember that it was the
13 Security Council that set the way and moved the trial
14 up to The Hague. And, as I recall, the only
15 requirement on the -- by the Dutch government was
16 that to ensure that if indeed he was convicted, that
17 he would not stay in the Netherlands, and that's when
18 the UK stepped forward, and said, "If he is
19 convicted, he can serve his sentence in the UK." So
20 that paved the way.

21 I was in Freetown when Taylor was
22 arrested and when Taylor came, and it was tense
23 there, and there were concerns in and around
24 Freetown. You know, you can always sit here today
25 and look back and say, "Well, nothing happened." You

1 can always sit here today and say, "Well, you know,
2 how can you say something would have happened?"
3 Well, you don't. You can't say that. But based on
4 the information, the Security Council took the steps
5 and moved him out.

6 I can't say much more on the witness
7 payments than what we've said in our pleadings. We
8 have not, we do not pay witnesses, we never paid a
9 witness for their testimony. All disbursements that
10 we made to witnesses, all of those disbursements,
11 which, I think, are certainly not out of line with
12 what is take -- going on in any tribunal, all of
13 those disbursements were -- or other inducements --
14 no inducements, "inducements" is not the proper word,
15 but benefits provided to witnesses, whether those
16 were direct cash disbursements or some kind of
17 in-kind benefits, those were all disclosed to
18 defense.

19 Defense had the ability and the means
20 to cross-examine on those to seek other things, and,
21 of course, they have filed numerous motions before
22 the Trial Chamber, one right before the holidays;
23 again, another motion trying to recall some witnesses
24 regarding inducements paid, and the Trial Chamber
25 dismissed those motions.

1 MR. SCHEFFER: Now --

2 MR. JOHNSON: So everything was disclosed,
3 just as we're required to do.

4 MR. SCHEFFER: Now, before I get to Prosecutor
5 Smith, I just want to ask Mr. Dixon: Troubled by
6 anything you've heard either by Courtenay or by
7 Mr. Johnson here?

8 MR. DIXON: No, no. Nothing stands out. I
9 think the one thing to bear in mind was having the
10 trial outside of West Africa potentially could assist
11 the defense.

12 I can imagine, having been in some
13 situations, where the defense are concerned about
14 being in a country where they might not be able to
15 call witnesses, and also where the media attention
16 might be more loaded more in favor of the
17 prosecution. So although I'm not familiar with all
18 the arguments that went backwards and forwards, from
19 a defense point of view, sometimes being out of the
20 heat of the action can be beneficial.

21 MR. SCHEFFER: Right. Okay.

22 What I would like it do is ask
23 Prosecutor Smith now: Let's go to Trial Number 2
24 before the Extraordinary Chambers in the Courts of
25

1 Cambodia where we have four major Khmer Rouge leaders
2 who survived after the earlier deaths years ago of
3 Pol Pot, of Son Sann and Ke Pauk. Other top leaders
4 of the Khmer Rouge regime have met their deaths in
5 the last 13 years or so.

6 But we still have surviving Nuon Chea,
7 the party's chief ideologue; Ieng Thirith, the
8 foreign minister; Ieng Thirith, the Social Affairs
9 minister, and his wife; and Khieu Samphan, the
10 party's head of state.

11 Now, the year 2010 was very, very
12 important for these individuals as persons of
13 interest, because on September 15th of 2010, the
14 coinvestigating judges handed down their closing
15 order, essentially indicting these four individuals,
16 and thus setting in motion the trials of these four.

17 However, that was appealed. And we
18 received a respo -- with the Pretrial Chambers, to
19 whom you appeal from the coinvestigating judges,
20 actually came down with their judgment, or their
21 decision on January 13, 2011, a couple of weeks ago,
22 so very dramatic developments.

23 Now, Mr. Smith, could you walk us into
24 Trial 2 a little bit? So many issues. In fact, I'm
25 sort of tempted to walk you through several of them

1 after you start here, because it's such a fascinating
2 trial coming up. But let's start.

3 What are they being charged with?
4 What was the significance of the Pretrial Chamber
5 just so recently confirming the genocide charge
6 against all four of these individuals? Issues of
7 that character.

8 MR. SMITH: Yes. It's a very important case
9 for Cambodia. These are the main architects and
10 ideologues behind this plan to turn Cambodia into a
11 homogenous society, an agricultural society, families
12 were broken up, young people were forced to marry and
13 procreate, people were forced to work 14 hours a day.

14 People were sort of targeted as
15 enemies of the State if they supported the previous
16 government or if they belonged to certain classes, or
17 if they were perceived to be against the regime's
18 policies, and that lead to 1.7 to 2.1 million deaths,
19 half of them by execution.

20 So it's -- the indictment itself,
21 certainly we think it's a very important, very
22 credible document, particularly in International
23 Criminal Law. It's a document that was about 700
24 pages long, about 400 pages of fact and law and
25 application of them both, and about five and a half

1 thousand footnotes supporting the charges.

2 And so particularly for Cambodia where
3 decisions are often not reasoned, cases are sort of
4 dealt with in an instant, it is actually a very
5 important legacy to have a charge, an indictment,
6 that states the case clearly to the defense.

7 The -- the crimes that were charged
8 were, as you said, genocide; genocide against the
9 Vietnamese, genocide against the Cham community,
10 crimes against humanity, murder, extermination,
11 imprisonment, inhumane acts, rape, torture, and also
12 war crimes.

13 The defense appealed the decision.
14 They basically said that international customary law,
15 violations of -- violations of grave breaches, crimes
16 against humanity and genocide weren't customary law
17 at the time in 1975, and, as a result, they can't be
18 charged with that. It would breach the principle of
19 legality.

20 They said because the Cambodian
21 courts -- at that time, there were no courts that
22 would prosecute these crimes; therefore, they
23 couldn't be prosecuted retrospectively, and basically
24 the -- and also in relation to Ieng Sary, the appeal
25 was that he had been given an amnesty in the past,

1 therefore, he couldn't be prosecuted before this
2 Court. So basically they challenged every aspect of
3 the indictment.

4 The Pretrial Chamber came back and
5 said, "Look, these crimes, genocide, crimes against humanity,
6 war crimes were customary international law back in 1975."
7 The Yugoslavia Tribunal really just dealt with the issue as
8 to whether or not these crimes were customary
9 international law back in the early '90s. So this
10 court had the extra challenge of going back to 1975
11 to see whether or not customary international law had
12 formed to that point on these particular crimes.

13 So the Pretrial Chamber rejected all
14 the defense appeals bar two aspects. Firstly, they
15 said that for crimes against humanity, it's required
16 that there be an armed conflict occurring connected
17 to the crimes against humanity, and the prosecution's
18 position was that an armed conflict is not required
19 to prove a crime against humanity.

20 But that's what the Pretrial Chamber
21 found, that there was a nexus required between those
22 crimes and armed conflict, going back to perhaps how
23 they were prosecuted in World War II.

24 MR. SCHEFFER: Can I just -- hold that thought
25 for a minute because I don't want you to stop yet,

1 and let's go to Professor Oosterveld for just a
2 second. This is incredibly important because we
3 thought moving to the Rwanda Tribunal from the
4 Yugoslav Tribunal statutes that we had broken this
5 bond between crimes against humanity and armed
6 conflict.

7 There were particular reasons that
8 existed for the Yugoslav Tribunal in the history of
9 the drafting that was separated out once we got to
10 the Rwanda Tribunal; now we see it come back.

11 Is it coming back because the court's
12 looking back at where customary international law was
13 in the 1970s, or is it doing something of greater
14 convenience in terms of the adjudication of these
15 cases before the court, I wonder?

16 MS. OOSTERVELD: I don't know if it's doing
17 something for greater convenience, but I think it's
18 getting a bit confused with respect to what the law
19 was as of World War II with respect to crimes against
20 humanity, and then looking at, say, the Yugoslav
21 statute and trying to guess at what point in time --

22 MR. SCHEFFER: Right.

23 MS. OOSTERVELD: -- that change happened. And
24 I disagree with saying that in 1975 there was this
25 required nexus. I think that it disappeared quite a

1 bit earlier. If it remains -- do I understand
2 correctly that point is being appealed?

3 MR. SMITH: That point was appealed. We -- we
4 opposed it, and then the court has come down and
5 said, "Look, no, there -- it is a requirement."

6 But just two other aspects: Firstly,
7 the Pretrial Chamber has given their decision. The
8 Trial Chamber is not bound by the Pretrial Chamber,
9 and under civil law and under this court, the Trial
10 Chamber can legally classify the crimes in the way it
11 wants at the end of the case, in any event.

12 And the second point, the Trial
13 Chamber that dealt with the Duch case, in dealing
14 with crimes against humanity, they didn't require a
15 nexus between armed conflict.

16 MR. SCHEFFER: Um-hum.

17 MS. OOSTERVELD: I see.

18 MR. SMITH: So in some respects, it seems like
19 a little bit of a waste of time because as soon as we
20 go to the Trial Court, they've rejected that
21 contention, in any event. So it won't really make
22 much difference for the trial.

23 MR. SCHEFFER: And then if you could finish up
24 on this, the second divergence of the Pretrial
25 Chamber with the coinvestigating judges was to

1 designate rape as another inhumane act.

2 MR. SMITH: Yeah.

3 MR. SCHEFFER: I mean, how do you read that?

4 MR. SMITH: It's basically the same argument
5 as with the crimes against humanity and the nexus.
6 They said back in 1975 to 1979, rape hadn't
7 materialized into international customary law as an
8 offense of its own, and so it would only be
9 categorized as an "other inhumane act." So they did
10 an analysis of the jurisprudence. Again, the
11 prosecution opposed the defense in relation to that,
12 but the Pretrial Chamber came out and said,
13 "No, rape wasn't a crime under customary
14 international law for crimes against humanity."

15 Again, the Trial Chamber in Duch
16 didn't accept that in the first trial, and they said,
17 "No, rape was a crime against humanity back in 1970
18 to '75, or '75 to '79." And so it will be -- in a
19 sense it will be, I think, a moot point when it comes
20 to the Trial Chamber, but that's what, you know, the
21 Pretrial Chamber thought.

22 MR. SCHEFFER: Okay. Now, let me leap from
23 that to something that I think engages Professor
24 Oosterveld, Mr. Smith, and Mr. Whiting, at least, and
25 that is, how did the tribunals during the year 2010

1 actually fare with the whole issue of gender-based
2 crimes?

3 I think all three of you have dealt
4 with this, and perhaps we could start with Professor
5 Oosterveld on if you just look across the scope of
6 tribunal practice on gender-based crimes, how would
7 you sum that up in 2010?

8 MS. OOSTERVELD: I would sum it up as being
9 relatively positive. There were some negative
10 aspects, and I had mentioned one already with respect
11 to the ICCR, but relatively positive.

12 Let's start with the International
13 Criminal Court. There were charges laid relatively
14 recently in the Em Baru Shamara case, which is in the
15 Democratic Republic of the Congo, and he was one of
16 the leaders of the FDLR within the Democratic
17 Republic of the Congo, and what's interesting in that
18 case is the breadth of the charges with respect to
19 gender-based crimes. Seven of the 11 counts relate
20 to gender-based crimes. This is sort of the widest
21 conception of gender-based crimes, I think, in any of
22 the cases in the International Criminal Court. It's
23 not only about rape committed against women, for
24 example. It includes rape as torture.

25 But I think somewhat even more

1 importantly, the International Criminal Court is
2 looking wider and recognizing that gender-based
3 crimes happen against men and boys as well. Wherever
4 there's sexual violence directed against women and
5 girls, there is often also sexual violence directed
6 against men and boys.

7 And so in this particular case, there
8 are inhumane acts charges related to the FDLR,
9 forcing male civilians to rape females civilians, and
10 the harm associated with that, and I think that's a
11 very progressive reading, progressive look at crimes
12 gender-based.

13 In the Al Bashir case, of course, we
14 mentioned gender-based acts of genocide have been
15 charged. In the Kenya investigation and charges,
16 rape and other forms of gender-based violence have
17 been charged.

18 Also in the evidence in the two -- in
19 two of the ongoing cases before the ICC and the --
20 actually, all three, the Katanga case, much witness
21 testimony on the five counts of sexual violence
22 charged, and I must say that the judges have shown a
23 very strong gender sensitivity in dealing with the
24 witnesses.

25 In the Bemba case, again, much

1 evidence coming forward on gender-based crimes, in
2 the Lubanga case as well, the special representative
3 of the secretary general on Children and Armed
4 Conflict testified as an expert witness in January of
5 2010 on the role of girls once they're recruited into
6 armed forces, and how they have a very sexualized
7 role in many cases alongside the role as fighters.

8 And I would like to end by mentioning
9 the Cambodian Tribunal has charged forced marriage in
10 the second case, and this is very exciting with
11 respect to gender-based crimes because here it
12 recognized, again, a crime committed against men and
13 against women because men and women were forced to
14 marry each other and have a conjugal relationship
15 with no choice on either side. This might be
16 something that Bill might want to speak about.

17 MR. SCHEFFER: Bill?

18 MR. SMITH: Yeah. I mean, that's right. It
19 was a policy of the Khmer Rouge to force people to
20 marry and procreate to build this new Cambodia, and
21 there were large marriages of 50 people getting
22 married at a time, and they were monitored to make
23 sure they did procreate. And it's that policy of
24 forced marriage and forced to procreate that that's
25 where this charge emanates from.

1 MR. SCHEFFER: And does it draw anything from
2 the experience with the Special Court for Sierra
3 Leone on forced marriage and the conviction on forced
4 marriage in Sierra Leone?

5 MR. SMITH: Yeah. I mean, we used that
6 jurisprudence to argue that, you know, forced
7 marriage was a -- was a crime against humanity and
8 also to support the surrounding circumstances for the
9 rape charges.

10 MR. SCHEFFER: And there will be, interesting
11 defense arguments about that before the Cambodian
12 Tribunal, particularly on the temporal issue.

13 Mr. Whiting?

14 MR. WHITING: Yeah. Valerie's laid out well
15 how gender crimes have featured in every single case
16 at the International Criminal Court. They are not
17 charged in the Lubanga case, but it has been part of
18 the evidence and part of the story, and there was an
19 effort at the halftime to add the -- by the victim
20 representative to add --

21 MR. SCHEFFER: That's right.

22 MR. WHITING: -- which ultimately wasn't
23 successful. But it's important that it's featured in
24 every case. And the prosecutor, I can tell you,
25 takes an enormous amount of pride in the fact that he

1 has pushed this agenda. He has a -- he's appointed a
2 special gender advisor, there is a Gender Unit within
3 the Investigations Division at the ICC. He is
4 developing a policy on charging gender crimes.

5 From an investigative point of view,
6 oftentimes gender crimes are among the hardest to
7 investigate because it's very hard to get witnesses
8 to cooperate. There are often enormous pressures on
9 them not to -- not to tell their stories, there are
10 huge witness security issues. They're hard cases to
11 put together, but the prosecutor has at every step of
12 the way pushed and insisted that this be within the
13 frame, and the result is that it is part of every
14 case.

15 MR. SCHEFFER: If I may, I would like to jump
16 now to both Mr. Hannis and, I believe, Mr. Dixon on
17 this particular line of inquiry. I wanted to talk a
18 bit about two cases before the Yugoslav Tribunal, one
19 is the Seselj case, and the other is the Prlic case.
20 Both of them had scrappy trial work through the year
21 2010, that included all sorts of allegations being
22 thrown back and forth, particularly by defense
23 counsel.

24 And, if I may, in the second case,
25 Mr. Hannis, if you could describe very briefly about

1 who Mr. Seselj is, and then perhaps talk to us about
2 this whole issue about why the funding of his defense
3 proved so controversial and why the Trial Chamber
4 sort of came to his rescue, similar to what happened
5 with the Special Court of Sierra Leone, when the
6 judges came to the rescue of some of the defendants
7 in terms of the funding of their defense work, and
8 then also Mr. Seselj's inclination to disseminate
9 through his book writing some very sensitive
10 information about witnesses and how the prosecutor
11 has dealt with these issues, so if you could
12 introduce us to Mr. Seselj and his rather interesting
13 trial, I think that would be useful.

14 MR. HANNIS: Mr. Seselj is representing
15 himself. He was head of the Serb Radical Party, a
16 strong nationalist party in Serbia. He's accused, in
17 part, of incitement to war crimes because he was a --
18 he's a gifted speaker, and he is -- he's
19 brilliant. Again, this is just my personal opinion.
20 The line between genius and madness is a very thin
21 one.

22 (WHEREUPON, there was laughter.)

23 He is a difficult lawyer to control in
24 the courtroom, and he has on numerous occasions
25 expressed his contempt for pretty much everybody in

1 courtroom and for the tribunal. He has violated
2 orders of the court concerning protecting witnesses.
3 One of the allegations of contempt on his part
4 relates to his having taken witness statements of
5 protected witnesses and putting them together and
6 having it published in a book. He refers to himself
7 as an author, and I don't know how many books, but if
8 that's all it takes to be an author, then I can be an
9 author pretty soon.

10 But that has been something that the
11 Trial Chamber has struggled with, and because of his
12 willingness and ability to do that, the prosecution
13 has had a hard time to -- there have been struggles
14 with witnesses who gave statements to the prosecution
15 some years ago, saying one thing about Mr. Seselj and
16 what he knew and what he did, and then before they
17 come to court to testify, suddenly they have now
18 furnished another written statement to Mr. Seselj's
19 legal assistants and advisors and investigators,
20 saying, "No, no, no, the OTP investigators threatened
21 me, bribed me, did all kinds of things to me, and
22 whatever I said before to them is not right, and what
23 I'm saying now is right."

24 And the prosecution has tried to
25 persuade the judges that these witnesses have been

1 intimidated by Mr. Seselj's associates, if not at his
2 expressed discretion, at least with his knowledge,
3 and have urged the court to take as substantive
4 evidence in the case their original statements that
5 they made to OTP investigators pursuant to one of our
6 newest Rules of Procedure, which is Rule 92, quin
7 quay (phonetic) -- pardon my French, I don't speak
8 French -- and that provides that if you can show that
9 a witness is -- has been subjected to intimidation
10 and you have a prior statement made at a time when
11 there wasn't reason to believe that it was made under
12 duress or intimidation, you can accept that prior
13 statement as evidence, as substantive evidence,
14 instead of what they're saying in court under oath,
15 and it's a call the judges have to make.

16 But, as you can imagine, in a
17 circumstance like that, it's terrifically difficult
18 for the prosecution to carry their burden of proof
19 beyond a reasonable doubt, where you say, "Well, the
20 witness came under -- came into court, he was under
21 oath, and said, 'What I said before is not true.'"

22 But the judges will have to weigh that
23 evidence, having seen the witnesses in court and
24 seeing their demeanor when they were testifying and
25 saying that, hearing the circumstances under which

1 the original statement was taken, the circumstances
2 under which their new statement to Mr. Seselj's
3 associates was made, et cetera.

4 MR. SCHEFFER: Now, can I broaden this just a
5 little bit? I think a lot of this is generated by
6 the opportunity afforded Mr. Seselj to represent
7 himself, which is a due process right that we're very
8 familiar with in the United States jurisprudence, of
9 course, and practice.

10 And yet in the context in
11 International Criminal Tribunals, and I think there's
12 a fair debate as to whether or not when one is
13 dealing with such massive crimes, such massive
14 amounts of evidence, whether the self-representation
15 right that is accorded these individuals if they wish
16 to choose it, is, in fact, the wisest course for the
17 court to take. I would like to open this up just for
18 a few minutes.

19 Mr. Dixon, as a defense counsel,
20 merits, demerits of the self-representation
21 opportunity in the light of Seselj and others, of
22 course, who exercise it; Milosevic, Karadzic, where
23 do you -- what are your thoughts on
24 self-representation?

25 MR. DIXON: I think it takes away a lot of

1 work from defense counsel.

2 (WHEREUPON, there was laughter.)

3 No. But, seriously, I don't think
4 that -- look, it's going to happen a lot in all of
5 these cases because of the kind of people you're
6 dealing with. I ultimately don't think that people
7 realize what's in their best interest.

8 I think the experience has been that
9 people who represent themselves generally miss all
10 the great points that they could take in the case
11 because they're so clouded, even though they don't
12 think they are; they think they know the case better
13 than anyone else, but they're too close to it, and
14 they don't have the benefit of independent counsel.

15 So I think from a practical point of
16 view, it's -- it's a hopeless cause. I mean, maybe
17 people do it for the soapbox, where they think
18 they've got no chance of getting anywhere. But my
19 experience has been, actually, they think that they
20 can do it, they can get themselves off, and it's
21 delusional.

22 MR. SCHEFFER: Can I just ask a naive
23 question? Why have the judges been so deferential to
24 this right --

25 MR. DIXON: Yes. That was my ---

1 MR. SCHEFFER: -- including the Appeals
2 Chamber of the Yugoslav Tribunal?

3 MR. DIXON: Yeah. That was -- that was my
4 second point. I mean, I think -- because I go
5 backwards and forwards this -- but I think I
6 generally think you've got to have the right to
7 self-representation at the end of the day, and this
8 is a fundamental right.

9 But then you do require good, strong
10 Judges. I mean, it's absolutely critical that the
11 judges take control from day one. You can't have the
12 accused not standing up or just calling the person
13 whatever names they want to,

14 I don't know how you can let a court
15 function like that, and we've seen it over and over
16 in some of these cases so it then requires a strong
17 hand, unless someone can convince me of another
18 mechanism we can use to appoint counsel.

19 But that is always going to run the
20 risk of imposition. And, you know, if it's not going
21 to happen in practice, if the person is not going to
22 work with counsel, why -- why bother? Let them do it
23 on their own, but then they have to be kept to very
24 strict rules. Yes, as much as one can promote the
25 message that representation is always going to be

1 better -- well, mostly, depending on the UK -- but
2 mostly it will always be to your -- to your
3 advantage.

4 And it doesn't mean that the accused
5 can't participate at times. They could still
6 cross-examine some witness or make their -- their
7 point.

8 MR. SCHEFFER: Right.

9 MR. DIXON: But, by and large, judges don't
10 really take very well to the accused intervening
11 directly. They're much more accustomed to dealing
12 through counsel.

13 MR. SCHEFFER: Did you want to jump in,
14 Mr. Hannis?

15 MR. HANNIS: If I could.

16 MR. SCHEFFER: Yeah.

17 MR. HANNIS: I agree with the point about
18 strong judges with these accuseds. I mean, they're
19 bright, they're strong-willed, they're -- they're
20 used to having their own way and used to running
21 things, and oftentimes, they're successful at doing
22 it.

23 Seselj, earlier on in the case, there
24 was a judge who made a finding that, because of his
25 conduct, he decided it was not appropriate to allow

1 him to continue to represent himself, and Mr. Seselj
2 went on a hunger strike, and eventually, arguably, it
3 appeared that the Registry and the Trial Chambers
4 gave in and allowed him to continue to represent
5 himself and then had a different judge come onto the
6 case. And I think once he was able to succeed in
7 doing that, there was no stopping him.

8 There's a real concern because there's
9 a strong view that the tribunal was anti-Serb,
10 there's a strong feeling in the region that Serbs are
11 prosecuted in disproportionate numbers and more
12 harshly and -- and branded more severely than others,
13 and I think that knowledge is in the back of the
14 minds of some of the judges, and they do bend over, I
15 think, a little farther than maybe they should to try
16 and maintain the view that this person is getting a
17 fair trial, and sometimes I think they go too far in
18 that direction. Again, that's just my personal
19 opinion and not necessarily that of the OTP or the
20 U.N.

21 MR. SCHEFFER: Okay. Before a short coffee
22 break, I want to hit one more issue, and that is
23 going to engage, I believe, Mr. Whiting on this one,
24 as well as perhaps as Mr. Dixon.

25

1 We've touched on this before, but
2 let's get a little more into the detail of this,
3 because there was a very significant development in
4 2010 for the ICC, and that is the decision to move
5 forward with an investigation of Kenya and the
6 electoral violence in Kenya.

7 On March 31st, the PTC granted the
8 prosecutor's request to commence an investigation on
9 crimes against humanity allegedly committed in
10 Kenya -- what was it -- 2007/2008 electoral cycle
11 within Kenya, and there was a very substantive
12 dissenting opinion by Judge Hans-Peter Kaul, who was
13 my counterpart in the Rome Statute in the criminal
14 courts and I worked for years with him on this.

15 He filed a dissenting opinion to the
16 Pretrial Chamber Commission who said that, in fact,
17 crimes against humanity, there's a reasonable basis
18 to believe that crimes against humanity, in fact, had
19 occurred in Kenya. Judge Kaul disagreed.

20 Why did that happen, Mr. Whiting?

21 MR. WHITING: Yeah. It's a very interesting
22 issue, and he's not -- it wasn't on the basis that
23 there weren't crimes, that they weren't widespread,
24 that they weren't serious, that it didn't merit ICC

25

1 attention for any of those reasons.

2 It's on a very particular and
3 interesting legal issue which arises from Article 7,
4 which is the Crimes Against Humanity section in the
5 statute, which requires for crimes against humanity
6 be charged by the -- by the ICC, that "the crimes be
7 pursuant or in furtherance of a state or
8 organizational policy." Now, that is an add-on to
9 the -- to Crimes Against Humanity what the statute
10 makes.

11 And what Judge Kaul found is that he
12 focused in not on policy, but on state or
13 organizational. And what he found is that, okay, it
14 can be either a state or nonstate party; that's fine,
15 that wasn't the issue. But what he found is that the
16 organization behind the crimes has to be -- if it's
17 not a state organization, it has to be like a state
18 organization. It has to have the same
19 characteristics as a state organization. So it has
20 to be, you know, functioning, sort of established
21 functioning over a period of time, effective command,
22 able to implement its orders and capable of
23 committing widespread and systematic -- widespread or
24 systematic crimes.

25

1 So what he's imagining is if it's not
2 a state that's committing these crimes, it's an
3 org -- like a rebel organization that is established,
4 that has been functioning and so forth.

5 The majority found that -- had a
6 different test, found that that was not required.
7 The majority found that as long as the organization
8 was capable of committing the crimes, then that was
9 sufficient. Whether it was the state, whether it was
10 like a state, whether it was something that arose
11 more spontaneously, that was all that was required,
12 is that it was capable of committing the crimes.

13 Now, it's important in the context of
14 Kenya because the -- the violence was -- the
15 prosecution alleges and there is evidence that the
16 violence was organized, but the organizations that
17 committed the violence, it really kind of came
18 together and coalesced in the context of the
19 election, right before the election and in the
20 context of the election violence.

21 So Judge Kaul found there was
22 insufficient evidence that there was an established
23 organization that was behind the violence. And his
24 concern, as he says in his dissent, is that if you
25

1 don't have this requirement of a state or
2 organization behind the crimes, then crimes against
3 humanity could be applied to mob violence, organized
4 crime, you know, that kind of -- those sorts of
5 ordinary domestic crimes.

6 So he was searching for some test that
7 would distinguish what we might consider as ordinary
8 domestic crimes that are ongoing and kind of
9 organized from what we tend to think of as crimes
10 against humanity. So it's an interest -- it was a
11 dissent, but I would expect this is an issue we'll
12 see again.

13 MR. SCHEFFER: And if I may just close this
14 with Mr. Dieng from your perspective. I know you've
15 spoken about Kenya. Knowing Kenya, would you lean
16 towards where Judge Hans-Peter Kaul concluded this,
17 that he wouldn't want to identify the type of
18 organization that arose in the Kenyan violence as
19 crimes against humanity or triggering crimes against
20 humanity, or would you be on the prosecutor's point
21 that, no, there is a broader concept for what
22 organization would be like in Kenya under those
23 circumstances?

24 MR. DIENG: Well, I would certainly say that
25

1 the position of Hans-Peter Kaul is correct. He is
2 correct. However, one should not really go into such
3 detail like he did in his dissent opinion simply
4 because what happened in Kenya during that
5 election, the end of 2007/2008, was so serious that
6 there was a need to come and bridge really the gap,
7 and that's where, if I go by what Goran said last
8 year during your session, are these tribunals here to
9 bridge the gap to end impunity or are the tribunals
10 here to deliver justice.

11 Definitely there was a need to send a strong signal.

12 But I think now when you look at the
13 situation, the current situation, you may then say
14 "Okay, maybe one should have followed judge Hans'
15 reasoning," because they are split. As you know, at
16 the end, eminent personalities were able to get both
17 parties, the ODM and the PNU, Raila and Kibaki to share
18 power. Things were not that easy.

19 And as of today, there is even more of
20 a split between President Kibaki and Prime Minister
21 Odinga around the issue, simply because Odinga is of
22 the view that those people have been identified and who
23 belong to both political parties;
24 you have three on each side, should be
25 brought for trial before The Hague, the ICC. Why

1 Kibaki is of the view that now they have a new
2 constitution, now they have decided to put in place
3 the new judicial system and with a new chief justice,
4 et cetera, he is of the view that they should try the
5 case by themselves.

6 I was a bit, I would say, disappointed that
7 the African Union Summit passed a resolution three days ago at the
8 Council for a deferral

9 MR. SCHEFFER: This is a deferral of --

10 MR. DIENG: Yeah.

11 MR. SCHEFFER: -- the Kenya, well,
12 investigation, right?

13 MR. DIENG: Right.

14 MR. SCHEFFER: So as to, I assume, allow
15 Kenyan courts to take the matter --

16 MR. DIENG: Exactly.

17 MR. SCHEFFER: Yeah.

18 MR. DIENG: Yes. And that's where, again, I
19 say the politics and international criminal justice,
20 this is a very important question we cannot really
21 ignore. I mean, this close link between
22 international justice and national politics and even
23 international politics. however, I think definitely one
24 should say that Judge Hans-Peter Kaul was
25 right, but as a human rights activist

1 I fully support the move made by Ocampo and
2 the decision taken by the majority of the judges.

3 MR. SCHEFFER: Okay. One closing point.

4 MR. WHITING: I have to say I -- I have to
5 disagree. I think that the -- my concern -- I
6 understand the impulse behind his dissent and his
7 concerns, but the test that he ultimately comes up
8 with is too narrow and too rigid and will fail to
9 capture conduct which will look like crimes against
10 humanity and looks like it satisfies all the
11 requirements, but because his -- his test is so -- it
12 has that particular rigidity, won't meet the test.
13 So in my view, it's the wrong test.

14 MR. SCHEFFER: Okay. Oh, I'm sorry.
15 Professor Oosterveld?

16 MS. OOSTERVELD: May I get sort of academic --

17 MR. SCHEFFER: Yeah.

18 MS. OOSTERVELD: -- on this? I think it's
19 fascinating to see the debate between Hans-Peter Kaul
20 and -- and the others, and I think it's because this
21 case is the closest we've ever had to that line
22 between where do you say something is a serious,
23 ordinary crime and when is something a crime against
24 humanity? So this entire case, entire set of cases,
25 is going to be exploring where that line is.

1 I must say, though, that I think
2 Hans-Peter Kaul, with respect, ignores the
3 negotiation history behind the -- the state or
4 organizational policy language and misses some
5 nuances there.

6 MR. SCHEFFER: Precisely, and also the
7 preliminary examination currently underway by the
8 ICC of Guinea and the violence there, not identical
9 to Kenya, but still raises some kind of similar
10 issues that would have to be calculated in looking at
11 the violence that occurred in Guinea, which is now
12 under examination, and that which transpired in Kenya
13 and the decision.

14 Now, I -- I think I
15 have to give people a little coffee break. I'm
16 told I'm -- I'm a bad boy not to do so. So we're
17 going to take a ten-minute break. I literally want
18 to start in ten minutes. For those students here who
19 wanted to have a chance to meet any of our guests for
20 any number of reasons, I'm going to thrust them on
21 you here as you're getting your coffee. So don't be
22 shy. This is -- this is an opportunity to meet them
23 personally, okay? Okay. Let's get to the coffee.

24 MS. OOSTERVELD: Thank you.

25 (WHEREUPON, there was a brief

1 recess had in the proceedings.)

2 MR. SCHEFFER: I would like to spend a couple
3 of minutes with an episode that took place in Rwanda
4 last year around May 28, 2010. One of the defense
5 counsels in the Rwanda Tribunal, Peter -- and,
6 Mr. Dieng, if you could help me.

7 MR. DIENG: Aloys Ntabukuze.

8 MR. SCHEFFER: We will try and get that up on
9 the board in a second. In any event, Peter Erlinder
10 was his defense counsel and was arrested by the
11 Rwandan government after entering the Rwanda country,
12 the country of Rwanda basically not for the purpose
13 of ICTR work, but rather to assist an opposition
14 candidate in some kind of advisory function who was
15 running against the President of Rwanda, President
16 Kagame in the election, and this led to, frankly,
17 probably a lot of work in 2010, Mr. Dieng, that you
18 never anticipated or even imagined you would have to
19 get involved with, which was one of your defense
20 counsel, if I may be off the cuff here, sort of
21 playing around in Rwanda, not on your business, but
22 somebody else's business, and you have to bail him
23 out.

24 So tell us what happened with the
25 court and Mr. Erlinder in early summer of 2010. And,

1 by the way, just to let you know, before Mr. Erlinder
2 landed in Rwanda, one month before, he had filed a
3 wrongful death lawsuit in the Western District of
4 Oklahoma, my home state, against President Kagame for
5 the alleged assassination of the Rwandan President
6 and his Barundian counterpart in 1994, which kicked
7 off the genocide. The case was filed on behalf of
8 their widows.

9 And on May 22nd, 2010, six days before
10 his arrest, he vowed to, quote, "Increasingly take
11 the offensive," close quote, in reshaping the history
12 of what had happened in Rwanda. Then he boards the
13 plane, lands in Rwanda, gets arrested, and your day
14 begins.

15 (WHEREUPON, there was laughter.)

16 MR. DIENG: I may say that I wonder if he wasn't
17 an American lawyer if there would have been that much noise.
18 At a meeting in Brussels, Erlinder denied there was a genocide,
19 which, in my view, already was
20 something not proper for a defense counsel before the ICTR. I mean,
21 already the Appeals Chamber has taken notice,
22 judicial notice, that there was a genocide in Rwanda.

23 MR. SCHEFFER: And just to make this point:
24 In 2004, I believe it was, judicial notice, genocide
25 has occurred, and we don't need to argue that again

1 in the courtroom.

2 MR. DIENG: Exactly. So I guess that even as
3 a matter of courtesy, as the defense, one should observe a minimum
4 of ethics.

5 In any case, when he
6 decided from Brussels to go to Kigali to defend his
7 client, his client is a Rwandan woman politician
8 opposed to President Kagame, his own colleagues I am
9 told said to him, "Don't go, you are going to face problems."
10 He apparently responded, "I will go. I know that I will be
11 arrested," and this happened.

12 When this happened, I said, "Well, we
13 have to see if he was there for this tribunal," to
14 start, and it became clear that he wasn't there
15 for the work of ICTR. Nevertheless, because I'm very
16 concerned about the rights of the accused, and particularly
17 also because I'm very concerned that defense counsel accomplish
18 their task without any interference,

19 I decided to take preventive measures,
20 and I asked the prosecutor general of Rwanda,
21 Martin Ngoga, to let me know exactly for which reason
22 Erlinder had been arrested, and awaiting for his
23 response, I, nevertheless asked that he be set free.
24 I wrote to the Office of
25 Legal Affairs in New York, said, "Okay, here's the

1 situation, tell me what route to take. In any case,
2 this is my position: I think he should be granted
3 immunity." They did not respond immediately.

4 MR. SCHEFFER: "They," being the OLA?

5 MR. DIENG: Affairs. Yeah.

6 MR. SCHEFFER: Legal Affairs. Yeah.

7 MR. DIENG: Because I took myself the decision
8 to ascertain his immunity, it was a big noise,
9 because all the legal advisors of the P-5 were
10 already informed about it. It was a big deal. The
11 Rwandan side also was not happy about my decision
12 defending the defense counsel.

13 MR. SCHEFFER: Now, just briefly, though,
14 you -- and this is important. You gave him or you
15 awarded him functional immunity, correct?

16 MR. DIENG: Correct.

17 MR. SCHEFFER: And that functional immunity
18 only went to the extent of his work for the Rwanda
19 tribunal.

20 MR. DIENG: Correct. Yes.

21 MR. SCHEFFER: Okay.

22 MR. DIENG: Correct. and by that time,
23 what happened is that the
24 case was brought before the Appeals Chambers
25 because the Ntabukuze case is pending on appeal.

1 So the Appeals Chamber asked
2 the Registrar, to get from the Rwandan judiciary
3 the charges against Erlinder. In fact, at that time,
4 he was not even yet charged, you see? And what
5 happened, we made representation, and at the end, he
6 was released on bail.

7 And I remember he
8 was afraid that, well, he
9 may be poisoned or whatever.

10 MR. SCHEFFER: So -- okay.

11 MR. DIENG: Yeah.

12 MR. SCHEFFER: I didn't know that.

13 MR. DIENG: when he was leaving the
14 airport, Kigali, he was searched. Again, he call, he
15 says, "Why they are searching my stuff?" which is
16 normal. And I thought that the search process is, I
17 would say, more acute in American airports than they
18 are anywhere else in the world. So what the Kigali
19 Airport officers were doing was simply proper.

20 (WHEREUPON, there was laughter.)

21 And what is interesting is at least I
22 think the move I took in that case has enabled

23

1 since the Office of Legal Affairs to review the issue
2 of immunity of defense counsel.

3 MR. SCHEFFER: Hmmm. Interesting.

4 MR. DIENG: And I think that is something very
5 important. And, in the meantime
6 the Appeal Chamber also made the decision and said
7 that, he should be
8 granted functional immunity only regarding the case
9 for which he was assigned on the ICTR --

10 MR. SCHEFFER: Right.

11 MR. DIENG: -- which was not the case, except
12 there was one mention in the Rwandan decision
13 that should be simply taken out, but the Rwandan
14 can still continue if they want, of course, the
15 proceedings.

16 And so as far as the ICTR is concerned,
17 I mean, Professor Erlinder continues in his role as a
18 lead defense counsel assigned to represent Aloys
19 Ntabukuze --

20 MR. SCHEFFER: Right.

21 MR. SCHEFFER: Very interesting setup. Some
22 additional issues, of course, were the fact that I
23 guess some of the defense bar at the ICTR decided
24 to -- threatened at least to boycott until
25 Mr. Erlinder's situation was resolved in Rwanda.

1 And I wanted to ask Mr. Dixon, this is
2 interesting. You know, the OLA at -- at the U.N. is
3 now looking at the whole issue of functional immunity
4 for defense counsel. Brief us up a little bit on
5 this. This is an interesting legal point. Had you
6 never had functional immunity before, or is this
7 something that is being triggered in some new
8 manifestation with the case, the Erlinder case?

9 MR. DIXON: Yeah, it is relatively new. I
10 mean, I should say that I do have an interest in this
11 as well because I have been assisting the Rwandan
12 government at looking at putting in place measures so
13 that there can be transfers from the ICTR and also
14 extraditions from the UL to Rwanda, and that was one
15 of the issues that we looked at: How to make sure
16 that defense counsel could come there and be free of
17 any interference.

18 It's a basic right, I think a
19 fundamental one. But you could understand the
20 position of the Rwandan government saying, "Well, if
21 a defense counsel was to come here and say that there
22 was no genocide," I mean, first of all, I would say,
23 why is there any need for defense counsel to be
24 involved in the merits of the case in that way. You
25 should be representing your client and nothing else.

1 But if you want to come there and say
2 those things -- I mean, exactly the same thing after
3 the Second World War. You can't just walk around,
4 going on about how you support the Nazi regime.
5 There's nothing wrong with having such a law, and
6 defense counsel should really be able to abide by
7 that law in the performance of their duties.

8 I agree. I think it was provocative,
9 and I think it's these kinds of things,
10 unfortunately, that give defense counsel very often a
11 bad name. When you come to meetings and people say
12 to the effect of they think about of these kinds
13 of -- of incidents, and it's not reflective, I don't
14 think, generally of people practicing in this area.

15 It's ultimately counterproductive, I
16 think, for his client, and the focus should be on,
17 you know, the office, the court. If you're going to
18 represent people before the court, you've got to play
19 by the rules. I mean, you can't become an activist
20 outside of anything. If you want to go into
21 politics, you can do that, but I think if you're
22 going to represent a client, then you have to comply.

23 I think what we'll see now as Rwanda
24 hopefully is going to start to see these cases, all
25 of these procedures are going to have to be in place

1 to ensure that there will be fair representation for
2 the accused.

3 But, at the same time, it doesn't mean
4 that you could just say, as a result of that, defense
5 counsel can come here and say anything about the
6 history of the country, making very insulting
7 comments when there's no need to in representing a
8 client.

9 MR. DIENG: I would simply add that at the
10 same time that some of the defense counsel who were
11 threatening, some of them were in Kigali, doing their
12 work properly, and never, never a single lawyer was
13 harassed by the Kigali government. So, in fact, one
14 of them, an American lawyer, defense counsel Peter
15 Robinson, he even sent me a letter to thank the
16 Prosecutor General for all the support given to him
17 when he was in a mission in Rwanda. That's why I was
18 saying just to laugh that Erlinder is a provocateur. I
19 mean, he's --

20 MR. SCHEFFER: A provocateur. Yeah.

21 MR. DIENG: Yes. But really I should say in
22 that case, I can understand also the emotion of the
23 Rwandan people. I mean, did not know until later
24 that he, of course, put this case in Oklahoma.

25 MR. SCHEFFER: You know, my guess is, I'm

1 sure, certainly in Kigali in President Kagame's
2 circle, it's that Oklahoma lawsuit that would have
3 ticked me off, and not necessarily, "Oh, it's just
4 another person supporting my opposition candidate,"
5 but I'm just speaking, of course, off the record.

6 Let's -- let's open it up for a few
7 questions before we get back to the International
8 Criminal Court.

9 Professor Armand?

10 PROFESSOR ARMAND: I was just going to comment
11 on this brouhaha last summer that here in the United
12 States, people really can say pretty much anything
13 about anybody in government, and so we sometimes
14 listen to these disputes with American ears.

15 Our center, before your time here,
16 Professor Scheffer, was contacted by a German who was
17 testifying in a court case in Germany, and his
18 proposition was that a whole lot fewer Jews than are
19 commonly thought were killed in the Holocaust, and
20 that's a criminal offense in Germany. He said he
21 faced a prison sentence and asked if there was any
22 way that we could help him get out of it, which there
23 was not.

24 So if you're listen -- if you're
25 looking at this earlier situation from the eyes of

1 part of the world that is aware that Holocaust denial
2 puts you in prison, then all of a sudden, genocide
3 denial in Rwanda, I think, is appreciated a little
4 differently than it might have been in some of the
5 American press.

6 MR. SCHEFFER: Do we want -- let's have
7 another question or two, and then I want to move on
8 to the crime of aggression before the International
9 Criminal Court.

10 MR. DIENG: But remain --

11 MR. SCHEFFER: Oh, I'm sorry. Yes.

12 MR. DIENG: Remaining with the defense
13 counsel, there was
14 mention that the death of the defense, the lead
15 counsel of Yusuf Munyakazi, Professor Mwaikusa was --

16 MR. SCHEFFER: Yes, yes

17 MR. DIENG: -- work-related,
18 what I can say, as far as we know,
19 the case of the death of this Tanzanian professor is
20 in the hand of the police and the court, the people
21 who were suspected have been arrested, and there is
22 no indication that it has to do anything with his
23 work as a defense counsel at the ICTR.

24
25 MR. SCHEFFER:

1 Okay. If we don't have a random
2 question out there, I'd like to jump, if I could, to
3 the International Criminal Court and a very
4 significant development during the year 2010. 2010
5 was sort of a marker year for the International
6 Criminal Court in terms of its long-term future
7 subject matter jurisdiction. And by that, I mean the
8 jurisdictions of the ICC cover war crimes, crimes
9 against humanity, and genocide, as well as
10 aggression. But the crime of aggression, which has a
11 long back story in 1998, was not activated in the
12 Rome Statute. It was not operational. It would only
13 become operational with an amendment to the Rome
14 Statute that could not be achieved anytime earlier
15 than the first review conference of the statute, and
16 that couldn't occur anytime earlier than seven years
17 after the operating date of the court, which was July
18 1, 2002, so we were looking at 2009 as sort of the
19 marker year for the review conference, and hence for
20 operationalizing the crime of aggression, meaning
21 what is its definition and how jurisdictionally does
22 it get triggered by the court for purposes of
23 investigation and prosecution. All of that was left
24

1 unsaid in 1998, and the review conference at least
2 was going to be a first opportunity to take a look at
3 it and see if those issues could be resolved.

4 So the states' parties of the ICC met
5 in Kampala, Uganda in early June of 2010. There were
6 a lot of nonparty states there, including the United
7 States government, which had for the first time --
8 well, not the first time literally. It was sort of,
9 I guess, their second or third appearance at an ICC
10 Assembly of States' Party meetings in the Obama
11 Administration -- there had been none in the Bush
12 Administration -- and the U.S. actually brought a
13 very large delegation to Kampala. The legal advisor,
14 Harold Koh, and the Ambassador at Large for War Crimes issues,
15 Stephen Rapp coheaded the delegation, and they had
16 their Justice Department and their DOD lawyers, and
17 so it was a very substantial presence, and all of
18 it -- well, a lot of it was for the purpose of
19 grappling of how do we -- if we're going to
20 operationalize the crime of aggression, how is that
21 going to really happen, and how do -- particularly
22 from the U.S. delegation's perspectives, how do
23 certain U.S. entities remain protected in the context
24 of the crime of aggression.

25

1 So to cut it short, I happened to be
2 there, and I thought I would just show you some
3 slides of what happened while we were at -- this is
4 part of a larger slide show, but you only get a few
5 slides here.

6 (WHEREUPON, the first side was
7 shown.)

8 I think I can verbally tell you this,
9 so that you'll know what's going on. The delegates
10 rather remarkably arrived at a consensus on the crime
11 of aggression. That's remarkable. I think many of
12 us, including myself, thought that even at the end of
13 the process there would be a vote, because it would
14 just be too difficult to reach consensus; you would
15 have to have a vote. And yet in the final hours of
16 Kampala, a consensus was reached by really two
17 brilliant negotiators, Prince Zeid Hussein of Jordan,
18 and Ambassador Wenaweser of Liechtenstein, both of
19 whom have had long leadership positions in the
20 Assembly of States parties and in the Rome process
21 before that.

22 In any event, they brought this
23 together, and I'm going to show you just a little,
24 tiny window into this process, because it was very,
25

1 very interesting.

2 What is the crime of aggression?

3 Well, this is what was agreed upon: "Committed by
4 leaders who plan or execute an act of aggression that
5 constitutes by its character, gravity, and scale, a
6 manifest violation of the Charter of the United
7 Nations. So we're into big -- this is gravity time,
8 magnitude time, okay, and leadership. It's a
9 leadership crime. Leadership, gravity. Okay.
10 Interesting.

11 Now, the problem is: What does it
12 mean to plan or execute an act of aggression? Well,
13 that is also defined: "An act of aggression is the
14 use of armed force against the State or any other
15 matter inconsistent with a 1974 U.N. General Assembly
16 resolution defining aggression," but, in that case,
17 between states, for state responsibility purposes,
18 not individual criminal responsibility purposes.

19 So you have a definition of a crime of
20 aggression that doesn't quite get you there in terms
21 of understanding how to first determine, well, what
22 sort of acts of aggression fall neatly into a crime
23 of aggression that has to have certain
24 characteristics to it; gravity, character, scale,
25

which were not really contemplated by General Assembly back in 1974, but that's a long issue we're not going to get to.

Could we go to the next slide, please.

(WHEREUPON, the next slide was shown.)

The way the United States delegation introduced a treatment of this is they said, "Look, you know, we can't -- we're a nonparty state, we came into this late, we were out of the party throughout the Bush Administration. The definition for aggression was basically settled during the Bush Administration and then brought to Kampala, so we're too late in the door to actually change the wording of the definition, so the U.S. delegation actually put forward understandings which were agreed upon after some tinkering, negotiation, and, again, they're trying to inject a more -- a clearer understanding of magnitude, a good-faith effort to inject a magnitude test into an act of aggression. It's still flawed, but, nonetheless, it still tries to get at this issue --

The next slide.

(WHEREUPON, the next slide was

1 shown.)

2 -- of how do you understand what is
3 the character of an act of aggression once it
4 becomes -- enters this realm of a crime of
5 aggression. And here it is, the understanding:
6 "Paragraph (6), it is understood that aggression is
7 the most serious and dangerous form of the illegal
8 use of force, and that a determination whether an act
9 of aggression has been committed requires
10 consideration of all the circumstances of each
11 particular case, including the gravity of the acts
12 concerned and their consequences in accordance with
13 the Charter of the United Nations."

14 You can see what's happening there.
15 This is a guidance for the judges to try to get them
16 to elevate their understanding of the magnitude and
17 the seriousness of the act of aggression that has to
18 occur before the ICC's jurisdiction is actually
19 triggered.

20 "It's understood that in establishing
21 whether an act of aggression constitutes a manifest
22 violation of the Charter of the U.N., the three
23 components of character, gravity, and scale must be
24 sufficient to justify a manifest determination. No

25

1 one component can be significant enough to satisfy
2 the manifest standard by itself."

3 So this understanding is attempting to
4 emphasize you've got to get all three of those way up
5 on that high level in order to trigger this. Now,
6 the judges are not bound to follow these
7 understandings --

8 Next slide. But -- yeah. That's it.
9 Yeah.

10 But at least it's an attempt to
11 provide some guidance. And finally I'm just going
12 to -- I'm not going to spend more time on this.
13 That's the definitional problem or issue for
14 aggression. But it was settled. There was a
15 consensus on aggression.

16 The next one is initiating
17 jurisdiction over aggression, how do we actually get
18 this crime started within the court? And you have
19 three possibilities: The Security Council can refer
20 a situation of aggression, and that's the simplest
21 route. A Chapter 7 resolution by the Security
22 Council, and we're in business; we've got aggression
23 moving forward before the court. That's going to be
24 tough, though, to get all five permanent members to
25

1 agree on submitting an aggression issue to the court,
2 but it is possible.

3 The more complicated one is the one up
4 on the screen, where either a state party or
5 prosecutor refers the crime of aggression, and I'm
6 not going to read through all of this for purposes of
7 time, but it's -- it's a complicated enough formula
8 that has various checks and break points in it that
9 bring the Security Council back into the equation at
10 various steps at the procedure, such that that
11 complexity of how you actually trigger the court's
12 jurisdiction over the crime of aggression, we're all
13 going to have to learn how to do this.

14 Nothing is going to happen before the
15 year 2017, and before the year 2017, at least 30
16 state parties have to ratify this amendment, the Rome
17 Statute. So once those 30 state parties to have done
18 so, then assuming that has happened by the year 2017,
19 the assembly's state parties will come together again
20 and vote again to reconfirm what they did in Kampala,
21 so another checkpoint in a very complicated process
22 to bring aggression on board.

23 And yet I think the -- I'll just
24 finish by saying it was a very significant
25

1 achievement. We got aggression, we got consensus
2 among all of the state parties that were present in
3 Kampala -- and most of them were -- input from many
4 nonstate parties, including the United States, to
5 establish a definition for aggression and a
6 jurisdictional pathway to actually launch
7 investigations of aggression when referred by a state
8 party to the court or by the prosecutor himself or
9 herself, and that was deemed very unlikely years ago
10 when we all thought the only way you could get this
11 started would be a Security Council referral. This
12 was the breakpoint. We got the state party and the
13 prosecutor to actually be part of the game, and that
14 can be very controversial, but there's some checks
15 and balances that emerged in the process.

16 I've skipped over a thousand details,
17 but now I want to go to Mr. Whiting. You -- I -- you
18 know, I have to imagine that within the ICC right
19 now, you have a 2017 mark date on this, so it's not
20 as if everyone is rushing around in a panic on the
21 crime of aggression.

22 But what is happening within the ICC
23 to start to prepare for the day of aggression
24 investigations and prosecutions?

25

1 MR. WHITING: Well, it sort of is far off in
2 the future, but it -- it's not -- it doesn't feel, at
3 least at the moment, urgent and imminent, and, of
4 course, it has to be confirmed.

5 But I -- I think it raises a number of
6 interesting and challenging questions; first of all,
7 how will we go about investigating that crime? And
8 the one thing that I'm always struck by when we
9 investigate crimes -- and I think this is probably
10 true in the experience at the other tribunals -- when
11 we investigate the war crimes, crimes against
12 humanity, and genocide, oftentimes witnesses,
13 particularly high-level witnesses, want to talk about
14 how the war started and whose fault it was, and that
15 is often a feature of trials.

16 Trials, there's -- you know, we talk
17 about sort of trial management and why these trials
18 take so long. That issue ends up inserting itself
19 again and again in the trial, often brought in by --
20 by the defendants. So sometimes the prosecution is
21 responsible for bringing in that larger context.
22 Well, now -- and what we always say is, "That's not
23 the issue, that's not the issue; we're not -- it
24 doesn't matter who started it or whose fault it was,

25

1 we're looking at the actual crimes."

2 Well, now, that will be the issue, and
3 it will be sort of interesting to, you know, sort of
4 engage that debate in the investigation. And the
5 second sort of related point is how is this crime --
6 how is the investigation and prosecution of this
7 crime going to affect the institution and the
8 establishment and legitimacy of the institution.

9 I was struck by, you know, Professor
10 Bassiouni at the -- at lunch when he was talking
11 about in his view, it was a mistake to charge Bashir.
12 He said, "You know, why politicize it?" Well, guess
13 what? You know, going out and doing the crime of
14 aggression, that arguably will politicize it. I
15 mean, if charging Bashir has that affect, imagine
16 what trying to prosecute individuals for illegal --
17 you know, for aggression will do. And, of course,
18 this was -- the United States took the position --
19 Harold Koh gave speeches about how he believed that
20 the institution wasn't established enough --

21 MR. SCHEFFER: Right.

22 MR. WHITING: -- strong enough to do these
23 cases, and it raises -- you know, it raises
24 interesting questions in this regard. What kinds of
25

1 cases will come to the ICC? How will they do it?

2 MR. SCHEFFER: The U.S. delegation entered
3 Kampala with a setup for months prior, trying to make
4 the point that it was premature still to negotiate
5 aggression operationally into the statute, and then
6 had to adjust once they were in Kampala, and the
7 understanding is part of that adjustment, and, of
8 course, they don't have a vote at the end, so they're
9 not part of the consensus, but the argument was very
10 consistent with what Mr. Whiting described, there's
11 no way that you can truly enter the realm of
12 aggression as a crime unless you deal with a lot of
13 political factors in your calculation,

14 MR. WHITING: Right. Now, I suppose the hope
15 is that the result of this very complicated mechanism
16 for getting cases to the court will be that only
17 cases where there is some consensus, where there's
18 some international support for the case itself, will
19 actually reach the court, and, therefore, if the
20 court engages one of these crimes of aggression,
21 there will be a lot of countries backing it and a lot
22 of support for the activity. That's sort of how I
23 read this -- some hope into this complicated thing.

24 MR. SCHEFFER: Right. Do we have any other
25

1 comments from -- of other experience--

2 Oh, yes, Professor Oosterveld. I
3 wanted to get to you on this, of course. Yes.

4 MS. OOSTERVELD: That's okay.

5 MR. SCHEFFER: Yes.

6 MS. OOSTERVELD: And I must preface this by
7 saying I served on the Canadian delegation to the
8 Kampala negotiations and got to see this from the
9 inside --

10 MR. SCHEFFER: Right.

11 MS. OOSTERVELD: -- but anything I say is said
12 in my personal capacity.

13 MR. SCHEFFER: Right.

14 MS. OOSTERVELD: With that said, I think that
15 the -- not only will the internally, within the ICC,
16 people have to educate themselves on what this means,
17 because it's incredibly complex. You jumped over --

18 MR. SCHEFFER: Oh, everything.

19 MS. OOSTERVELD: -- areas a bit, but you can
20 have 20 more slides on it. The Assembly of States
21 Parties, so the states that have ratified the ICC
22 statute will have to spend the next number of years
23 really looking closely to see if this is workable,
24 workable for the court, and making a decision in

25

1 2017.

2 There were a wide variety of countries
3 in Kampala, those who really wanted the crime of
4 aggression in and thought it was relatively
5 straightforward, all the way to countries that were
6 really worried about including the crime of
7 aggression because of the potential politicization of
8 it. They did get brought along, but because of the
9 complexity of the negotiated solution --

10 MR. SCHEFFER: Um-hum.

11 MS. OOSTERVELD: -- they all will have to
12 study it. Our colleague, our academic colleague,
13 William Schabas, said, "Hey, this is a make-work
14 project for academics for the next eight years."

15 MR. SCHEFFER: Yeah. I was sitting next to
16 him when he said that, and I had to start laughing
17 because --

18 MS. OOSTERVELD: And it's true in some
19 respects.

20 MR. SCHEFFER: Our colleague, Mr. Schabas, who
21 has been in your seat before four years ago, he was a
22 little thrilled at one moment. He -- you know, he
23 said, "Gosh, this is -- this could give us a lot of
24 work now for -- as academics, for many years to
25

1 come." Okay.

2 MR. DIENG: I think really it was a great
3 achievement. I think what happened in Kampala was,
4 in my view, really something symbolic. I think the
5 adoption of this article was purely symbolic. One
6 could not leave Kampala without something. I mean,
7 this review conference at the end, what did it
8 produce? I mean, one could have certainly not have
9 that review conference because the real problems, you
10 know, and that's where I think I agree with Cherif
11 Bassiouni, there is a need maybe to
12 conduct an assessment of the functioning of the ICC.

13 I do take an example, the right to
14 visit has been an issue, you know, and at some stage
15 even our detainees were asking to be granted that
16 type of right to visit, while I'm still being
17 concerned about the victims, nothing being given to
18 the victims, no?

19 So -- and regarding this crime of
20 aggression, as was said during the lunchtime, for
21 many years were working on it, but we were
22 pragmatic. What about having this crime of
23 aggression when you still at that time, have these
24 superpowers, the United States, the Soviet Union.

25

1 But even though the Soviet Union is no
2 longer there, you still have Russia on one side.

3 Just as an example, the other day, about
4 Cote d'Ivoire, there was an issue which should not
5 have been even a debate, to deploy 2000 peacekeepers,
6 but the Russians didn't want. They -- they were
7 opposing at the beginning.

8 So to say that it was good, we
9 achieved something in -- in Kampala with this
10 configuration, seven years later we will review it,
11 and I'm not sure that at the time of the review you
12 will have the same dynamics, because things may
13 change once -- I'm not pessimist, but I think
14 depending how the world is going to evolve. That's
15 all I wanted to say.

16 MR. SCHEFFER: I -- I think very appropriate.
17 I want to come back now, if I may -- I asked special
18 permission of our representatives from the Special
19 Court for Sierra Leone and the Yugoslav Tribunal if I
20 could focus on a couple of other courts in the final
21 moments, and they have graciously allowed me to do
22 so.

23 We come back to Mr. Smith, because
24 from the Extraordinary Chambers in the Courts of
25

1 Cambodia, we had a very serious problem that
2 continues to linger with the Cambodian Tribunal, a
3 problem by, I'd say, in terms of this is a -- these
4 are difficult moments for the tribunal with respect
5 to its relationship with the Cambodian government and
6 how that relationship is being handled by the judges,
7 by the prosecutor, by defense counsel.

8 And what I have in mind here,
9 Mr. Smith, Trial Number 2, there are serious charges
10 of political interference by defense counsel for the
11 four -- I think it's all four, right, have raised
12 this issue of political interference by the --
13 allegedly by the Cambodian government -- depriving
14 the four defendants in Trial Number 2 access to six
15 witnesses who were on the -- I think all six were on
16 the government payroll, or at least were or still
17 are, and they claimed that those six witnesses are
18 critical possibly for purposes of exculpa --
19 exculpatory evidence before the court.

20 Can you walk us through this problem?
21 We had several moments with the courts on this. We
22 had the coinvestigating judges looking at it
23 throughout the early part of 2010, and then we had
24 the Pretrial Chamber weigh in on September 9th, 2010,
25

1 with respect to whether or not the charge of
2 political interference, in fact, would short-circuit
3 Trial Number 2 and bring it to a grinding halt. And
4 that was the dilemma.

5 MR. SMITH: That's right. I mean, the ECCC
6 started in 2006, and the reason the U.N. are involved
7 in the Cambodian court is very much on the basis that
8 the judiciary was viewed to be a weak judiciary in
9 terms of its development and have its separation from
10 the executive and the judiciary, there was a lot of
11 interaction previous.

12 And so the U.N. had a concern about if
13 the Cambodian government judiciary, which will run
14 the trials by themselves, then there may well be
15 political interference, and that's the reason why the
16 U.N. are involved in the court.

17 So this issue is not a new issue.
18 It's an issue that everyone involved in the
19 establishment of the court was aware of. So it's
20 obviously in the statute. It stated that no -- the
21 prosecutor, the judges, will take no instruction from
22 either the Cambodian government or be it any other
23 foreign governments.

24 And as a result of that, well, this
25

1 incident arose when the defense asked for six
2 witnesses. These witnesses had evidence that was
3 placed on the case file, and that evidence was
4 inculpatory and exculpatory of -- of the accused.

5 Because of statements that were made
6 by the government, stating that high-level government
7 representatives should not be summoned to the court,
8 after the summonses were sent, these high-level
9 representatives didn't turn up for -- for interview.

10 The defense then requested the
11 Pretrial Chamber to conduct -- or the investigative
12 judge in the Pretrial Chamber to conduct an
13 investigation into whether interference had occurred,
14 which would be in breach of -- a breach of the
15 tribunal rules.

16 And the Pretrial Chamber ultimately
17 heard the issue and said the statements from some of
18 the high-level Cambodian government representatives,
19 although they said that they shouldn't attend the
20 court, wasn't enough to say the government had
21 interfered with the process.

22 Now, the -- the two international
23 judges said, "Look, based on the facts, it looks as
24 though that, in fact, has happened. There has been
25

1 some interference in the process and an investigation
2 should be carried out," but that was the minority
3 decision and that was stated by the two international
4 judges.

5 So the motion was dismissed by the
6 defense, and as we move into the trial -- that was
7 the judicial international phase -- it will be
8 important to see how this issue will be dealt with.
9 And certainly from the prosecution's perspective, if
10 we feel these witnesses will be central to or
11 significant in terms of providing exculpatory
12 evidence against the accused, we would have to
13 support the defense to request the Trial Chamber now,
14 because it's moved into that phase, to have those
15 witnesses called.

16 So it's -- you know, there's been
17 mixed statements coming out from the government,
18 other statements that said, "Well, they can't attend
19 in their official capacity, but if they want to
20 attend in their personal capacity, they can."

21 But these statements coming from a
22 government that is supporting a court and is
23 supporting the independence of the court is
24 contradictory and inconsistent with the spirit of the
25

1 statute. So it's a -- it's a concern for us, and
2 certainly it's something that can be remedied through
3 the trial. If the defense wants to call these
4 witnesses, we'll have to make an assessment to see
5 whether or not they would have significant impact on
6 the case, and we'd have to support them in that
7 regard. So --

8 MR. SCHEFFER: Can you extend your point also
9 to the issue of ultimately achieving approval from
10 the court for the investigations of the -- I mean, I
11 know that they're under investigation, but the
12 additional four or five unnamed persons of interest.

13 Could you explain what happened in the
14 year 2010 that advanced that issue, such that it
15 remains a very active issue for the court whether or
16 not there will be some additional indictees
17 ultimately of the court? Has there been alleged
18 interference by the government on that issue?

19 MR. SMITH: Not -- not real -- well, there
20 have been -- there have been statements by the prime
21 minister stating that really only five will be
22 investigated in this court, not the ten which the
23 prosecution put forward.

24 The prosecution had put forward an
25

1 extra five in the previous year, and the national
2 prosecutor disagreed with that, and so that
3 disagreement under the statute was taken to the
4 Pretrial Chamber, and the Cambodian judges basically
5 stated that the prosecution shouldn't proceed because
6 it would affect the country's stability.

7 The two international judges said,
8 "Look, it should proceed. We don't think that is a
9 relevant factor," and, as a result, because it didn't
10 receive a 4-1 vote, which was required to actually
11 stop the prosecutions for the very fear that the
12 legislators had foresaw that may happen, political
13 interference, the trial must push forward unless at
14 least one of the internationals agreed that the
15 investigation shouldn't go forward, and so that
16 investigation went forward to the investigative
17 judges. It's under investigation.

18 An interesting aspect arose in that in
19 the sense that both the national investigative judge
20 and the international investigative judge both signed
21 investigation letters, Rogatory Letters under the
22 civil system for these accused to be investigated,
23 and then once it hit the press about one or two days
24 later, the national judge withdrew his name off the
25

1 Rogatory letter and said, "Look, maybe now is not the
2 time. Let's -- let's look at it in again in sort of
3 six months' time."

4 The situation that we're at now is
5 that the investigations are being carried out by the
6 investigative judges. As far as how much -- and how
7 much interest there is within that office in terms of
8 the international side, it's really -- it's really
9 unclear.

10 However, there is no disagreement
11 being lodged by the national investigative judge to
12 stop the investigation, and that's -- I think that's
13 a significant factor in the sense that they are
14 proceeding.

15 But certainly statements, mixed
16 statements, coming from the prime minister that, on
17 the one hand, this court should only be dealing with
18 five because if you prosecute any more, you'll create
19 instability, and then a couple of days later, saying,
20 "Well, you know, the court is a truly independent
21 court; I won't get involved in the court affairs."
22 It sends mixed signals, and that's not the best
23 context to work in. You know, obviously we want to
24 work in a context where the government is fully
25

1 behind the independence of the court. You know, the
2 same goes for international governments in terms of
3 not taking instructions.

4 So that's the stage we're at, where
5 the investigations are continuing, and we will find
6 out what the results of that investigation will be
7 sometime this year, I would assume.

8 MR. SCHEFFER: Is there any impression -- and
9 if you can comment on this, perhaps Professor
10 Oosterveld would be the better individual to answer
11 this question, the back story on this political
12 interference, particularly with regard to the six
13 government witnesses, is this a classic -- and,
14 Mr. Dixon, you're welcome, too -- is this a classic
15 defense counsel move to simply delay and obstruct
16 perhaps by a year or so the trial in order to resolve
17 an issue which ultimately would actually show in what
18 way could these six government witnesses possibly be
19 exculpatory when they were certainly subordinate to
20 these particular defendants during the Pol Pot
21 regime, as if the these top-level officials would
22 answer to these subordinate officials? It's a little
23 confusing what could possibly be exculpatory. I
24 direct that to Professor Oosterveld and perhaps
25

1 Mr. Dixon. Any -- any thought on that? No?

2 MS. OOSTERVELD: I think you put it very
3 well --

4 MR. SCHEFFER: Okay.

5 MS. OOSTERVELD: -- so I don't.

6 But do you?

7 MR. SCHEFFER: Mr. Dixon?

8 MR. DIXON: Yes. I'll make a general point
9 because I don't know all the details of this --

10 MR. SCHEFFER: Yeah.

11 MR. DIXON: -- particular application, but
12 it's something that arose early on when we were
13 watching the Steve Sackur --

14 MR. SCHEFFER: Yeah.

15 MR. DIXON: -- interview as well. I think as
16 defense counsel, wouldn't you take the point that
17 there is a fundamental breach somewhere that the
18 trial is unfair or that somehow there's government
19 interference that's making it impossible to have a
20 fair trial, you've got to be pretty sure that you've
21 got the points to back that up.

22 And it's something that I said right
23 at the beginning of today: If you make that kind of
24 allegation, that the whole thing is unfair and you

25

1 can't back it up, I think you just lose all the
2 credibility that you could possibly have with the
3 court, and it's one thing you have as defense
4 counsel. You have nothing else. You have your
5 reputation and credibility. When judges don't think
6 they can trust you because you're making arguments
7 that might not be actually back-upable --

8 MR. DIXON: -- you immediately put your client
9 in jeopardy. It's not in their interest to make bad
10 arguments. Having said that, sometimes you're just
11 instructed to do it, and you've got to decide as
12 defense counsel whether you're going to make the
13 argument.

14 But even then, there are ways of
15 signaling to those around that -- that you're
16 instructed to make this argument, as opposed to, you
17 know, if -- if you're going to stick your neck out
18 and say the whole thing is upside down and being
19 interfered with, you -- you need the evidence to back
20 it up.

21 MR. SCHEFFER: It's -- it's --

22 MR. DIXON: And I can see your point that it's
23 not -- it doesn't seem as though it's crystallized to
24

1 that extent, because if -- if it is accurate, I mean,
2 it can't be a knockout blow, but it needs to be -- it
3 need to be substantiated. That's --

4 MR. SCHEFFER: It re -- it --

5 MR. DIXON: -- one way to refute these
6 allegations.

7 MR. SCHEFFER: It reminds me of acting on
8 instructions by your government as a diplomat.

9 MR. DIXON: Yes.

10 MR. SCHEFFER: "I'm acting on instructions
11 only." Yeah.

12 (WHEREUPON, there was laughter.)

13 Sometimes you just have to say that
14 and admit to it. We have reached 5:00 o'clock, but I
15 wanted to -- any questions that anyone would like to
16 raise? We can certainly stay at this for another
17 five or ten minutes.

18 Yes, Ronit?

19 MS. ARIE: I have one, and it has to do with
20 the involvement of civil parties, because the
21 Cambodian Tribunal is the first one to have its own
22 civil parties that actually came out with a judgment
23 regarding reparations and their involvement, and the
24 result was really underwhelming, to say -- to say it

25

1 diplomatically.

2 The court had come under some
3 criticism for not being creative enough in coming up
4 with additional ways to find reparations for the
5 civil parties that it did recognize. And the ICC
6 has, in some ways, sort of a similar in --
7 involvement of civil parties in its future -- in its
8 future -- in the cases that are -- are going to kind
9 of come before it.

10 So my question is: What are your
11 thoughts on how the court treated it in Case Number
12 2, what the implications are for Case Number -- oh,
13 it's Case --

14 MR. SCHEFFER: It's 1.

15 MS. ARIE: -- Number 1. Sorry. What the
16 implications are for Case Number 2 and how this
17 jurisprudence that is sort of beginning might --
18 might end up being much more limited or much -- kind
19 of -- you know, how -- how do we get it to where the
20 original intent of the -- those who wrote the statute
21 and wrote in the inclusion of civil parties, how do
22 we get the jurisprudence to match up with that
23 intent, because it seems to -- there seems to be a
24 little bit of a disparity there now.

25

1 MR. SMITH: It -- it's good you raise that
2 question, because to talk about the Cambodian court
3 and -- and not talk about civil parties, it's -- you
4 know, it's unheard of to -- to get through a
5 discussion.

6 So, I mean, just -- just for -- for
7 people's knowledge, the Cambodian court is based on
8 the civil law system. And -- and based on that fact,
9 there's not only a prosecution or -- and the accuser
10 are party to the -- the proceedings, so are -- so are
11 victims, if they can prove that they were -- suffered
12 some harm as a result of accused actions in the
13 indictment.

14 And so it was very important that the
15 Cambodian court had a -- had a model that was similar
16 to the actual Cambodian system itself, otherwise,
17 particularly the legacy of the court in terms of the
18 jurisprudence produced, wouldn't have a beneficial
19 effect for the -- for the regular courts in Cambodia.
20 So that was very important, that it had that sort of
21 system in there.

22 But the rules had to be modified a
23 bit, and the rules had to be modified because there
24 was difficulty with funding, and there wasn't --
25

1 there wasn't really enough money to provide financial
2 reparations, and, as a result of that, in the rules
3 it states that basically only sort of moral
4 collective reparations can be obtained for the
5 victims, which, is, you know, I suppose, compared to
6 your regular civil party system, there's the --
7 there's the letdown at the beginning.

8 You're not going to get cash for --
9 for what happened, and so there's nothing really much
10 that the court can do about that, because there just
11 wasn't enough funding to support that.

12 However, having said that, you know,
13 speaking to Youk Chhang, he's the director of the
14 Documentation Center of Cambodia, very effective in
15 actually sort of bringing sort of reconciliation to
16 Cambodian outreach and explaining to the victims what
17 has happened.

18 When he talks about victims, he says
19 the main thing they want is not so much cash -- this
20 is in the Cambodia situation -- but they want
21 recognition. They want to have their voice heard in
22 the courtroom and they want to be remembered, they
23 want to be respected because that didn't happen
24 obviously 30 years earlier, and there wasn't much
25

1 sort of a -- of an environment to have that sort of
2 happening now.

3 So I think the court Case File 1 was
4 successful, and the civil parties had a voice, and
5 that was heard. They asked for sort of reparation
6 such as -- I think about some civil party, sort of
7 people over here, the reparation was for monuments
8 and stupas, buildings that would recognize the dead,
9 and there was a long list of things.

10 And the court basically said, "Look,
11 we can't -- we can't sort of order that because we
12 can't enforce it. There's no enforcement mechanism
13 to -- to -- and there's no volun -- there's no fund
14 to be able to fund this." So in the end, all the
15 civil parties got was, you know, their -- their names
16 in the judgment.

17 And -- and so I think you're right in
18 terms of sort of they weren't perhaps as creative as
19 they could have been, and they were very restrictive.
20 They said, "Because we couldn't enforce a judgment, a
21 monument or something against the government, get the
22 government to pay for it or a -- other organization
23 to pay for it, we can't give it."

24 But the civil parties have appealed
25

1 that, and perhaps they could say, "Look, we request
2 the Cambodian government or we request other
3 governments to provide funds to -- to build a
4 memorial maybe like in Washington for the -- the
5 Vietnam, you know, veterans," and they could have
6 been sort of more creative in that way and encouraged
7 it.

8 I noticed in your notes, you had the
9 Deputy Prime Minister Sarkheng said it was very
10 disappointing that there was -- there wasn't more of
11 a reparation given. But it's a bit ironic really
12 because the money wasn't coming in from the Cambodian
13 government nor other governments anyway.

14 So they could have been perhaps, you
15 know, a bit more creative, understanding the -- sort
16 of the -- the importance of this court and where it
17 is and how it connects with victims, so I'm sure that
18 this argument we've put towards the Supreme Court,
19 the Appeals Chamber, in the appeal.

20 So it's -- I mean, in terms of the --
21 I think the ICC, they do have a voluntary fund, and
22 so that is quite a big distinction. But they
23 certainly played, the civil parties played, a very,
24 very big part in Case File 1.

25

1 In Case File 2, the -- the new
2 issue -- and I'm not saying the problem, but the
3 challenge that everyone is dealing with -- is that
4 because there were so many civil party
5 representatives; there were eight in Case File 1, and
6 now in Case File 2, there's nearly 3,000 civil
7 parties, and perhaps everyone could have a lawyer,
8 and just imagine 3,000 lawyers questioning a witness.

9 I mean, in Case File 1, we had up to
10 27 people, judges, prosecutors, civil parties, and
11 defense, questioning a witness. That is not
12 conducive to ascertaining the truth. So what they've
13 done is they've got one lead colawyer that will
14 represent all the interests of the group. That's an
15 issue: How do they do that properly? And -- and
16 perhaps there's going to be a rotation where
17 different groups will represent on different parts of
18 the case.

19 So it will be interesting to see what
20 the Appeals Chamber says about the appeal by the
21 civil parties and asking for a more creative
22 approach, and certainly maybe -- politically there
23 may be some lobbying of governments to sort of try
24 and come forward and perhaps even amend the rules to
25

1 allow for voluntary contributions, so it's more
2 concrete.

3 MR. SCHEFFER: Any reactions from our
4 panelists to this issue as well? Some of you did not
5 have to address victims' reparations issues
6 obviously, but this might have been a "What if"
7 question. What if you had had to, you know.

8 Yes?

9 MR. DIENG: I can just say that both tribunal,
10 ICTY and ICTR, are very much frustrated on that
11 issue. I remember Judge Jorda, who was then the
12 president of the ICTY, and Judge Pillay, president of
13 the ICTR, wrote to the Security Council. Until
14 today, no response on that issue.

15 MR. SCHEFFER: Hmmm.

16 MR. DIENG: And it is my view that the
17 international community, which failed the Rwandan
18 people by not intervening in 1994, by letting almost
19 this tragedy to happen, fail also the victims, the
20 Rwandan victims, by not providing resources.

21 And I do remember July 2001, the first
22 time I met with the survivors' group. And at that
23 time, I requested that the UNAMIR equipment be
24 transferred to ICTR so that we can launch a wide

25

1 program, not only for Rwanda, but which will cover
2 also the Great Lake. No, we did not get it. At the
3 end, that equipment was transferred to Afghanistan.
4 And I do remember around that same period a pledging
5 meeting for Afghanistan, and still nothing for the
6 victims in Rwanda.

7 I came back again and said, "Look,
8 let's organize ourselves. Let's put a committee to
9 start raising funds by ourselves." But
10 unfortunately, the victims' group at that time,
11 including Ibuka, were of the view that it was the
12 duty of the United Nations to put it. I said, "No,
13 let's be pragmatic." They did not listen to me.

14 We waited many years, and, I should
15 say, that outreach should have -- which is part of
16 our mandate, is not funded through the regular budget. We have to
17 go and look
18 for voluntary contribution, and you know it's very
19 hard today with the donor fatigue to get support for
20 it.

21 I was saying to your student from
22 Spain how pleased I was to get even symbolically a
23 grant from Spain to help those victims in Rwanda,
24 witness victims who are HIV-infected, who are afraid not
25 continuing to get support through the clinic I built

1 in Kigali.

2 The international criminal justice
3 system is working definitely. There are a lot of
4 achievements, but my main frustration is the lack
5 of proper attention being put for the victim, and
6 that's where the ICC, learning the lesson from ICTR
7 -- ICTY put in place that mechanism. But that
8 mechanism also showed very quickly its limitations.

9 Take the Cambodia Tribunal based on
10 the civil law, they tried to introduce the statutes
11 of it, and we just heard from our good friend also
12 the limitation of that system. To say what shall we
13 do? Definitely. I mean, we are looking for the
14 future. How can we improve? We're talking about the
15 future, the ICC.

16 And that's where I say it when I was
17 talking about the need to make an assessment. I was
18 particularly thinking about the member state, the
19 state parties, the issue of cooperation, I think
20 which is critical, because unless the state parties
21 cooperate closely with the ICC, there will be no way
22 to advance the international justice system. And I
23 think some have been showing cooperation, but still

24

1 there are a lot of states which are dragging their
2 feet.

3 MR. SCHEFFER: Thank you very much.

4 Tom, did you want to have a
5 concluding --

6 MR. HANNIS: Yes. Thank --

7 MR. SCHEFFER: -- word?

8 MR. HANNIS: -- you. Can I say some --

9 MR. SCHEFFER: Yes. Mr. Hannis.

10 MR. HANNIS: The procedural matter about
11 victims, I think what Bill said is right. The
12 victims aren't there to get money. They want to be
13 recognized, they want to be heard, they want to tell
14 their story. They want to have, you know, their
15 loved ones they lost be mentioned, be recognized.

16 A procedural problem that developed
17 that I saw in The Hague from years ago during the
18 Milosevic trial, there was such a hurry to get the
19 case done as quickly as possible. There was a lot of
20 pressure on the prosecution; limit the number of
21 hours, limit the number of witnesses, find ways to
22 get their evidence in faster.

23 We have Rule 92, back then there was
24 Rule 89(c), where the prosecution had a written

25

1 statements of the witness, they brought the witness
2 in, they read a summary of what was in the written
3 statement and had the statement admitted, and then
4 the witness was turned over to cross-examine by
5 Mr. Milosevic.

6 The witness never got to say to the
7 judges in their own words what happened to them. And
8 I know from talking to some of them who came back
9 later to testify in other cases, talking about how --
10 how dissatisfying that was. And they'd say, "I don't
11 even know Milosevic. I saw him on TV. He's not the
12 one who killed my family." You know, it's the mayor
13 or the local police chief or the colonel.

14 But to have gone through what they
15 lived through and then come to court and not be able
16 to, at least in 15 minutes or half an hour, tell
17 their story. I think that was a tremendous
18 disservice to them. I don't know how you balance
19 that with the need to get these cases done as quickly
20 as possible, but I really think the victims need to
21 have that opportunity.

22 MR. SMITH: Dave, can I say just one thing?

23 MR. SCHEFFER: Yes. Uh-huh.

24 MR. SMITH: In the Duch trial, the two weeks
25

1 where the victims came and gave their statement, that
2 was the most powerful testimony that was had during
3 that period, and it really resonated through many
4 people in Cambodia, so the importance of recognizing
5 the victims -- and the idea that somehow another
6 500,000 or one million can't be put aside for a
7 monument of -- it's -- it's -- I mean, in my personal
8 opinion, it's absolutely crazy.

9 And -- and I hope that over the next
10 year or so that actually happens in terms of whatever
11 the outcome of Case File 2, but there is -- there is
12 something in the end not about paying these people
13 out, but actually by providing some significant
14 monument or whatever they would like so that that
15 recognition is -- is there forever, I mean, in
16 Cambodia.

17 MR. SCHEFFER: Very critical point. Well, we
18 have some questions. I don't want to overstrain the
19 stenographer. Can we go on for, let's say, five
20 minutes without you collapsing?

21 MS. REPORTER: That's fine.

22 MR. SCHEFFER: Yes? You're okay?

23 MS. REPORTER: Yes.

24 MR. SCHEFFER: You're still -- you're still
25

1 managing?

2 She's going to be the one who deserves
3 the applause.

4 We have a question right here from San
5 Francisco, I believe.

6 AUDIENCE MEMBER: Yeah.

7 MR. SCHEFFER: Okay.

8 AUDIENCE MEMBER: I'm from the Center for
9 Justice and Accountability. Just to go on with the
10 civil party system, I'm a civil party lawyer myself;
11 I know that our clients are really excited about this
12 form of participation with the court.

13 With that said, there's been a lot of
14 criticism by the defense about how this violates the
15 right to equality of arms. Do you have any opinion
16 about that? Thank you.

17 MR. DIXON: Well, I was never a fan of victim
18 participation, to be honest, but I've changed my view
19 entirely, and I found a lot of judges to be -- the
20 judges to be at ICC the same, providing that it's
21 properly controlled.

22 It actually assists enormously, and,
23 as a footnote, I think earlier on this provides
24 another check and balance in the system where the
25

1 judges only listened to the prosecution or the
2 defense, but now they can hear firsthand what they
3 experienced.

4 Now, it's a developing area how far
5 they are going to be prepared to go, but I think it
6 should go. You've got a good potential the judges
7 will find a way of taking it in. It needs to develop
8 through good counsel, good law and other things. Up
9 until now, it hasn't been that competitive, but
10 there's nothing set in stone yet, and I think it's
11 very, very encouraging that this has taken off and
12 it's generally being accepted.

13 I mean, that's the key, and, yes, I
14 agree, you can't have another prosecutor there. But,
15 I mean, sometimes you have victims who might be more
16 sympathetic to the -- to the defense than the
17 prosecution. I mean, it's possible that you can have
18 victims who say, "Look, you've got the wrong person
19 here." These are avenues that -- that can be -- that
20 can be utilized because of this new mechanism, so I
21 think it's a very positive development, but -- but it
22 really has to be used responsibly. Good victims'
23 counsel is the key in this.

24 MR. SCHEFFER: Mr. Whiting?

25

1 MR. WHITING: Yeah. I -- you know, I've had
2 exactly the same experience. I -- I, as a common law
3 lawyer, as a -- with a prosecutorial background, I
4 was very skeptical of victim participation. There's
5 a lot of talk about how it can compromise the -- the
6 rights of the defense in a case, which I -- which I
7 think is a real risk, but also from the prosecutor's
8 point of view.

9 The pros -- one thing you want as a
10 prosecutor is control over the proceedings, and
11 having -- having somebody else offering alternative
12 theories or other arguments is -- is potentially an
13 unwelcome development, but I also have been persuaded
14 that it is a -- a good thing.

15 And Professor Bassiouni at lunch
16 talked about how -- I think he said -- I don't know
17 if he was -- if he's actually counted or he was
18 exaggerating, but he said there's been a thousand
19 pages of litigation on this issue, and I think it has
20 been probably the most litigated issue at the ICC,
21 and all of these issues that Rod is talking about
22 have been worked out about when can the victims
23 participate --

24 MR. SCHEFFER: Um-hum.

25

1 MR. WHITING: -- under what circumstances,
2 what sort of interventions and so forth, and I think
3 they've worked out some pretty good rules for --
4 that -- that balance out the right of the victims to
5 participate in their role on the one hand, and the
6 ability of the proceedings to proceed expeditiously
7 and the parties to have control over their cases, on
8 the other hand.

9 And I agree, I think it provides a
10 good check on the prosecution, on the judges, on all
11 the parties. It's a great sort of additional check
12 on the system.

13 MR. SCHEFFER: Um-hum. Okay. Well, let's go
14 with perhaps one or two more questions, no more.

15 One right here (indicating). Yeah?

16 AUDIENCE MEMBER: Staying on the victims'
17 theme, to take a more pessimistic kind of view --

18 MS. REPORTER: I'm sorry. I can't hear.

19 MR. SCHEFFER: She can't hear. Speak into the
20 microphone. Yeah.

21 AUDIENCE MEMBER: Staying -- staying on the
22 victims' theme, to take a bit more of a pessimistic
23 view, having worked in the victims' office at the ICC
24 this past summer, do you think that perhaps trying to
25

1 merge a kind of truth and reconciliation commission
2 with a criminal proceeding is doing a disservice to
3 the victims, who, because of the ICC jurisprudence,
4 are only allowed to intervene in a very, very limited
5 way, because of technicalities, may not be allowed to
6 intervene at all, are they now being denied the
7 chance to tell their story, because we assume it's
8 being done at the ICC, when, if there had been two
9 separate commissions, we would know it was being done
10 in the truth and reconciliation commission, and then
11 there would also be a criminal proceeding?

12 MR. WHITING: Yeah. I -- I don't think -- I
13 don't think it ever aspired to be like a truth and
14 reconciliation commission, and if it did, then --
15 then I don't think it ever could be. And I think
16 that what you're -- you make a good point, that it's
17 going to be essential to manage expectations.

18 And that is a theme about these
19 tribunals in general, is that -- is managing
20 expectations about what they can do, what they can't
21 do is incredibly essential, and this is one aspect of
22 that, that -- that you're right, the -- the role of
23 the victims as it's been conceived is -- is a role
24 but fits into the case and is -- I think it's an
25

1 important one, I think it's significant, and the --
2 and the prosecutor is very committed to the right of
3 the victims to participate, but it's not -- it's not
4 unlimited, and it should never be portrayed as such,
5 and it shouldn't be thought to be that.

6 And there is probably with -- with
7 these conflicts, still space for alternative
8 mechanisms for victims, whether it's, you know,
9 individual suits or -- or commissions or truth and
10 reconciliation commissions, but I -- I would -- yeah,
11 I would be -- I would be unhappy if -- if this, the
12 role of the victims were -- were thought ever to
13 accomplish all of those larger aims, which I don't
14 think it ever -- it ever could.

15 MR. SCHEFFER: Okay. Last question. Wait for
16 the mic just to come to you, okay? There you go.

17 AUDIENCE MEMBER: My question referred to
18 Mr. Dieng. I would like to hear your input on the
19 Hissene Habre case and why the Senegalese government
20 is quite reluctant to handle the case. If they can,
21 why not, you know, give it to an international court?

22 MR. SCHEFFER: This is the Habre case, former
23 leader of Chad, who is now in Senegal, your country,
24 and there is a considerable delay in bringing him to
25

1 justice.

2 MR. DIENG: Well, I don't know if Senegal is
3 reluctant. I mean, Habre has been in Senegal since,
4 I think, 1992, and he seek asylum there when he fled
5 Chad, went to Cameroon, but the Cameroonian didn't
6 want to accommodate him, and finally Senegal said,
7 "You are welcome." And I do remember that President
8 Wade, when he was in the opposition himself, he was
9 supporting that Habre be brought to justice, and I do
10 know, having discussed on this issue with him about
11 three years ago when the European Union was prepared
12 to fund the project. The Minister of Justice came
13 with a huge estimate budget that President Wade
14 rejected. He said, "This is unbelievable. You
15 cannot ask all this money simply to try one man."
16 So they reviewed the budget, lowered it down, and two
17 months ago there was a meeting, a pledging meeting,
18 of the donors.

19 The West African Court of
20 Justice was seized by the defense counsel of Habre,
21 saying that Senegal had violated Habre's human rights
22 in the sense that law was passed
23

1 simply to accommodate the trial of Habre. The
2 West African Court was of the view that
3 there was a serious problem, that Senegal could not,
4 through it's own judicial system, try Habre, but
5 instead, they should have put in place a special
6 tribunal.

7 I don't have the
8 recent news because I am sure this matter was
9 discussed in Addis Ababa at the African Union Summit today
10 most probably, to see whether the African Union will set a
11 special African Tribunal to meet the concern
12 expressed by the West African Court, or if they say,
13 "Senegal, we have given to you a mandate to try
14 Habre, you have to proceed."

15 You may know also that the Belgium
16 government put a case before the International Court
17 of Justice, and the case is still pending. They
18 wanted either Senegal to try Habre or to extradite
19 Habre to Belgium, because one of the victims was of
20 Chadian origin, but he's now a Belgium national, so
21 the case is still pending.

22
23 I don't know
24 for the time being what will be the final decision,
25 but the United Nation Committee Against Torture also

1 has asked Senegal to try him. Senegal has put all
2 the legislation required, and that is that
3 legislation which has been challenged by the Ecowas
4 Court.

5 It's a complicated issue, but I do
6 hope that we will get through. I mean, we have been
7 working hard on this case, and particularly
8 with my brother Reed Brody since the time he was working
9 with me at the ICJ.

10 MR. SCHEFFER: Right.

11 MR. DIENG: I am still following the case. And
12 let's hope he will be tried in Senegal. If not, in
13 Belgium, but he can't escape, he can't escape.

14 MR. SCHEFFER: Well, thank you very much to
15 all of our panelists, thank you to the audience.
16 This brings to a close the Fourth Annual Atrocity
17 Crimes Litigation Year in Review Conference. I truly
18 am grateful to all of the efforts. You've put in a
19 hard day of work, and you've got -- I think a couple
20 of you have some planes to catch at some point here
21 this evening, so I want to let you go. But thank you
22 very much.

23 Remember, we're recording all of this.
24 There will be a video, a transcript, and then
25 ultimately the Northwestern Journal of International

1 Human Rights this summer will publish a special
2 edition. I want to thank those editors and students
3 also, and we'll have a lot of this recorded and
4 papers published out of this in that journal.

5 So thank you once again. We're way
6 over "brief" here. Thank you very much to our
7 stenographer, who we appreciate so much, and to our
8 film crew and everyone else who has helped generate
9 this conference today.

10 So I'm going to bring this to a close.
11 Thank you very much

12 (WHEREUPON, there was applause.)

13
14 (Which were all the proceedings
15 had in the above-entitled cause,
16 January 31st, 2011.)
17

1 STATE OF ILLINOIS)

) ss:

2 COUNTY OF C O O K)

3
4
5 I, CARMELLA T. FAGAN, a Certified
6 Shorthand Reporter and Registered Professional
7 Reporter doing business in the City of Riverside,
8 County of Cook, and State of Illinois, do hereby
9 certify that I reported in computerized shorthand the
10 foregoing proceedings of said conference as appears
11 from my stenographic notes so taken on the 31st day
12 of January, 2011.

13 I further certify that the foregoing
14 is a true and correct transcription of my shorthand
15 notes, and contains all of the proceedings had at
16 said conference.

17 In testimony whereof, I have hereunto
18 set my hand and affixed my notarial seal this _____
19 day of _____, 2011.

20
21 _____
22 Carmella T. Fagan, C.S.R., R.P.R.
23

 My notary expires: