

ATROCITY CRIMES LITIGATION YEAR-IN-REVIEW (2008)
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Northwestern University School of Law

OPENING REMARKS

David Scheffer, Moderator
Northwestern University School of Law

Ladies and Gentlemen: I am Professor David Scheffer, Director of the Center for International Human Rights here at Northwestern University School of Law. On behalf of the Center, I want to welcome you to the Second Annual Atrocity Crimes Litigation Year-in-Review Conference here at the law school. It is the only conference of its kind anywhere in the United States. We are grateful for the generous support of the John D. and Catherine T. MacArthur Foundation and the international law firm of Baker & McKenzie in making this day possible. Representatives of both of those entities are with us today and we are very grateful for that. I know that Dean David Van Zandt who is on the West Coast today would like to be here, but he is presiding over Northwestern Law's Securities Regulation Institute in California on matters that cry out for regular examination as we enter the second year of the recession. He extends his warmest regards, thanks and deep respect to all of our distinguished participants. I also want to thank Northwestern University President, Henry Bienen, for his personal assistance in helping to arrange this conference. Finally, thanks to the Northwestern Law students on the Journal for International Human Rights and members of the International Law Society and Amnesty International Chapter at the law school for all of their expert help.

We will endeavor today to review the jurisprudence during the calendar year of 2008 of the international and hybrid criminal tribunals, namely the International Criminal Court, the International Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the War Crimes Chamber in the State Court of Bosnia and Herzegovina. It is a very dynamic year for each of these courts, or it has been, so we have a very spirited discussion ahead of us. You have sitting before you some of the top judicial officers of the tribunals: Chief Prosecutor Hassan Jallow of the Rwanda Tribunal, Chief Prosecutor Stephen Rapp from the Special Court for Sierra Leone, International Co-Prosecutor Robert Petit of the Cambodia Tribunal, Deputy Prosecutor Norman Farrell of the Yugoslavia Tribunal, on the end there, the Prosecutor's Legal Advisor Rod Rastan of the International Criminal Court, on the other end, and Judge Elizabeth Fahey, recently of the War Crimes Chamber in Sarajevo. Deputy Prosecutor Fatou Bensouda of the ICC could not join us due to the late scheduling of the Lubanga trial before the Court this week, but Mr. Rastan is here, able to represent the Office of the Prosecutor. Likewise, Prosecutor Serge Brammertz of the Yugoslav Tribunal had too many last minute conflicts arise this week to join us, but

his very able Deputy Prosecutor Mr. Farrell is the most welcome substitute. Also joining us is ace Defence Counsel Gillian Higgins of the Yugoslav Tribunal and law professor Beth Van Schaack of the Santa Clara University School of Law. All of their biographies are before you in the brochure, so I will trust in your judgment to brief up on our participants as we go along.

We're very fortunate this morning to have Jonathan F. Fanton, the President of the John D. and Catherine T. MacArthur Foundation, deliver some introductory remarks. While you have his bio in front of you, I want to emphasize the following: President Fanton has had three career paths that brought him to the leadership of the MacArthur Foundation in 1999. The first path is one of those stellar academic careers that so many of us aspire to and rarely reach, with a doctorate in American history and teaching duties at Yale and then the University of Chicago. While at Yale, he was special assistant to President Kingman Brewster from 1970 to 1973. I interviewed President Brewster in 1972 for a feature article in the Harvard Crimson about women's access to a Yale education, and I do wonder whether young Jonathan Fanton was lurking somewhere in the background of the room the day I interviewed his boss. At both Yale and Chicago, Mr. Fanton took on highly demanding administrative positions along with his teaching. That second career path took a leap in 1982 when he assumed the presidency of the New School of Social Research in New York, a post he held until 1999. It's during that tenure that he developed his third career track, a long-standing leadership role in human rights issues. President Fanton's guiding hand in the evolution of Human Rights Watch helped propel that key non-governmental organization into the highest ranks of human rights monitors in the world. It was only logical that he then was selected as President of the MacArthur Foundation. During his ten year presidency at the MacArthur Foundation, Mr. Fanton has demonstrated unparalleled leadership in advancing the cause of international human rights and international justice through generous and well targeted funding towards the projects and programs that have made significant impact on global society. I honestly believe it is fair to say before you today that Jonathan Fanton and his foundation have been and remain the most significant philanthropic force in support of human rights and international justice in the world. Achieving that status takes courage, wisdom and a high sense of morality, so I am deeply honored to introduce President Jonathan Fanton to you today.

Jonathan Fanton, Introductory Remarks

President, The John D. and Catherine T. MacArthur Foundation

David, thank you for that very generous introduction. I also want to acknowledge Mary Page, my colleague who leads our international justice work at MacArthur. She is really co-responsible for all that we do.

We meet at a significant time for human rights and justice around the world. For decades, often in seemingly hopeless circumstances, courageous men and women stood up for accountability: the principle that human rights are basic and non-negotiable, and the need for a system to hold accountable those who commit unspeakable atrocities.

Today, we have a network of strong human rights organizations that spans the globe, an emerging system of international justice with the ICC as its cornerstone, regional courts and human rights commissions whose influence is growing, and a commitment from the United Nations to the Responsibility to Protect. The era of impunity is drawing to a close. Nowhere is this new era more evident than in the work of the international hybrid criminal tribunals. Consider these developments: senior members of the Khmer Rouge facing justice in Cambodia for the “killing fields,” with the first trial about to start, Jean-Pierre Bemba of Congo’s MLC arrested, Radovan Karadžić in custody, Charles Taylor on trial in The Hague, Theoneste Bagosora of Rwanda convicted, Omar al-Bashir threatened with prosecution. And it goes on.

The reach of international law is growing longer, its influence more pervasive, its jurisprudence settling into national systems and the common wisdom. Many of the people before you have been at the forefront of this effort: Hassan Jallow of the Rwandan tribunal, Stephen Rapp of the Special Court for Sierra Leone, Robert Petit of the Extraordinary Chambers in the Courts of Cambodia, Norman Farrell of the International Criminal Tribunal for the former Yugoslavia, and more. Here we have assembled in one place the pioneers, those present in the creation of this emerging system of international justice.

But the work of international justice involves also diplomats, advocates, philanthropies such as MacArthur, and of course, scholars, universities and law schools. Few are as distinguished as Northwestern, so I return the compliment that you’ve given us at MacArthur. The wide range of courses in international law, the pioneering JD/LLM degree of International Human Rights, and the Center for International Human Rights all put Northwestern at the forefront of international justice. Faculty members, such as Sandra Babcock litigating on the death penalty and the rights of the detained, Bridget Arimond pressing cases under the Alien Torts Claim Act, and Stephen Sawyer teaching international law in innovative ways, all stand out. And David Scheffer, who did so much to build the international and hybrid systems of the 1990’s, continues to have worldwide influence as he focuses research on the prosecution of atrocity crimes and associated jurisprudence. It’s really a great honor to be standing here in this room.

Well, MacArthur has played a role, indeed, and I want to say a little bit about that now. Since our first grant to Amnesty International in 1978, the Foundation has invested 300 million dollars in supporting 600 organizations in 90 countries around the world working to defend human rights and build a system of international justice. We have supported the global institutions, such as Human Rights Watch or INTERIGHTS, but also the small local groups, such as Tlachinollan in Mexico, Public Verdict in Moscow, and the Legal Defence and Assistance Project in Nigeria, organizations that work on the frontlines against discrimination, police abuse, repressed freedoms, such as lack of due process, and all the rest. Grantees such as Access to Justice in Nigeria, the Blacksoil Center for the Protection of Media Rights in Russia, and Pro Juarez center in Mexico prepare cases for regional courts, setting important precedents and winning compensation for victims. And at the center of this emerging global system is the ICC. I know that David Scheffer, who

signed the Rome Statute on behalf of the U.S. here, shares our view of the Court's importance and looks forward to the day, and let's hope it's a day in the near future, when America honors its commitments.

MacArthur helped bring NGO representatives from the Global South to Rome to participate in the drafting process of the ICC Treaty. Later we supported the Coalition for the International Criminal Court – a group of hundreds of NGO's around the world that provided critical support for the ratification of the treaty. We provided funds to the Court itself and to other groups to gather evidence helpful to the first cases. And we continue to underwrite organizations that encourage participation in the Court and raise awareness of its work, groups like the Ugandan Coalition for the ICC, Avocats Sans Frontières, and the International Center for Transitional Justice. We assisted in 2001 in funding the International Commission on Intervention and State Sovereignty that articulated the Responsibility to Protect, and we're now helping the International Crisis Group and others to promote understanding and support for R2P around the world.

To celebrate MacArthur's 30th anniversary, we established the MacArthur Award for International Justice. Last March, in New York, we honored Kofi Annan – a tribute to his role in establishing the ICC, but also for encouraging the Responsibility to Protect. He gave a stirring speech that night and it sharpened our resolve to build a system that moves the world from an era of impunity to the age of accountability. You all are pioneers of that new age, present for the creation of institutions and jurisprudence that are changing the landscape of accountability.

I read over David's memorandum modestly called "lines of inquiry" for this conference. I've learned a lot from it and I learned, among other things, the daunting legal, theoretical and intellectual challenges that you all have been facing. Building a fair and effective system without the safe guide of inherited structures and settled precedents, harmonizing disparate legal traditions and balancing them with international law, training personnel from the international systems, and all the rest. It's been a steep challenge, but you've done so well. So I would say the world is very fortunate that people like you are diligently lending your imagination, courage, commitment, confidence, and leadership in this critical moment. MacArthur is glad to join Baker & McKenzie in supporting this conference, which will give closer review to the body of law generated by the tribunals over the last year.

We've sponsored several conferences of this sort to help build coherence and cooperation within this developing system of international law. Let me mention just a few of them. In the last year, we've sponsored three conferences. At Wilton Park in the United Kingdom, jurists, human rights advocates, academics, government officials, and donors met to reflect on the performance of the international tribunals over the last fifteen years and lessons to be learned from them. A number of us were there together and that is where we first met. In Abuja, Nigeria, we convened representatives of regional courts and commissions, governments, civil society groups, and scholars to discuss the political context for effective justice, the role of strong national justice systems, how the tribunals and the ICC can build local capacity. And then we helped with a conference in Arusha,

organized by Prosecutor Jallow, that brought together prosecutors of the ad hoc tribunals, international prosecuting pluralities, and civil society, to ensure that there would be no gap in the struggle against impunity.

Now those of us who attended the Kofi Annan award in New York looked at an overflow of the power potential of international justice. It was just palpable in that room as I stood on the stage walls' exterior with Kofi, obviously applauding, awarding him. He said, "I can't believe this, I've never seen this room so full. I've never felt such energy." Coming out of that event—Luis Moreno O'Campo was there—we decided that we wanted take a more proactive step in trying to bring additional pieces of this together. At Luis's suggestion, MacArthur is now helping to organize a conference this fall to explore how the ICC, the human rights organs, regional courts and commissions, the ad hoc tribunals and civil society can work together. The Prosecutor will present his three-year strategic plan and others will be asked to share their forward plans as well. In preparation for that occasion, MacArthur has asked the International Center for Transitional Justice to gather representatives from the UN and the regional courts and commissions, and also ASEAN, which is trying to struggle with creating a regional plan, to get together and prepare for this conference, both to articulate their own forward plans but then to see how they can work together more clearly.

I am a big fan of the regional courts and commissions because I firmly believe that ordinary abuses such as discrimination, police torture, and infringement of free expression accumulate. They aggregate and they set the stage for the worst atrocities, so I think the regional courts and commissions could be seen as a sort of forward defense against genocide and other crimes against humanity.

So meetings like the ones I've just described and the one we are about to have help establish the common principles of a coherent international movement. They reaffirm successful strategies and best practices. And they also foster the personal and professional bonds that allow colleagues from different cultures and legal traditions to work effectively together.

Our respect for those who have labored to put principle into practice led us to give the second MacArthur Award for International Justice to Richard Goldstone. His meticulous work as Chief Prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and for Rwanda gave moral authority and legal credibility to those bodies, and helped speed, I think, the establishment of the ICC. In May, in The Hague, we will bestow that Award on Justice Goldstone and as we do, we will also honor all who have worked in the ad hoc tribunals. We'll put together a panel to discuss their achievements but also future questions that remain unresolved. You all are invited to come to that. Yesterday I learned that Justice Kennedy from the U.S. Supreme Court is going to come and address our gathering, and I think that the U.S. wants to be a part of this international system.

So as we think about the panel that we are going to have and the discussion you are going to have, there are questions - I know David has outlined a lot - but here are a few that I

would mention and then I'll close. I know that on everybody's mind is how can the arrest warrants by the ICC be reinforced? Mladić remains at large, Joseph Kony continues to commit atrocities in Uganda, Harun and Ali Kushayb are free in Sudan. How can pressure be maintained on states to fulfill their treaty obligations? The ICC conference held here in December 2007 discussed the concept of international marshals forced to enforce these arrest warrants. I think that is a really important idea worth pursuing.

The second question is how can the UN itself be made to play a more robust and constructive role? The Security Council is crucial in this regard. It needs to be less of a sounding board and more a source of considered but firm action. Proactivity and not reactivity. Establishing practical ways to facilitate evidence gathering and enforce arrest warrants would be a good point of departure.

The third question might be how best to phase down those tribunals that are reaching the end of their mandate. Is it better to declare victory and withdraw, or to seek further resources to pursue lesser offenders and help strengthen the local justice systems?

The conclusion taken from the meeting between Prosecutors that Hassan Jallow organized was very clear and I want to quote it. They said that "together they renew their commitment to actively collaborate with one another to ensure that there are no gaps in the struggle against impunity, that no safe havens remain for suspects of international crimes, and that any work left over from the mandates of the international tribunals is efficiently undertaken by National systems." The plan of action that followed that preamble was concrete and comprehensive, covering topics like investigation of international crimes in domestic statutes, establishment of a universal framework for extradition, a protocol of protection and support of victims after closure of the tribunals, a mechanism for helping national authorities picking up where the tribunals left off.

I do not favor a rigid adherence to deadlines for shutting down ad hoc tribunals and I believe resources should be available for helping develop successor processes within national systems.

Another question might be what shape domestic hybrid tribunals take, as nation states prepare to mount prosecutions using their own courts? I had the privilege of visiting the Extraordinary Chambers in Cambodia in November of last year and I learned a lot. What we've learned there and what we've learned from the Sarajevo War Crimes Chamber about the political, legal, and cultural challenges of conducting war crimes trials within a country's borders: how can we take those lessons and how might they be useful in Rwanda as international courts take up unfinished cases from the ICTR, or in Uganda as it considers trials for mid-level LRA suspects? These are questions that, I think, really demand our attention.

And finally, how can the U.S., which as David said, played a formative role in international justice over the years, how can we find a way to engage with the international justice system and help build and shape its future? I think we all can hope

that the new administration will see that the time is right for a more cooperative stance toward the ICC and even more support for the Inter-American human rights system.

All of these questions and all the many more that David has posed have no simple answers. Politics, resources, local cultures, and historical sensibilities will all have an influence on how the system evolves. But I believe we are on the cusp of a mosaic of courts and commissions that together send this powerful message: for those contemplating gross human rights abuses, there will be nowhere to hide. Conferences like this one will strengthen the architecture of international justice, make it more coherent, promote cooperation and tackle complicated issues like the relationship of peace and justice.

So as you deliberate and examine what has been accomplished this year, MacArthur joins you in affirming that people of good will, expressing that will through civil society and the legal system, can make a difference. Together, we can build a more just, equitable, and accountable world for all. So I wish you good luck and good discussion.

PANEL DISCUSSION

David Scheffer, Moderator

Northwestern University School of Law

Thank you very much, President Fanton. I too want to recognize Mary Page, who actually didn't know if she could be here today because she was on jury duty this week in Chicago or the Cook County court system and did her duty admirably. Actually reached a verdict, correct? For those of us who toil in these fields, the name Mary Page means you immediately perk up, you wake up, because Mary is on the front line every single day actually advancing the kind of support for human rights and international justice that President Fanton directs from the top office of MacArthur Foundation. We are extremely grateful for all that Mary has done as well. Also, I just want to recognize Bob Deignan, who represents Baker & McKenzie, who is our other major sponsor. So thank you for coming.

Alright folks, we have a lot to cover today. And the way I will handle this is... President Fanton has had the distinct honor of delivering the one and only set speech for this conference. All of the rest of this will be a moderated discussion, roundtable style, as you can see here. I will throw questions out and we'll get the discussion going. The purpose of this is to look at the calendar year 2008, decisions, judgments, and also occasionally progress of ongoing trial work in the tribunals during the year 2008. So we have a sort of temporal jurisdiction to this discussion that everyone is staying within those parameters, but we will also slip into January 2009 because we've had some significant developments in some of the courts in January 2009 that we will also address as we go along.

I'd like to start... and again the bios of everyone are in the brochure in front of you. I'm not going to go through all of that, but when first recognizing them I will certainly

remind you of where they're coming from. I'd like to start with our academic distinguished speaker for this conference and that's Professor Beth van Schaack of the Santa Clara University School of Law. And she is with us here. She's a prominent scholar in the field, and in fact my students use her casebook and I teach from her casebook. So I recognize the quality of her work very, very much.

Professor Van Schaack, would you describe 2008 as the year in which international criminal law evolved significantly in the tribunals' jurisprudence, or did international criminal law actually experience some muddled or less decipherable characteristics due to conflicting signals from the tribunals? Can you touch on that, obviously a global question, just to get us started here?

Professor Elizabeth Van Schaack, Panelist
Santa Clara University School of Law

I would love to. First let me just say that it's a real pleasure and an honor to be invited to this gathering. Thank you, David. It's great to be reunited with some old friends and to meet people who I've only been able to admire from afar. So it's really great to be here. I will next time not wear open-toe shoes to Chicago in February (laughs). It's California mentality. It takes away your common sense. But anyway, it's really great to be here, thank you.

What I've found looking at the jurisprudence this year was not so much a lot of breakthrough thinking. In fact, I think maybe the opposite is happening, what we're seeing is the rate of change and the rate of innovation actually slowing now. In the old days and some of the early days of this field, with the renaissance of international criminal law in the 1990s, there were huge leaps taken in some of those early cases, really having to cross vast areas of open territory. All we had to work with really was the before World War II jurisprudence, and all of that had to be updated for the modern era. What we're seeing now is, I think, much more micro-resolution of smaller problems, nuances in doctrine, filling in increasingly smaller gaps. The legal philosopher Ronald Dworkin would use a tri-metaphor to describe this process, whereby some of the early cases—the Kadic and the Akayesu cases—were the trunk of the ICL renaissance, and now we're perched on narrower and narrower branches as we address some of the still open questions in the doctrine.

That's not to say that there aren't some breakthrough moments, which we'll talk about over the course of the day today, but increasingly what we're seeing is the application of old law to novel and interesting new facts. It's a much more mature system of law now, and what that means is there are fewer opportunities for judges to innovate. In some of those earlier cases, what we saw really can only be described as judicial law-making, where there really was no stamped positive law that these judges could draw on and what they did was take a sort of teleological approach: what's best for the object and purpose of international criminal law. They were filling in those gaps themselves in sort of a common law way. And we're not really seeing that as much anymore. It's more of a – I

don't want to describe it as rot, but more of a classical judicial function applying existing law to new facts that come before it.

One area where I think we did see some innovation, on which I'm really looking forward to hearing from members of this group, is with respect to forms of participation. We're still grappling with the full reach and scope of some of the doctrines of say, joint criminal enterprise and superior responsibility, doctrines that are really essential to international criminal law, given notions of collective criminality, given that crimes often happen very far from the capitals in which they're being designed and the systems are being created. And so, finding ways to hold individuals in the center liable for atrocities that are happening at the periphery, I think we still have some work to do there and I think that's one area where we may have had some retrograde decisions. But at the same time I think you're seeing judges pulling back a little bit on some of the more expansive applications of some of these doctrines where we're getting farther and farther away from principles of individual criminal responsibility that are really at the base of any system of criminal law.

The other area where I think, though it's still in the early stages, we've got some indications of some of the challenges is with respect to victims' participation. I think 2008 and moving into 2009 is really going to be the year of the victim, where we have the Extraordinary Chambers and the ICC that are governed by very unique provisions that allow for great participatory rights for victims. And I think we're still working out the modalities of that. We have the decision of the ICC defining who constitutes a victim. We all have an intuitive sense of what that is, but we need a legal set of standards in order to decide who gets to come to the fore, who gets to present testimony, who gets to come forward as the constituted victim. Likewise in the ECCC, the court is grappling with how to determine who is going to be able to play that role with respect to this new system, the tripartite system that we're seeing developed in the more modern tribunals. So that's an area I think where we've had some significant innovation. But in terms of the system as a whole, we're not a new system, we are a maturing system and we're really seeing how that can be reflected in the roles that judges are taking.

David Scheffer, Moderator
Northwestern University School of Law

And if I may just extend this to one additional person, unless others would like to jump in too, Counsel Gillian Higgins, obviously from a defense perspective, how is your relationship with the trunk of the tree these days?

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

It's an interesting relationship, because I think in the year 2008 and leading up, as we now move on to the other branches, I'd like to echo really the words of Professor Van

Schaack concerning the maturing of the system, which has its own challenges for defense counsel. What we're seeing procedurally is the development as it moves – we've gone from the big mega trials, for example Milošević, where he was charged with sixty-six counts, and which in my view and experience became significantly unworkable once we had the joint enterprise indictments into one trial. What we see these days are smaller trials which are often criticized for not reflecting the entirety of the conflict, and whether or not that is the goal of these courts, which are criminal courts. I take issue with that; it's not a forum for every incident in the conflict to be showed, but rather for individuals to be tried fairly.

One of the things that we've also seen, if we look at Judge Robinson's report from the ICTY Security Council, is discussion of the completion strategy and his report as to the progress of the trials before the ICTY. We've seen procedural developments concerning the use of rules such as rule 73bis, which I think we may come on to later today, where judges can take a more active role in asking or ordering prosecution to limit the crime sites and the ways in which they present their case. We've also seen an increased use of judicial notice and the use of witness rules 92bis and 92ter, which I'm sure you will be familiar with, concerning the presentation of evidence in court of law, most of which goes in in the form of witness statements. What from the defense perspective we have to be careful about is that we still maintain the fairness and we give time for trials to take their course. A trial of ten years' war is going to take its course and I think even though the use of these rules helps with the efficiency of the trials, I have concerns because some of the rules necessitate extended cross-examination or very careful analysis of those facts which are being proposed for the court to take judicial notice of. So there are very much defense matters that are at the top of our agendas, even though procedurally we see the law developing at a pace at least to allow for efficiency, but we have to be the safeguards from the defense perspective as well.

Judge Elizabeth Fahey, Panelist

War Crimes Chamber of the State Court of Bosnia and Herzegovina

Can I jump in here for one second?

David Scheffer, Moderator

Northwestern University School of Law

Yes, and then we'll jump over here. Judge Fahey is a judge on the Massachusetts State Court who took a one year leave to serve as an international judge in the War Crimes Chamber of the State Court of Bosnia and Herzegovina during the latter part of 2007 and most of 2008. Judge?

Judge Elizabeth Fahey, Panelist

War Crimes Chamber of the State Court of Bosnia and Herzegovina

If I can second what Gill said, at least in Bosnia, sometimes as a Judge listening to the evidence I have the sense that what the Prosecution is trying to do is to create a historical record of what happened during the war. If it's already thirteen years since the war ended, some of these witnesses might not be alive in five or ten more years. And so I thought the Prosecution, instead of calling all of the witnesses that experienced whatever happened in a certain village, might be better off to put on its best witnesses, the ones who can make the record as to these accused the best and leave the historical record for another venue. That was my thought.

David Scheffer, Moderator

Northwestern University School of Law

And we've got three more. Let's start with Rwanda Tribunal Prosecutor Jallow.

Prosecutor Hassan Jallow, Panelist

International Criminal Tribunal for Rwanda

Thank you, David, for having us here. I'm here with my colleague Abdoulaye Seye who is a member of the team who has been working prosecuting the Bagosora case.

For us at the ICTR, we generally have been one of restatement of the certain principles of law in the application of our cases, subject of course to what is going to come out in the Bagosora judgment. So far we have only an oral summary of that decision. We are still waiting for the written judgment to be made available. I'm sure the explanation, the reasoning behind the conspiracy charge will prove to be very interesting to all parties. I can't say much, but generally it's been a restatement of law principles.

One new area where we've broken new ground is with regard to the rule 11bis cases, that is in relation to the transfer of cases to Rwanda for trial. It was the first time that matter was litigated at the ICTR tribunal. Out of a number of decisions, I think five decisions, some principles relating to the assessment of fair trial prospects in a national jurisdiction were adjudicated by the court. It's an unusual matter for the court. The court is essentially concerned with guilt and innocence of an accused person before it, but under 11bis it's called upon to determine whether a particular national jurisdiction has the will and the capacity to deliver fair trial for the accused person. You find a number of principles that are done for the trial chambers and by the appeals chamber relating to the criteria for determining whether fair trial prospects exist in Rwanda. We will be coming to this later, but I wanted to mention it, because it's really an area where we have broken new ground.

David Scheffer, Moderator
Northwestern University School of Law

Excellent. And Chief Prosecutor Stephen Rapp from the Special Court for Sierra Leone.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

I'd like to draw attention to one area in the substantive law where I think we may have sent a branch off the trunk of the tree, and that's the crimes against humanity, specifically the residual area of other inhumane acts. The ICC and all of the ad-hoc tribunals have this listing of crimes against humanity which arise out of customary law, and this final category of "other inhumane acts." Sometimes it's been used for certain kinds of violence, but in our court we had made the decision, my predecessor made the decision, to indict as another inhumane act the crime of forced marriage. There hadn't prior to that time been any expression of that crime in international literature. When we went to trial on that in the AFRC case, the first case where we had a judgment, our judges refused to, while convicting the accused of eleven other crimes, and said that what they had done was not another inhumane act. The judges said that there was sexual slavery already indicted as a crime against humanity, already indicted as an outrage against personal dignity, and this is nothing more than sexual slavery.

We had alleged that what occurred in Sierra Leone was more than sexual slavery, that women were conscripted. This phenomenon was common with hundreds, if not thousands, of women essentially being forced to take on the conjugal role, not just as a sexual slave but also as a servant for the soldier in an exclusive kind of relationship, that in fact, the women still feel they are tied to. It in fact stigmatized them and caused them problems as sort of long term victims that are foreign to this case, but that we see in other cases. The Trial Chamber refused to enter a conviction, we appealed that, and in February of this year our Appeals Chamber reversed and found that it was possible to have a crime such as this, because it was of equal gravity to other crimes listed in the group of crimes against humanity, it's considerably delineated in the ICC statute where it says crimes of equal gravity, and this is certainly more grave than say the crime of imprisonment. As a result, they found that we had indeed presented proof on the issue, but because the individuals had been convicted of so many other things, they declined to enter a conviction at the appeals level.

But now it's open to our Trial Chamber in the RUF case that we've indicted as well, and we're hoping that we'll have a verdict within the next two or three weeks to return a verdict for this crime. If this is followed I think it opens the possibility that other kinds of criminal conduct within the contextual elements of crimes against humanity, the widespread and systematic attack attacks against civilians, could be criminalized in the future by other courts and indeed under the similar language of the statute.

David Scheffer, Moderator
Northwestern University School of Law

Thank you, and we'll come back to that AFRC judgment because it is so fascinating - although brief, it's just an oral summary that we have available to read at this point.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

Really?

David Scheffer, Moderator
Northwestern University School of Law

Yes, off the web at least. It may be out there somewhere, but we have a fairly long oral summary of what was written in court that I want to get into a little bit later. Prosecutor Robert Petit of the Extraordinary Chambers in the Courts of Cambodia...

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

Thanks, David. I just wanted to pick up on something about a court of law not being the best instrument to tell history. But sometimes it's the only thing real, as for example in Cambodia. I totally agree that because of the nature of the process, which is to determine the guilt or innocence of someone, to have a black and white, beyond reasonable doubt decision, it's probably not a very useful process to establish a historical record which is a lot more complex and a lot more difficult to clarify.

However, I think it's part of the mandate of these courts – these are the hybrid courts, and I think it's part of their responsibility to try and reach it, because if we are to foster reconciliation, if we are supposed to help a country go beyond and rebuild from conflict, it has to be able to look at something and know that it's the truth about what happened. And we are supposed to be able to establish that. I agree that we have to strike a balance between our resources to achieve that mandate – that we have to strike a balance between that and telling the story – for example, in Rwanda. When I started there in 1996, there were multiple versions of what had happened. People believed what they wanted to. Now, I think, with the body of work and the facts that have been established by ICTR jurisprudence, I think you will always find deniers, but nobody in his right mind can deny what happened. And I think maybe in a generation or two, those findings will be a cornerstone of Rwanda rebuilding itself and moving beyond what happened. It might take a while, but I think it will be an essential part.

In Cambodia, a few months ago, this NGO did a documentary on young Cambodians – and the majority of the population in Cambodia is under thirty because of the events – where, in this documentary, a lot of people were interviewed about “Do you believe what happened? Do you believe your parents when they tell you what happened here?” and you had young people saying in front of their parents for the camera, “No, I don’t believe this. I don’t believe you when you tell me that Khmer killed Khmer for an ideological reason that doesn’t make any sense.” So you have a generation – a whole nation – that grew up not knowing and not believing what happened. Because of recent history and because of the upheavals of society, it hasn’t been taught and will only be a part of the national curriculum this year – the Khmer Rouge era – in Cambodia. There’s a strong part of the population, a certain part of the political apparatus, that would like to bury the past and not talk about it. And when even the victims or the survivors, those who want, talk to their children about what happened, a lot of them don’t believe it, because it doesn’t make sense for members of the same ethnic group to kill each other. So we are – short of a TRC – going to try to strike that balance between prosecuting for the right offenses in the right amount of time and with the right amount of money, and yet be able to leave behind a comprehensive record of what happened, who did it and why, and make that record accessible so that the country does move forward towards truth about what happened. Oftentimes, we are the best option.

David Scheffer, Moderator
Northwestern University School of Law

I might just throw in two points, Robert. One, I’ve always felt that the endless Kadic trial before the Yugoslav tribunal was attempting to establish that historical record so that it would not have to be necessarily repeated each and every time thereafter. And secondly, Prosecutor Jallow, doesn’t the Rwanda tribunal operate under judicial notice that genocide occurred and you don’t have to prove that every time you enter the courtroom?

Prosecutor Hassan Jallow, Panelist
International Criminal Tribunal for Rwanda

Yes, that came in the Karemera decision about two years ago, but until then in all the twenty-six cases we have, we had to re-establish evidence that genocide had occurred. What is an issue now is really the possible involvement of the particular accused person.

David Scheffer, Moderator
Northwestern University School of Law

Let me jump now a little more deeply into the Yugoslav Tribunal. Deputy Prosecutor Norman Farrell is with us on the end of this row and also Defense Counsel Gillian Higgins. And what I want to ask is – we have the arrest of Radovan Karadžić this last year of 2008, a very significant event for the Yugoslav tribunal. It’s very difficult to

imagine the Yugoslav tribunal following through with a completion strategy without having prosecuted these top suspects, Radovan Karadžić and one other individual who are still at large, being the only two left and Radovan Karadžić being a very senior individual. But what we have noticed with respect to Mr. Karadžić is his effort to represent himself in the courtroom without the assistance of Defense Counsel, and I'd like to talk about that a bit with both of you, because it brings to mind the new rule – and forgive us, we all identify these rules in court, so we throw these numbers around – Rule 45ter, which is the assignment of counsel in the interest of justice and reads as follows. This is a new rule that guides the criminal procedure of the Yugoslav tribunal and deals with this issue of self-representation, which is a bedrock, of course, of our American criminal legal system. “The Trial Chamber may, if it decides it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.” We experienced self-representation with Mr. Milošević; we're experiencing it now with Mr. Šešelj, and of course with Mr. Karadžić.

Prosecutor Farrell, how are you approaching this issue of self-representation from the Prosecutor's office at the Yugoslav Tribunal?

Deputy Prosecutor Norman Farrell
International Criminal Tribunal for the former Yugoslavia

That's a very good question. As everyone else, thank you for the invitation to attend. Just for those of you who don't know these cases that we're speaking about, Karadžić is presently attempting to represent himself. There's another accused, Mr. Tolimir, who is charged with genocide and has indicated he wishes to represent himself. There's Mr. Šešelj, who has been representing himself. Now, if I may just mention a few preliminary comments. A lawyer might have other issues or other agendas, or other interests at stake that they want to represent, so self-representation in my view is not something that you can automatically apply as you would think of self-representation necessarily in your domestic jurisdiction. Accepting that, there's the example of Šešelj. Mr. Šešelj is representing himself. It's no secret that the Prosecution has brought a motion to ask that a counsel be imposed on Mr. Šešelj.

David Scheffer, Moderator
Northwestern University School of Law

Just tell them briefly why he is such a dynamic figure.

Deputy Prosecutor Norman Farrell
International Criminal Tribunal for the former Yugoslavia

Thank you very much, David. (laughs) Yes, I'm sorry. For those of us working in the field, we take for granted that all of you have the same interests and level of involvement

as we do, and I completely accept that you probably don't. And likewise, there are some of my colleagues who deal with similar interests in other cases who probably don't care so much about Mr. Šešelj. But we do in the ICTY. Mr. Šešelj is the former leader of the radical party. He's charged with crimes in relation to crimes against humanity and war crimes in relation with three different geographical areas. He's also charged with crimes for hate speech – I know that's a sensitive issue for those who've read the decisions on incitement and first amendment rights. But Mr. Šešelj is a particularly strong and intelligent man who has a very particular ideology and who has stated at the beginning of trial, and who has stated at times throughout the trial, that in his self-representation his intention is to destroy the tribunal. So keeping that in mind as the individual who will be the advocate on the other side of the bar table, your approach to this matter is somewhat different than if it were a lawyer.

Mr. Šešelj has also recently – about a week and a half ago – been charged with contempt for the disclosure of information that was disclosed to him while he was representing himself as counsel. The Court specifically held on January 21st on its decision for contempt, that there is evidence that, as the author of three books – I think the charges are in relation to one or two – there is evidence that he has disclosed information that might identify or lead to the identification of protected witnesses, and disclosed parts of a witness statement. Now, he has received those because he is representing himself. Mr. Šešelj also has been using his privileged communication for allegedly reasons other than defending himself. There has been a decision of the Registrar that he has used his privileged communication for political purposes and there is evidence that his privileged communication may have been used for witness interference. These are all allegations pending before the court; there's been no finding per se. Mr. Šešelj of course is presumed innocent both on the substantial charges and on the allegations about his use of his privilege as his own defense counsel to undertake or be involved in certain acts, which if it was a lawyer, it may be criminal. So keeping all that in mind, the question is, "How is self-representation working out in the trials of the ICTY?" Well let me just sum up by saying that it's particularly difficult.

David Scheffer, Moderator
Northwestern University School of Law

Defense Counsel Higgins, any comment?

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

If I could just put it back into context from a Defense perspective for a minute, Rule 45ter in my view is merely a codification of a discretion that the Trial Chamber has to assign counsel to an accused before the ICTY against his will. That was decided in the Milošević case at the Appeals Chamber level. So it's no more than that. In order for judges to assign counsel against the will of an accused, the judges will have to come to a

determination that it is in the interests of justice. So not just because it's more difficult, or not just because the job itself is going to be more tiring or more complex – they have to reason it within the context of the interests of justice. We've had several ways in which that has been done to date. One classic example is Mr. Milošević, which involved the assignment of counsel on health issues. It was a long, drawn-out journey and it took the Trial Chamber a long time to get the balance right. We went from – some of you may know – the assignment of *amici curiae*, which was from the start of the trial to a sister chamber when they knew that Mr. Milošević was going to represent himself, to an eventual assignment of counsel against his will, which in first instance the Trial Chamber determined were to take full position and were to take on the case without instructions from the accused.

Now, as one of the two counsels who were assigned by the Court, I can tell you that was the most onerous task I've ever been given. It was one that was on a practical level not workable. The Appeals Chamber recognized that the measures that were put in place were not proportionate, and in fact the Appeals Chamber while retaining counsel reversed the position and put Mr. Milošević back into the driving seat, because they knew that without instructions, the counsel would be in an extremely limited place to present any effective and fair defense on his behalf. Bear in mind that at that stage, it was also the start of a defense case, so although we had a list of his proposed witnesses, it was difficult if not impossible to get more than five of them to actually turn up.

Now those are the practical problems of assignment of counsel against the will of an accused, which the trial bench will face when dealing with the issue of Mr. Karadžić. At the moment, he's defending himself. What he's asked for is a legal team to assist him in the background, which is something that Mr. Milošević had and also that Mr. Šešelj has. One might argue that this form of self-representing the accused is a useful half-way hybrid house. If Mr. Karadžić doesn't overstep the mark and become obstructionist or he doesn't suffer from the same sort of health problems that Mr. Milošević did, it's very difficult to see at this stage how the Trial Chamber can legitimately impose counsel on him. We go back to the fact that although not an absolute right, it is a fundamental cornerstone right for an accused to represent himself. So the journey is going to be certainly an interesting one.

David Scheffer, Moderator
Northwestern University School of Law

Thank you. You know, what I would like to do now is jump to the International Criminal Court, and we have with us Legal Advisor Rod Rastan on the end over here. Mr. Rastan, this week was a very historic week with the International Criminal Court. On Monday, the first ever criminal trial before the first permanent international criminal court commenced against Mr. Thomas Lubanga Dyilo with respect to the situation in the Democratic Republic of the Congo. Could you give us a sense of how that trial has kicked off and also walk us back through 2008 in the procedural landmines that erupted before we could get to this trial date of January 26th, with respect to the production of

evidence by the Prosecutor and the objections that were raised by defense counsel over the last year?

Rod Rastan, Panelist
International Criminal Court

Thank you, Mr. Scheffer, for inviting the International Criminal Court's participation today, on behalf of Prosecutor Fatou Bensouda who is in court as we speak on the first trial. As some of you may know, our first trial formally kicked off on Monday with Thomas Lubanga Dyilo, who is on trial in relation to child soldier offenses. The ICC is quite unique perhaps in the sense that the start of the trial doesn't necessarily mean that the process has gotten under way. We have a rather lengthy pre-trial phase that has to be gone through and I guess the closest comparison would be perhaps to the Tribunal in Cambodia. But in relation to the current proceedings in relation to Lubanga, we've had a confirmation process. We've had that confirmation process also in two other cases. So it's actually been a very long time before we've been able to start the trial. And now we're getting to the first stage. Yesterday we had some interesting issues where the first witness, a former child soldier, appeared on the stand and in the morning gave testimony about being recruited. Then something happened during the lunch break and in the afternoon he came back and denied ever being recruited and that he had been told to say this by an NGO. So then we immediately became concerned that something had happened during the break and we've appealed for additional protective measures in relation to that. So in some ways this is obviously very troubling, but it's also the normal process of a trial. These are tests and difficulties that all the tribunals have gone through, but if you like, this case continues to bring up interesting issues as we proceed and I'm sure the Court will find solutions to enable the most effective use of its time.

David Scheffer, Moderator
Northwestern University School of Law

He's charged, by the way, with recruitment and use of child soldiers in the Congo conflict, so it's a very, very significant start and a very almost novel start for the International Criminal Court. So walk us back to 2008 and those dynamic procedural hiccups.

Rod Rastan, Panelist
International Criminal Court

One of the reasons that it's taken a while to get to this point, because this trial was scheduled to start last year, was because a number of issues came before our Court on which we felt the law did not provide sufficient clarity, and at the same time the Defense Counsel pleaded to the Court to find a resolution. The basic problem was a simple issue of disclosure. It's relatively familiar terrain, but it's an issue which takes up the time of

all of these courts and tribunals, and particularly the issue of disclosing potentially exonerating evidence. At the ICC, the Prosecutor has a positive obligation to investigate incriminating and exonerating circumstances equally. And in some ways it's more onerous in terms of exonerating evidence than perhaps the other tribunals. There was really a balance being struck in Rome to make sure the Prosecutor did practically go out and investigate these facts and circumstances, which we did, and we had material to that effect. So that's one provision that deals with the disclosure of potentially exonerating evidence – nothing problematic there.

But also, there's another provision in our statute, which relates to the ability of the Prosecutor to obtain information on the conditions of confidentiality from information providers. This is classically the Rule 70 provision in the tribunals, which has been of great assistance to them, and it's a provision that basically was incorporated in the last statute in recognition that sometimes actors in the field who have evidence available may be willing to assist the Prosecution, but may have difficulties in terms of it being revealed that they were the source, whether they are an NGO operating on the ground who may fear for the security of their staff, or a State that has gathered intelligence, or the United Nations in relation to the proper conduct of its operations and disclosing the fact that their staff who are still operating on the ground may have also gathered information relevant to our prosecution or to our defense. So this provision is there in the Statute and the issue that came up was that we had potentially exonerating evidence which was also at the same time under an agreement of confidentiality towards the information provider.

So we had two obligations under the Statute: one to disclose to the defense this potentially exonerating evidence, which we recognized and brought to the Chamber, and at the same time our duty to protect the confidentiality of this information. There is also our obligation not to disclose it without the prior consent of the information provider, and we didn't know how to resolve this issue. We brought this issue to the Chamber and we told them the extent of the problem, and the number of documents we had, and basically argued that the Chamber should find a resolution to this issue in a way that did not jeopardize the confidentiality but enabled the Prosecution to proceed. The Chamber grappled with this issue, the Defense Counsel pleaded that a trial cannot proceed on this basis if there is evidence that has not been disclosed, and at the same time the Prosecution was hopeful that the information providers would ultimately lift the different restrictions on disclosure. And the trial basically had to be postponed for about six months until this issue could be resolved.

Around June last year, it was so clear that some of the information providers were still not willing to lift restrictions on this documentation – of a significant portion, it was about a hundred and fifty to two hundred documents – that were still under these regimes of non-disclosure, but contained some element of potentially exonerating information. Basically the Trial Chamber said, well if the Prosecution cannot resolve the issue, then we're going to hold proceedings. Then they proceeded after that to say, well if we hold proceedings there's no legal basis anymore to hold the accused, and we're ordering the release of the accused. So before we actually even got to the start of the trial, the whole case came under the spotlight because of this tension.

In terms of the way it was perceived and played out in the media, it was really unfortunate because we had the big bad prosecutors seen as having secret evidence on the accused that they refused to hand over, and there's some sort of conspiracy going on with the information providers, and there's some under-hand deals. In reality for us, it was a legal question – how do we resolve these two legal obligations? We couldn't simply just disclose and put at risk the lives of individuals, our sources, who had provided it. If we did that, you could expect that all of our future investigations would have no interaction whatsoever with people on the ground. They would refuse to assist us. And here we were talking to local NGOs on the ground, too. Some of them had provided us information, as well as the United Nations. We felt that the decision was disproportionate and unfair, and we also felt that the legal regime needed clarification.

Basically what happened is towards the end of last year, the Appeals Chamber came down with a ruling, and they argued two things. They said that the Trial Chamber was correct in suspending the procedure, because clearly the trial cannot start with a large number of documents still not disclosed to the defense. However, they said that the Trial Chamber was wrong in thinking that this was a permanent rupture, that this was in fact a temporary rupture, and that therefore the Trial Chamber should work towards the resolution. Given that it was a temporary rupture, they should not have ordered the release of the accused, so the issue should be remanded back to the Trial Chamber.

Then they provided clarification – and this is the important aspect – clarification of how the issue should be resolved. They clarified that the Trial Chamber should have access to all the documents, review all the documents, and then authorize which protective measures should be applied to certain documents. And then, on that basis, authorize the Prosecutor to disclose with redactions or with summaries or with submission of alternative evidence or by making concessions of facts. Once the Appeals Chamber clarified that obligation and also stressed that the Trial Chamber itself is bound by the duty of confidentiality on those documents, the Prosecution was able to proceed and to disclose the evidence, and now the trial has begun.

David Scheffer, Moderator
Northwestern University School of Law

Is there disclosure to Defense Counsel?

Rod Rastan, Panelist
International Criminal Court

To Defense Counsel, yes. So I think the principal difficulty that arose really was, for the information providers, an issue of uncertainty. They weren't willing to put these documents before the judges because they didn't know what the judges would do with the documents. And earlier back in the year, around April or May, we had actually explored

with the information providers allowing us to submit these to the judges and letting them decide and they said, “We don’t know what the judges will do.” These confidentiality agreements bind the Prosecutor, not the judges. Maybe the judges will see these documents and then just say, “OK, well I order these disclosed.” And so we have this sort of to and fro with the information providers in terms of the lack of legal services.

So what the Appeals Chamber basically did is they said that the Prosecutor should provide these documents to the judges, but the judges are equally bound to respect confidentiality. Once that certainty had been provided by the Appeals Chamber, then all the information providers were given confidence and they were happy for the judges to look at the documents. On that basis, the issue has been resolved. The judges have been able to review document by document in their entirety and assess whether the redaction of a name or NGO worker who is currently in the field is justified, whether that name went to the exonerated portion, whether there’s analogous information available, or whether another form can be made. So these are, if you like, very technical, dry issues that are familiar, but they threaten to disrupt the very first trial because they are untested before our Court.

David Scheffer, Moderator
Northwestern University School of Law

Does anyone want to jump in on that?

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

If I could ...

David Scheffer, Moderator
Northwestern University School of Law

Yes, Mr. Rapp.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

I have enormous respect for Luis Moreno-Ocampo and his staff in meeting the challenges of this new regime, and he has much less flexibility than we do with a statute that requires him to go to the Court for information in an adversarial hearing, and there are just all of these additional provisions in terms of reading these orders of the Pre-Trial Chamber to proceed. But also just looking at it from working in the same building, where we have the Taylor case – and we very much appreciate the ICC hosting us there – we’re

able to observe these things, and I was a guest of the Prosecutor this week for the opening of the trial. But there are some practical rules and practical approaches that I think are going to make things difficult in the future.

One of the key ones, and perhaps it will come down to being the reason why there was the trial and this first witness, is there was an order from the Pre-Trial Chamber that there can be no preparation sessions between Prosecution attorneys and witnesses. Having been involved as a senior trial attorney myself, the defense is always very suspicious – they think we’re coaching these witnesses, instead of bringing people in from areas of the world where you don’t tell time by clock, or days by calendar, or are not oriented north, south, east or west, and you have to spend a great deal of time to orient them and focus them on the specific facts in the case. Of course they’re also very fearful; they’re very concerned about their futures. They talk to you about these threats and then you can go to work with the victims section and become an advocate for them.

Here, this has been banned by the Pre-Trial Chamber at the ICC. So the witnesses are coming in more or less cold into these kinds of circumstances, not knowing really whom to trust, and this kind of difficulty is additionally compounded now with victim representation. I was there at the opening, there was a great speech by the Prosecutor and Deputy Prosecutor, but there were seven more speeches for the Prosecution from each of the victim representatives. I’m sure the Defense didn’t appreciate that, but they all took a slightly different angle and said the Prosecutor should have indicted this or he should have done that or he should have done this. I think it was actually one of the victim representatives that raised the issue that may have caused the recantation. You can almost imagine the situation: by the time the victim representatives are done cross-examining the witness, the Defense will say, “We don’t need to ask any questions.”

These cases have to be very focused and as it is, this is only a child soldier case as opposed to the multiple dimension cases that we’ve had to deal with. It becomes very complicated in terms of actually getting to the end of that process. The Prosecutor has obviously been working along that, certainly opposed this idea of banning of proofing, and wants to contain the victim representation in appropriate ways, permitted under the Statute. In my view, the Prosecutor represents the victim, but I’m involved in this process because I want to represent the interests of victims and I think victims have a place particularly in fixing their own damages in a proceeding that might follow a conviction. But to create this kind of cumbersome procedure I think runs the risk that disclosure simply won’t work.

David Scheffer, Moderator
Northwestern University School of Law

Let me do this: because I want you to address another issue as well, I’m going to hold off on Prosecutor Jallow. Let me ask Defense Counsel Higgins, obviously you’re on the front line on this issue with exculpatory material, etc. Let’s go to you, and then Norman did

you want to say something – or Mr. Farrell – very briefly? Or not briefly, but to the extent that you wish, and then we’ll go to Mr. Jallow. Ms. Higgins?

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

Just very briefly on two points. Mr. Rastan, you described it as a simple question of disclosure. It proved itself to be very much more complicated an issue that needed resolution by the involvement of not only the Trial Chamber, but by the Appellate Chamber. I think we would all agree, from whichever perspective we come, that disclosure is probably the most centrally, significant, important point of any trial in terms of again ensuring its fairness, which is also why it became such a large issue in your trial. It’s a shame perhaps, looking back in retrospect – and forgive me if I’m unduly harsh – that given its obvious importance in this case and the knowledge that the information was given confidentially by information providers, that the issue wasn’t grasped at a much earlier stage and resolution of the problem sought well before the forum of the Pre-Trial as we approached trial.

The second point, which Mr. Rapp has mentioned concerning proofing sessions and the decision of the ICC that it is not to take place – he mentions that Defense Counsel are often suspicious about what the Prosecution will get up to when they proof the witness. Well I have to say, in some circumstances, the suspicion is rightly so. I can tell you I’ve had experience of reading transcripts of interviews where the interviewee – potential witness – has been questioned perhaps by a prosecution investigator, where it is leading question per leading question per page, to an extent which cannot be fair when you’re dealing with an assessment of trying to reach the truth of the matter. I’m not saying that happens in all cases; I’m saying that I’ve seen many examples. Another issue is that what will often happen, because proofing is still allowed at the ICTY, is that very important information will be taken from a witness that comes to The Hague to testify the night before, and service of that information will be given to Defense Counsel often very late in the evening the day before the witness is due to testify. And as much as we try to avoid adjournments, in order to perhaps conduct further investigation, it is a matter which the ICC has rightly, in my view, taken very seriously.

David Scheffer, Moderator
Northwestern University School of Law

And Mr. Farrell, did you want to jump in?

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

If I may.

David Scheffer, Moderator
Northwestern University School of Law

Yes, please.

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

Just one brief comment. The development of the rules relating to the information that you obtain confidentially from what we call a “confidential provider” in our institution is an extremely important step in determining and assessing the material that you get. I think there are a number of difficulties that arose in the Lubanga case. Ms. Higgins has mentioned a few; Mr. Rastan has attempted to deal with how it developed. All I want to say is that these growing pains, if I can call them that, are experienced by the ICTY as well. The need to have proper rules – and in this I think we are in agreement – about how you deal with confidential information, who gets access to it and the ability to ensure that you can provide it to the accused and the defense, is necessary, is critical to an understanding of how you are going to be able to do your job, for one. Secondly, I think that in the ICTY we have found less and less difficulty over time with Rule 70 providers.

David Scheffer, Moderator
Northwestern University School of Law

Thank you. Did you want to jump in quickly, Mr. Rastan?

Rod Rastan, Panelist
International Criminal Court

Sure, just to respond to some of the comments given. I think definitely we saw the huge repercussions of the issue. It had huge repercussions also for the way that we’ll proceed. I think that the ICC clearly has a lot of benefit to some extent of coming after the different ad-hoc tribunals and Special Court for Sierra Leone, in the sense that it can draw on their experience. And of course our rules were drafted heavily borrowing from the experience of the ad-hoc tribunals. But since 2002, our rules have been frozen in time and awaiting jurisprudence to clarify how things can proceed. Some of the developments that have happened at the tribunals or in some of the jurisprudence have yet to be reflected in our procedural framework.

The issue that we have in the Lubanga case with this tension, for example, between these two provisions or this lack of clarity, is something that to some extent has been addressed already in the case about the tribunals and their respective rules. They have yet to be

really be clarified before our system. I think you see this with a number of procedural issues, whether it becomes an issue of witness proofing where again the ICC is looking at the examples from the other tribunals, but is also trying to take a broader perspective in terms of comparative criminal law and developing its own procedure, and also has to go through the experience of trying out the system and seeing what works and what doesn't work.

With information providers, I think our experience is the same. We have a lot of confidence now established in terms of our relationship with them, but they don't have any relationship so far – if they had an opportunity to experience a relationship – with the judges. And if you'd like, this Appeals Chamber decision has established the ground rules in terms of how the judges interact with information providers, which again will be hugely important. So, definitely everything is still up for grabs in terms of our Court. There is a lot of sound jurisprudence, but how it will proceed . . . everyday is a new learning experience for us.

David Scheffer, Moderator
Northwestern University School of Law

Let me jump now back into the Rwanda tribunal, if I might. Mr. Jallow, I know you might want to say something on this issue as well, but after you do so, I'd like you to jump in to the Bagosora case for us and the judgment that came out at the trial level. Also, describe a little bit about who Mr. Bagosora is and how significant he is, as well as his colleagues as defendants. The issue I would love for you to pore into is the acquittals on the conspiracy charges to commit genocide. This was a very significant development in my view in terms of establishing acquittals on those counts, and yet one could take a different view of it. I assume you are appealing on those acquittals and the fact that the Trial Court stated that there has to be proof beyond a reasonable doubt. If there's any other explanation, then you knock out the conspiracy charge. Well, that will be an interesting one to appeal, and I'd love to get your comment on it.

Prosecutor Hassan Jallow, Panelist
International Criminal Tribunal for Rwanda

Yes, thank you. Before I get into Bagosora, I just want to say that Steve is right to say that the law on proofing within the ICC potentially can cause a lot of disruption in the trials there. This proposition was brought up in our own tribunal and the judges did not go along with it. Proofing is allowed at the ICTR. What is not permitted, of course, is for you to coach your witnesses. You are not allowed to coach your witnesses, but you are entitled to prepare them, confound their statements, and explain to them the circumstances under which they are going to give testimony in court, which is essentially to orient witnesses. Most of them have given their statements years ago; if either prosecution, or possibly defense, witnesses are just thrown into a courtroom under that kind of situation, you can only expect, I think, a disruption of the trial. You should not

coach your witness, but you should prepare the witness to know what to expect when they get into court. The concept of cross-examination, for instance: it's not obvious to everybody who comes that they are going to be cross-examined and what this requires of them. They may not expect that they have to answer any questions in court. So you need to prepare them.

Way beyond the question of proofing, one of the most significant developments this year, if not the most at the ICTR, has been the Bagosora judgment, judging it from a number of levels. Since I came to the Tribunal, I haven't had the number of messages that I received worldwide when the judgment was delivered. And the perception seems worldwide that with the Bagosora decision the ICTR has finally done its job, what it set out to do. This is what we get from the messages that we've been reporting from all over the world, from lawyers, from ordinary people, from international organizations, from governments.

The judgment is important also from another perspective. Bagosora is not the most senior person we have tried and convicted. There are other senior individuals – generals – who have been tried and convicted. A former Prime Minister has been convicted, and an important former Cabinet Minister. But Bagosora more than anybody else, from the evidence presented in court, had the chance – the opportunity – to avert the genocide. But he chose to throw in his hand on the extremist side. He was the Cabinet Director of the Ministry of Defense. The Minister of Defense was not in place; he was in Dar es Salaam when the President's plane was shot down. And so Bagosora at that particular point in time was actually in charge of the Rwandan Armed Forces. He was the most powerful man then.

The Constitution provided for the succession of the Prime Minister in the event of the death of the President. And the Prime Minister was dead – Madame Agathe Uwilingiyimana. But Bagosora refused to allow the constitutional process to proceed. These are all facts found by the trial team. He refused to allow the Prime Minister to proceed to form a government. Why? Because she wanted . . . she was a very motivated person. Despite the crisis at that point in time, what she wanted was to go to the national radio and appeal to people to calm down, to appeal to people not to engage in reprisals and killings. That was not what he wanted. So he not only stopped the constitutional process from proceeding, but he made sure she was killed as well. He made sure that the villagers were killed. And then he made sure that roadblocks were set up throughout the city and in other places, and then the systematic killing of both civilians and political opponents to the regime started. For the next few years, the killings were mostly carried out by the military, and Bagosora was in charge. So, he really had a chance. If he had thrown his weight with the Prime Minister and went on the national radio and appealed to people not to take any action, we probably would not have seen the genocide.

He admits in court that he was really in charge during that period; he admits that he was the person in charge during that particular period. He was charged with three other military officers with genocide – with conspiracy to commit genocide, crimes against humanity, and certain war crimes. All of them were acquitted on the conspiracy count. One of the accused, General Kabiligi, was acquitted on all counts. We don't, as I said,

have as yet the written judgment setting out the full reasons why the Court arrived at these decisions, and our Prosecutor applied to the Trial Chamber to ensure that Kabiligi remains available within the jurisdiction for any possible appeal. So he will not leave the jurisdiction until we decide whether we are going to file an appeal or not. The Appeals Chamber has also given us more time to file our appeal and the time will now start running from the day the Trial Chamber actually gives us its written reasons.

I can't say much about the decision as yet, but this will probably go on appeal, especially with the conspiracy charge. It raises a number of issues. I think first, at a sort of conceptual level, we have to decide actually where the offense of conspiracy is not inherent in the offense of genocide. Genocide is not an offense of one person against another person. Even if it occurs in that way, it is within a given context upon acting to annihilate a whole people. There's always inherent in the idea of one element of conspiracy, of people acting together in concert. It is really one at the legal level. I think it is an issue we need to look at.

And there's also the second consideration, which is this: that the Trial Chamber found that all the killings that took place between the 6th and the 9th of April, when Bagosora was dead, could not have been anything but the result of an organized attempt to wipe out people. I mean, you're talking of a conspiracy once you say that it is an organized attempt to eliminate, to exterminate, people. We are not only talking about a conspiracy, insofar as an organized attempt cannot take place without an agreement between the people who are engaged in that process itself.

Then also we need to bear in mind that the Trial Chamber, not this particular trial team but the ICTR, had earlier on actually convicted the Prime Minister who was heading the government – convicted him of genocide. The Prime Minister Jean Kambanda had appeared in court and been convicted of genocide in that, as a member of the government, he and other cabinet ministers and leaders had conspired. They had committed a conspiracy and also carried out a genocide. How does this stipulate with the acquittal of Bagosora and the others under conspiracy charges?

And there's also the issue of how the Trial Chamber has approached conspiracy. They found that several inferences could be drawn from the evidence led by the Prosecution, some consistent with conspiracy, some not necessarily consistent with conspiracy. It is probable that in any incident, you can draw many inferences. But the law of the Court always is not so much to say: because there are several inferences, you cannot come to the conclusion that it was a conspiracy. You have to evaluate the inferences and determine what was the most reasonable inference. Many inferences there will always be, for some are not credible, some are not reasonable, some are more reasonable than others. So the Court has to identify what was the most reasonable inference to draw under the circumstances and not simply say that the Prosecution has failed to prove that the most reasonable inference was...

So there are lots of issues I think on this conspiracy issue which we need to look at and it most probably will have to go to the Appeals Chamber for a final determination. There may be other legal issues which will probably come up in the judgment.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much. You know, what I'd like to do now, I'd like to ask one more question of our participants, one in particular. And then we'll have maybe ten minutes to open it up to some questions from the audience before we have to break for our luncheon event. Then we resume here at two o'clock and I do strongly encourage as many of you as possible to return for a two o'clock to five o'clock session of this discussion.

I'd like to ask Robert Petit, the International co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia. There is a dispute currently between yourself and the Cambodian co-Prosecutor over whether or not to charge additional individuals before the Court by or in the process of being charged or one is actually on its way to trial shortly in mid-February, but there is a dispute now between the two co-Prosecutors which is going to be resolved by a panel of judges. Mr. Petit, if you could walk us through that dispute, I think it's one of the most interesting disputes, it's of a very unique character to the Cambodia Tribunal and it would be enlightening to get your perspective on it.

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

I'll try to do that as much as possible considering, however, that the process is by law confidential. Going back to the agreement between the Royal Government of Cambodia and the United Nations and the Cambodian law that established the Court, the co-Prosecutors are independent, but as the agreement says, it is understood that the prosecution will be of senior leaders and those most responsible for the crimes committed during the Khmer Rouge era in Cambodia. During the negotiations – and David is well aware and well placed to know – there were several different scenarios in terms of the scope of those prosecutions, in terms of the numbers of accused, not necessarily in terms of who. So there were various scenarios. However, those scenarios, those numbers, those names – nothing of that is in the law – so my take is to look at the text and apply. Senior leader and those most responsible, to me, has to be defined first by the evidence that you find after you start working.

And what we did from July 2006 onward was to establish that there were, quite obviously at the beginning, five individuals that were well known to be either senior leaders or those deemed most responsible for the crimes committed. And we worked to build up the evidence on those suspects, waiting for the Judges to enact the internal rules. As soon as that was done, we the co-Prosecutors forwarded that first case with those five accused. That case was later split into two, the first one being Duch, who will start his trial in

February, and the others, the four more probably described as senior leaders, who are still under investigation for trial. Now during the course of that first year of investigation, it also appeared clear to me that based on the evidence, as Rule 53 tells me, there were sufficient grounds to believe that crimes had been committed and other people could be deemed responsible for those crimes and could fall within those two criteria of senior leaders and most responsible. My colleagues took a different view of that. So through that period we discussed and evaluated and kept on conducting preliminary investigation.

As I mentioned before, I think it's essential for these courts, especially these hybrid courts, if possible, to describe as substantively as possible the events and the criminality behind those events. The people without whom these events would not have happened or would have had a much lesser magnitude – when it became clear to me that there were possibilities of having additional cases that would achieve that result, that would allow for the widest substantive justice possible within our mandate, including the timeline restrictions and the budgetary restrictions, and when it became clear that my colleague took a substantively different approach, then I initiated the disagreement procedure. David is right in saying that this is quite unique in all the tribunals and it's actually that mechanism of resolving a difference of opinion that, if I understand correctly the history of this, is what led to the creation of the Court. The Government of Cambodia was always – well, right after it asked for international help – was always very much of the opinion that it had to be a Cambodian solution to the problem, or to justice for what had happened, whereas the international community wanted to make sure that there were international safeguards built in to the Court to ensure that the results were beyond reproach. And the negotiations were quite long, quite difficult, and at the end one of the key solutions to resolving this issue was that disagreement procedure.

What the law says is that in the event that the co-Prosecutors cannot agree on a prosecution, or in the event that the co-investigating judges cannot agree on the investigation, then each or one of the parties can file a statement to the pre-Trial Chamber explaining what the disagreement is about. The pre-Trial Chamber then gives the other the opportunity to file his or her response and the case goes to the pre-Trial Chamber for determination. The pre-Trial Chamber, if you don't know, is composed also of three national judges and two international judges - so a majority of national judges. However, for a positive decision, for a yes or no on any issue, including a prosecution or investigation, there must be what's called a supra majority, which is again unique in the international criminal law. In other words, for example, if the pre-Trial Chamber was of a mind to stop these additional investigations, at least four judges would have to say no. Theoretically that means at least one international judge would have to agree with all the national judges to stop these prosecutions from moving forward.

As I said, the process is confidential, but we have endeavored to – the national co-Prosecutor and I – give as much information as possible so that the public can understand what this is about. I have stated that, as far as I know, the only guiding principle in the law is those characterizations of senior leaders and those most responsible and the belief that crimes were committed. That, to me, is sufficient to initiate proceedings, to forward these cases, to forward investigations to the investigative judges. We're not talking about

indictment here. We're just talking about continuing investigations because there is grounds to believe. That's our threshold. I believe that once you sign a law and it's in black and white with jurisdiction or what the guidance is in that law, and you hire somebody to apply that law, then that's it. You let him or her do his or her job the way he or she sees fit. And if there's a problem, that's up to the judges to decide in how this person or these persons exercise their responsibility in their discretion.

As I said, I believe that the criteria are clear in the law and, based on the evidence that we've accumulated are sufficient in my mind for these cases to go forward and be investigated further. My colleague, as she has stated publicly, believes that to the contrary, the spirit of the agreement would be sufficiently upheld for these five individuals to be prosecuted. That's where perhaps the peace and stability argument comes in. I've said that the process is now engaged and is confidential. I'm hoping that the judges will obviously follow my reasoning, and that the law must be applied and these cases must be further investigated. I've stated that I think that it's the best chance this Court has to deliver as much justice as possible and tell as much of the story as possible to the Cambodian people. And if we are to fulfill our mandate, I think part of that rests on these cases going forward. We'll see what the Court decides.

David Scheffer, Moderator
Northwestern University School of Law

Do you have any sense of when the judgment comes down?

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

No, there's nothing in the rules that sets a timeline for this. The judges have in the past, legitimately so, shown great care in trying to achieve consensus amongst themselves for some of the difficult issues that have come up before them already. This certainly ranks way up there, so I expect that it will take them some time to decide. But one of the reasons I put these cases forward now is because time is of the essence. We already have a very limited budget. Actually, we're supposed to run out at the end of the year. If these cases are to go forward, it has some implications in the length of the Court, and hopefully they will decide as quickly as possible.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much, Mr. Petit. What I want to do, I know that we're close to noon here. I want to go to twelve-oh-five and then we'll break, we'll go upstairs for the lunch. I just want to say, many of you are invited formally to the lunch and have accepted. Those of you who do not have an invited seat at the lunch, the presentation by our two book

authors, Professors Hagan and Kinzer, will commence at twelve forty-five and if you want to come back at twelve forty-five, there will be some seats at the back of the luncheon room where you can listen to them, and I strongly encourage you. They're going to be discussing fascinating books that they have written on the situation in Darfur, as well as the very dynamic piece in history over the last fifteen years or so in Rwanda. So I encourage you to come back. I do want to suggest now that we give the audience literally five minutes, and I'm sorry, we'll give you more this afternoon. If we have one or two questions, I'd be happy to point them out and proceed. Professor Arimond?

Professor Bridget Arimond: I have a question for Mr. Petit. My question is about how one defines what is the positive decision and what is the negative decision when there is, as there is now, a dispute. For example, if it requires a positive decision, as I believe you said, to prevent the additional cases from going forward, it makes it a great deal easier for the cases to go forward. But if it requires a positive decision to allow additional cases to go forward, then the position from which you're advocating is going to be facing a much harder battle. So how is that decided?

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

I should have been a bit more precise. The agreement specifies that if there is no positive decision, the Prosecution goes forward. So if they can't agree, then it goes forward. I think that was the idea of this mechanism – that everybody thought this particular situation would happen. So if they cannot say no to me, it goes forward.

David Scheffer, Moderator
Northwestern University School of Law

Another question from the audience? Yes, Vicki and then Professor Sawyer. We'll go with Vicki here.

Vicki (student): Thank you. It's very enlightening for me – there's so much information, it's just wonderful. My question is with reference to rape cases. I was a student in gender studies. I understand that it is a crime against humanity – it's a war crime. But at the same time, there are cases in which this charge has been dropped as a plea bargain. So why this ignorance?

David Scheffer, Moderator
Northwestern University School of Law

Professor Van Schaack?

Professor Elizabeth Van Schaack, Panelist
Santa Clara University School of Law

I'll maybe weigh in on that. I think you're absolutely right. We now have, at least in the ICC statute itself, some positive law, but also from the jurisprudence of the Tribunals the most progressive positive law on crimes of gender and sexual violence available to us. But we also know that it doesn't necessarily guarantee that we'll have prosecutions and convictions going forward, because there are lots of steps along the way where those charges can fall away. And I've recently conducted a study on the ICTR jurisprudence, especially in some of the earlier days, where your point is absolutely right. There were charges that were not brought, there were charges that were brought but then dropped, there were charges that were brought and then plea bargained away, and then charges that were brought and not proven because there wasn't enough commitment to finding the evidence to prove those charges.

So the outcome, if you look at the actual judgments from the ICTR, suggests that there was not a lot of sexual violence happening during the genocide in Rwanda. And of course empirically we know that not to be true. The work of NGOs and anthropologists and sociologists who were there said that many of the survivors of the genocide were also raped or sexually abused during that period. What I think it takes most importantly is prosecutors, and I think the Special Court for Sierra Leone is a great example, making sexual violence a priority. Where they find evidence of that, pursuing that evidence with investigators who are sensitive, with investigators who understand how to prove those crimes, to gather the necessary evidence and then keeping that commitment moving forward as the cases progress toward trial and then ultimately are tried. So it really takes that commitment from the Prosecutor's office to do sometimes what is extra work to prove up charges that maybe don't have the physical evidence that you have with a massacre site, for example, or the destruction of cultural property.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

If I might just follow that up, I've worked of course for the last two years at the Special Court and before that for six years at the Rwanda court. At the Special Court indeed, they're very aggressive prosecutions, not just of rape but also as I said of sexual slavery and this new crime, potentially, of forced marriage. Though even then, difficult judicial resistance, I mean, in the CDF case, my predecessor sought an amendment, put it in well in time, and the judges refused to consider it and refused to allow us even to present evidence of rape as part of another violence that was occurring. We were denied the opportunity to appeal that. Eventually, in our final decision appeal we sort of won a moral victory. They said the judges were wrong, but because the evidence hadn't come in, there was no way of dealing with it then.

Of course, ICTR began with a first great conviction in a case where rape was a crime against humanity and the finding that rape could be a mean by which you commit the crime of genocide. But that case involved some very close facts. I mean, Akayesu was right at the scene, supposedly made this inciting speech about never needing to know what a Tutsi woman tastes like, etc., and incited the rapes right in essentially the City Hall. The difficulty we've had, I know at the ICTR, is our judges have been far more willing to find people responsible for killings at a distance, hold leaders responsible who never went near a roadblock, who never went near a killing site, hold them responsible for killing hundreds of people. But even though rape was very much part of the whole pattern of criminality, they've been very reluctant to hold people responsible for rape unless they were right there at the scene or unless they were the ones actually committing the rapes. We found that kind of resistance. Now obviously over time hopefully that will be broken down and I think in the Karemera case, where it's been alleged, there's an opportunity.

David Scheffer, Moderator
Northwestern University School of Law

And if I may, Professor Sawyer, you had a question?

Professor Steven Sawyer: I do, but I'll defer it until this afternoon because I think we've run through our five minutes.

David Scheffer, Moderator
Northwestern University School of Law

Alright, if you don't mind. Prosecutor Jallow?

Prosecutor Hassan Jallow, Panelist
International Criminal Tribunal for Rwanda

Just to answer the question on sexual violence. You're quite right about the record at the ICTR. It's clear from all the information we have that rape, sexual violence, was a part of this genocidal program and that it was very widespread. It's not reflected very much in the convictions we have secured on rape and sexual violence for a number of reasons. We've had situations where because so much time has elapsed, a lot of potential witnesses, especially the victims, are no longer willing to come forward. Our agenda as prosecutors is looking for justice, and the victim reasonably wants to close that chapter ten years after the event.

So the way to deal with this, I should say, is to prioritize prosecution for sexual violence. The later you wait, the less likely that you're even going to get the victims to support

your effort to prosecute. It's a very serious offense and even the accused person acknowledges this. In our experience in plea bargaining, we've found you have accused who are willing to plead guilty to genocide, but not to rape. They would not accept the charge even if it carried a lesser sentence because of the stigma, and this is acknowledgement by them of the fact that they've committed a serious offense. We still have a chance in the criminal trial, whenever you have a charge against senior people, former leaders who had been ruling during the combat, for crimes of sexual violence, not in terms of them themselves having carried it out, but because they were in charge of a machinery which set out deliberately to use sexual violence as part of the genocide. Hopefully we'll succeed at that very senior level to make up for the lapses we've had in the past.

David Scheffer, Moderator
Northwestern University School of Law

And Prosecutor Petit has a closing word.

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

Just to reassure you, though, that from the Prosecution side of things, this is no longer a difficult issue or a question. From 1996, discussing Akayesu, this woman charged in 2002 with sexual slavery, now in Cambodia, gender crimes are no longer an issue. It's a priority.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much, everyone. For those of you joining us for lunch, elevator to the fourth floor, walk up a flight to the fifth floor. The elevator does not go to five. For the students who would like to join us, the talks are two professors on Rwanda and Darfur.

LUNCHEON

David Scheffer, Moderator
Northwestern University School of Law

Welcome to the luncheon program here at the Atrocity Crimes Litigation Year-in-Review (2008) Conference at Northwestern University School of Law in Chicago, Illinois. We are very honored to have all of the guests here at this luncheon join us and I want to specially - since we've introduced others obviously before - before I introduce our two

professors and book authors, I just want to specially recognize the presence first of President Jonathan F. Fanton of the MacArthur Foundation and Bob Deignan of Baker & McKenzie, our two co-sponsors of this event. They are sitting here and will raise their hands and say hello. Thank you very much. (clapping) And of course, I add Mary Page of the MacArthur Foundation to that welcome as well. Also, I want to recognize that we have a very distinguished Federal Judge joining us today, Judge Ann Williams from the 7th Circuit. Judge, would you stand up? Thank you so much, Judge, for joining us. What I will do now is, I'm going to introduce Professor Hagan and he will describe his extraordinary new book and then we'll go on to Professor Kinzer.

Professor John Hagan is the John D. MacArthur Professor at Northwestern University and he is at the American Bar Foundation. He is the Editor of the Annual Review of Law and Social Science, which is truly a premier publication of its character. Professor Hagan's book *Justice in the Balkans*, published in 2003, is on the International Criminal Tribunal for the former Yugoslavia and his most recent book, *Darfur and the Crime of Genocide*, published just this year, is co-authored with Wenona Rymond-Richmond, and of course, is the subject of his talk. With Rymond-Richmond and Alberto Palloni, Professor Hagan's most recent articles appear in *Science*, the *American Sociological Review* and the *American Journal of Public Health*, which is forthcoming. They document and explain the patterns of rape, killing, dehumanization and displacement involved in the Darfur genocide. Professor Hagan is a former President of the American Society of Criminology and he is the recipient of the Edwin Sutherland, Albert Reiss and C. Wright Mills Awards. You know, President Fanton, I said we all would aspire to your academic career. I'm going to amend that – I'm aspiring to John Hagan's career right now. (laughs) So, Professor Hagan, would you please join us up here. (clapping)

John Hagan, Keynote Speaker
Northwestern University

Thank you very much, David. It's a great pleasure to be here for this wonderful event. I attended last year's occasion as well, and it's a remarkably unique opportunity to learn about recent and extremely important events in international criminal law. I might ask if it's possible to flip a switch and maybe have a little less overhead lighting here. You might see the slides a little bit more easily. In any case, let's see... OK. I'm going to be talking about our recent book on Darfur which is out in paperback at dangerously low prices. I invite you to peruse it, if you can, at Barnes and Noble or some other place.

I want to talk a little bit about genocide and then the research in Darfur. You are all familiar, I think, with these kinds of distinctions that are frequently drawn between crimes against humanity and genocide and I want to pay special attention in my remarks today about some of the defining features of genocide in terms of its intentional aspect and also the reference to destruction in whole or in part of a national, ethnic or racial group. Now, the way I'm going to approach this actually draws on David Scheffer's work. I think, in an extremely useful article that's appeared in the *Journal of Genocide Studies*, David draws a distinction between atrocity law and atrocity crime. And I think

this is extremely helpful because it points out that we have a tendency to focus on a very precise and careful way on the legal aspects of, for example, defining genocide. The effect can sometimes get us caught up in technicalities and the precision without the sort of backdrop of work that would most effectively develop a case in terms of deciding whether these very precise definitions do appropriately apply. And so, David opens up this space, I think we could say, between a focus on atrocity law on the one hand and atrocity crime on the other. I'm, for professional purposes, actually a criminologist and so I find this very attractive; it sort of opens up what I would think of as the "criminology of mass atrocity." And what I will present to you today is very much an attempt to understand the atrocities that occurred in Darfur, in terms of the social science and criminological aspects of those events.

Now, going back to the definition of genocide, we begin with this concern about scale, about destruction of group in whole or in part, and I want to just make a few remarks about that aspect of the issue. This slide is really an attempt just to give you a sense of the chronology of events in Darfur and the occurrence of really two waves of violence in Darfur in 2003 and then again early and continuing in 2004. These represent sort of the two basic pieces in terms of the scale of events in genocide. Some of our early work, initial work, was involved in trying to establish what the scale actually was. We've been involved in two different estimates of the scale of the mortality in Darfur: one to try to set a kind of upper limit or a sense of how extensive the killing may have been, and another to get an idea of what the floor level of this mortality might be, so that we have an idea of what the range is. And while we cannot be very precise about these numbers, I think we can be careful to indicate that there is a kind of floor or base level that we know in this genocide that the amount of killing exceeds.

And so in an article in *Science* we try to emphasize very clearly the idea that this is on the scale of hundreds of thousands of deaths and we set a floor estimate in that particular piece of work of two hundred thousand. We think, at that time we know, that before the occurrence of our article that the media was talking about tens of thousands of deaths and we've done an analysis of the pre and post publications by Reuters and the BBC and we think it's clear that that work had some impact in terms of beginning to raise the sense of the scale of the mortality in Darfur. Of course, today it's more common to talk about that mortality as being on the scale of three hundred thousand, which is usually attributed to a UN estimate, which really does not have any precise numbers behind it but I think is a reasonable estimate given the range of work that's out there. We've argued that it's between two hundred thousand and four hundred thousand, so it certainly fits within our arguments.

I want to mainly, though, talk to you in the brief time that I have today, about the work that we've done to try to address the issues of intentionality involved in genocide and in Darfur and this work draws primarily on some data that are available to us through a State Department survey that was done in Chad across the border from Darfur. Many of you will know of this survey because it was the basis of Colin Powell's determination before the UN Security Council and before Congress that genocide had indeed occurred in Darfur. This is quite a remarkable survey. It involved interviews done with 1136

refugees from Darfur, across the border, in twenty locations in Chad. In the context of making the genocide determination, Secretary Powell was really only able to touch on some of the highlights of the survey and we were interested in making further use of this remarkable study. It's a study that cost nearly a million dollars to undertake. It was done in the summer of 2004 and done in collaboration with the Coalition for International Justice, an NGO that was then doing important work in Washington.

This map gives you a sense of the twenty camps on the left-hand side of the figure where the refugees initially were interviewed. But these refugees, of course, had come from Darfur and these small circles on the right-hand side of the border are indicating the localities that they came from. We were particularly interested in taking advantage of the uniqueness of this State Department data in the sense that it not only then provided us information about the experiences of these individuals, but also the communities from which they came. What we did was to take the data, and we were able to identify the communities from which 932 of these refugees came – twenty-two settlement clusters, villages, in Darfur. And much of our analysis then is focused on understanding what was going on in the settlements from which these individuals came.

Now this chart is a simple attempt to impose some structure on the role of the Government of Sudan and its involvement in Darfur and I mainly want to draw your attention to the lower part of the figure down here, which talks about four different militia leaders that we emphasize in our analysis. We're interested in the activities of these militia leaders, the attacks that they were involved in across these twenty-two settlements in Darfur, and their alliance and their collaboration in the joint initiatives with the Government of Sudan forces in attacks on these villages. So we're interested in trying to develop a sense of the joint criminal enterprise as we might talk about it in international criminal law, as it unfolded in Darfur, to get some sense of how this took place.

Now I want to go back for just a second to the initial discussion about the separation between atrocity law on the one hand and atrocity crime on the other. One of the points that David Scheffer makes in his piece is in relation to Darfur. The UN Commission of Inquiry on Darfur got quite tangled up in trying to make a precise determination of whether genocide had occurred or not and of course, that Commission determined in the end that there had not been any collective sense of genocide, but maybe individuals could be pursued in that way later on. But basically a decision that this was not genocide, and of course the United States has determined otherwise and now the Prosecutor at the International Criminal Court is pursuing charges involving genocide against the President of Sudan, Omar Bashir.

The point I want to make in relation to this is that the Commission got highly involved in trying to decide exactly whether there was a protected group here and whether it could be distinguished in ethnic or racial terms. What we're trying to emphasize in our research is that this is very clearly the case and that it is actually a racialized set of attacks and genocide. The Commission actually in its determination argued that it was not even an ethnic kind of event, that it was impossible to separate groups in Darfur objectively from one another, that they might feel subjective differences but actually they were

overlapping. We think this is actually quite a misrepresentation of events in Darfur and the way they unfolded. I'll explain a little bit more about this as we go along, but I want you to have in your mind the sense of this emphasis that we're placing on the racial aspects of these events.

Now again, this is a map that shows Darfur and along with the border with Chad, it identifies with these different shapes and colors the areas in which the four militia leaders that I mentioned before were operating. There's actually a misspelling on the lower right-hand side of the diagram that hopefully you might not have otherwise seen, but in any case I've now pointed it out. Only one of these individuals, the individual on the lower right, has been charged by the ICC. The best known of the four – Musa Hilal on the upper part of the diagram – has not been charged. So we're interested in sort of filling out the picture that one might think about in terms of the criminology of this atrocity or set of atrocities or the atrocity crimes in Darfur. This is a model that we use and I don't really want to spend too much time on it other than to attract your attention again that we're particularly focusing on the conflict between Arabia's groups on the lower left and Black-African groups on the right in the lower part of the diagram and trying to think about this in terms of the role of racial aspects of the genocide.

I want to draw your attention to the nature of the racial involvement in these events and I want to do that by talking about the idea of racial epithets. One of the very effective and good things that the State Department survey did was to get very careful, recorded transcriptions within the individual interviews of the hearing of racial epithets during the attacks and these epithets would take various forms – they want to clean all the black skins from Darfur, kill the Nuba – the term for blacks, “We don't want to see any blacks,” “This is a place for Arabs only,” “This is the last day for blacks,” and so on. These are the kinds of epithets that refugees would report hearing in the events in Darfur.

Now, we first of all looked at our data to try and get a sense of the sort of temporal dimensions of these events and could we see a pattern in the hearing of racial epithets that related to the killing occurrence. So here we're back to the two waves of killings that occurred in Darfur in 2003 and 2004 and we spread out our data in terms of the hearing of racial epithets. And again, we've got this peak in 2003 and also another peak in 2004 that actually persists and is ongoing. So there's a temporal correspondence in terms of what's going on with hearing the racial epithets and the scale of the killing that is occurring. This figure is an attempt to give some sense of the connection between the role of the Sudanese government troops and the Janjaweed militias in the attacks and the reporting of hearing racial epithets. And so, on the right-hand side of the figure what we have here is a bar that indicates the highest level of reporting of hearing these racial epithets and it's occurring when the Sudanese government troops are combined with the Janjaweed in the attacks rather than attacking separately. And we're getting up to half of the people reporting hearing these epithets when the joint attacks actually occur.

What we're going to do finally is to try to look at this in terms of the patterns of the spread or the variation in the attacks across Darfur and try to understand this in terms of the combined role of the government forces and the militia and the role of racial epithets

in these attacks. So we're now talking in this last part of the presentation about the villages or settlement clusters, across Darfur – these twenty-two different places in Darfur where we were able to locate these individuals, these refugees, as having fled from. So this is just a picture, one of the early and important pictures, that reflects the kind of damage done in these wholesale attacks on villages or settlements across Darfur.

Now what we've tried to do, and there's a complicated hierarchical and near modeling sort of background – statistical background – to this, but this is an attempt to try to show what it really means, to try and summarize in a clear way what's going on. The circles on this map are reflecting the extent to which the individuals in these different localities were reporting hearing racial epithets during the attacks. And remember, the hearing of racial epithet was most likely to occur when the Sudanese forces were combined with the Janjaweed militia in the attacks. So these circles are organized in quartiles – the largest is the top quartile representing the largest amount of hearing the racial epithets. Inside the circles, you see numbers and the idea is that the lower the number – a one or a two indicating the highest levels of reported victimization overall – in the first score, and then a score in each circle is indicating actually the frequency of rape which we touched on at the end of the last session before lunch.

What we're able to show, I think, is that there is a definite correspondence between hearing the racial epithets indicated by the size of the circle and the high rankings of these villages and settlements in terms of experiencing victimization, both in a general way and in terms of sexual violence. And I also want you to take a look and sort of sense that there's a kind of clustering also among the villages or the settlements, so that in the Western part of Darfur we see a lot of this activity and we also see some evidence more towards the north and I want to then take you back to that map we saw earlier. Musa Hilal is known particularly for his activities in the northern part of Darfur, as well as West Darfur; the three other individuals more towards the western part of Darfur. So I think there's a correspondence between what's going on in terms of the violence, the hearing of racial epithets, and what we know from other sources about the activities of these militia leaders operating along with the GOS (the Government of Sudan) troops.

Just one last figure that tries to look specifically at rapes. This is a part of the work that we are trying to develop most at the moment. We have a follow-up article that is going to appear in the American Journal of Public Health on this aspect of the research and we are organizing a conference actually this summer in The Hague focused on the issue of rape as a war crime in Darfur, but elsewhere as well. This particular figure is an attempt to show the combined impact of hearing the racial epithets along the lower horizontal side of access of this figure. The occurrence of rapes on the vertical left-hand side of the diagram and the indication is that as you hear more of the racial epithets, the level of sexual attacks increases and this is higher when there are government and militia forces combined together in the attacks than when either group attacks alone.

And I want to say, finally, about the rape issue: I do think it's extraordinarily important in all sorts of ways, and one of the ways I think it's particularly intriguing and important to think about is because, you know, with killings there's always this sort of lingering

counter-argument about counter-insurgency and the back and forth, tit for tat kind of conflict. While I think it's clear what side the balance falls in Darfur with regard to the killing as well, certainly, with rape of course there's never that excuse. Counter-insurgency is never a defense with regard to the occurrence of rape, and so we're particularly intrigued with the possibilities of developing this part of a criminology of atrocity crimes that hopefully will have an impact in terms of the atrocity law as well. Thank you very much.

David Scheffer, Moderator
Northwestern University School of Law

You'll be able to ask some questions to both of the authors after Professor Kinzer completes his presentation here today. Thank you very much, Professor Hagan.

I next want to introduce Professor Stephen Kinzer. He's an award-winning foreign correspondent who has covered more than fifty countries on five continents. His articles and books have led the Washington Post to place him "among the best in popular foreign policy storytelling." And as he knows, I just can't help but tell you that I'm such a fan of *Crescent and Star*, his book about Turkey in the 1990's when he covered it for the New York Times. It was assigned reading to my students as we went off to Turkey a few years ago for an International Team Project. Everyone was under instruction; you must read this on the airplane as you go. And they all did and it was a tremendous introduction to the country. I just learned that he's just updated it. It was released last month and I strongly encourage you to look at his book on Turkey, which continues to have such a dominant role in the European and Middle Eastern region. His most recent book is *A Thousand Hills: Rwanda's Rebirth and the Man Who Dreamed It*, which is going to be the context of his talk here today. In 2006, Professor Kinzer published *Overthrow: America's Century of Regime Change from Hawaii to Iraq*. It recounts the fourteen times the United States has overthrown foreign governments. Professor Kinzer seeks to explain why these interventions were carried out and what their long-term effects have been. He is also the author of *All the Shah's Men: An American Coup and the Roots of Middle East Terror*. It tells how the CIA overthrew Iran's nationalist government in 1953. He spent more than twenty years working for the New York Times, most of it as a foreign correspondent. His foreign postings placed him at the center of historic events. From 1983 to 1989, he was the Times bureau chief in Nicaragua. And you know what that means in those critical years. In that post he covered war and upheaval in Central America. He also wrote two books about the region. Columbia University awarded Professor Kinzer its Maria Moors Cabot prize for outstanding coverage of Latin America. He studied history at Boston University and graduated with high honors and teaches journalism and political science now at Northwestern University and is a constant contributor to book reviews and to The Guardian. So I'm very pleased now... Professor Kinzer, will you please join us and talk Rwanda with us.

Stephen Kinzer, Keynote Speaker
Northwestern University

Thanks very much. It's wonderful to be here. I'm probably the exception - all of you people are real specialists in a very important area of international law. I'm just a journalist. You know, when my books started coming out, sometimes they were reviewed by academics and I would see in them the phrase that this book was "journalist." It took me a while to realize that this was not intended as a compliment. But we pay them back, too. We sometimes write, "Well it was an OK book, but it was academic."

It was fascinating to watch that presentation on Darfur, because there are some connections between Rwanda and Darfur – the obvious one is their tragic experience with genocide. Rwanda is also one of the principal contributors to the Rwanda UN peacekeeping force, and in fact one of the times that I was in Rwanda working on my book happened to coincide with the dispatch of a new brigade of Rwandan troops to Darfur. And President Paul Kagame, who was of course the leader of the insurgent army that overthrew the genocide regime in 1994, came to bid farewell to this contingent that was going off to Darfur and he said something that really struck me. He said, "I have two orders for you. Number one, don't kill anybody. Number two, don't stand by while anyone else kills anybody." This obviously comes out of their own experience of watching these UN troops standing by while atrocities were unfolding right in front of their eyes.

While I was doing this book, I had the opportunity of spending more than thirty hours in interviews with President Kagame and he's a fascinating figure, truly one of the most remarkable revolutionaries of his generation. And during the period I was doing these interviews, we were trying to make time here and there. One time I got a call and they said, the President is making a trip to Abuja, another part of Africa, and he'll have time in the plane. Would you like to get in the plane and you could conduct an interview for a few hours during the ride. So I said, sure. We got on the plane; we had our interview.

And it turned out that there was a meeting of African heads of state in Abuja; there were ten heads of state meeting there. And that evening there was going to be an event in which all ten would speak briefly. So even though that was none of my business, I asked the people who were bringing me there, couldn't I go? Can't you somehow get me in to this dinner? Because a chance to see ten heads of state speaking is always very interesting. And sure enough, they managed to get me in. And I should have brought it, I still have a card, it says: "Government of Rwanda, Stephen Kinzer." I don't look like anybody else in the Government of Rwanda. (laughs) But that's a nice little souvenir.

Anyway, we had our event and so all ten of these heads of state were up in the front and each one got up and spoke for five or ten minutes. But something very remarkable happened. Of course, I was particularly interested in Kagame. He spoke for a few minutes, and then all the other nine would sit down and listen to the next guy and went one after the other. At one point, President Bashir came up to the podium, and at that moment President Kagame picked up the program for the event and unfolded it and held

it directly in front of his face, and kept it there for the entire time that Bashir was speaking. The moment Bashir was finished he folded it up and put it down again. I guess in a position like that you could not expect another president like Kagame to jump up and shout at him or denounce him or throw his dinner at him, but that was probably as far under the limits of protocol that he could go to show that he was not approving of the fact that not only what Bashir was saying, but the mere fact that he was present in such an august and respectable group. So there certainly are connections there and they're very deeply felt, certainly in Rwanda.

Now, let me talk a little bit about Kagame and the ruling group and their approach to justice and development. I was just in the lunch line talking to one of our colleagues who has just been in Rwanda last week, he told me, and said that he was totally amazed at the progress that Rwanda has made. And I think anyone who goes to Rwanda has to be. It's truly spectacular what they've managed to achieve these last ten years. If you go back to 1994, the year of the genocide in Rwanda – that was also the year when Somalia collapsed. You remember that Black Hawk Down incident happened; there was this outbreak of planned warfare. Those were probably the two most ruined countries in the world in 1994. And if you would ask anyone then what the future of these countries were, you probably would have the same answer for both of them - that if they were lucky, they would have a brutal ethnic dictatorship. Otherwise, more likely they would be in a state of constant anarchy and terror and starvation and misery. And that is exactly what has happened in Somalia, but not in Rwanda.

Rwanda has rebelled against destiny, against history, against its fate. It's a place that's full of hope and full of enthusiasm. While I was there, Bill Clinton showed up to open up his new hospital. A few days later, a guy they call "the other Bill" – Bill Gates – showed up. They're always competing. I hadn't realized this. So Gates was saying, "Well, his hospital is serving all of Rwanda, but mine is actually also going to serve doctors who are coming from other countries. We're going to train them too, so ours is better." Paul Farmer, who many of you may know from that wonderful book, *Mountains Beyond Mountains*, has effectively given up his work in Haiti where he spent much of his life, and has moved to Rwanda now in the development community. Rwanda is the hottest number one topic. And that's one of the reasons that drew me to this untold story. The head of the Millennium Village Project in Rwanda, who's working with Jeffrey Sachs, told me, "I've worked in dozens of countries and I can tell you, this is the only country on the face of the planet that has a chance of going from absolute poverty to middle income in the space of a generation." So in the development community, there's tremendous excitement about Rwanda. I couldn't say quite the same about the human rights community, but it's very interesting. These issues about development and human rights and whether they're complementary and how do you define them in a full way really are very vivid in Rwanda and those are fascinating issues.

Now after the new regime took power following the genocide, in addition to trying to rebuild the economy and its shattered society, they had to decide, "How are we going to deal with the genocide?" You have something like a million murderers in Rwanda. That might be at least one out of every three adult males in the country. And many of the other

people in the country are survivors of families that were slaughtered. To say that there's a huge mental health crisis in Rwanda would be a gross understatement.

Now to try to rebuild something on these ruins is almost overwhelming and challenging. They held a series of conferences; they invited people from many other countries to try and figure out how to do this. Essentially they came up with the following dilemma. There were two things that were completely opposite – the first was, you must punish the guilty. The reason this genocide was possible is that all these outbreaks of violence, which they now call “practice genocide” that happened all during the ‘60s and ‘70s and ‘80s went without punishment. So people got the idea, you can always hack the family next door to death with a machete and you will never be punished. So you must punish them now to set an example for the future.

The only other thing that is as obvious as that is that you cannot possibly punish them. They have no legal system. A million trials would take centuries. There are no defense lawyers, there are no judges. There are no prisons - the entire prison system of Rwanda can hold only ten thousand people. And besides, you need those people to work, to develop the country. You can't have them in jail where the government is supporting them, because the government can not even afford to pay for what's required to run the country for the people who are out of prison.

So you have these two obvious facts: You must punish them. You can't punish them. Through a long process, they finally decided, as many of you know, to reach back into their own pre-colonial history to this system called “gacaca,” which was a traditional form of justice. I think that word literally translates as “sitting on the grass.” These were tribunals that in the pre-colonial era involved lesser crimes like, “Your cow broke through the fence and ate my crops and now I don't have anything.” So the village elders would sit in front, everyone in the village would show up, and the different parties would give their sides, and the village elders would pronounce their verdict and their sentence. So they've created sort of a modern version of that.

And right now, at this very moment, there's over a thousand gacaca tribunals functioning all over Rwanda. At these tribunals, the alleged perpetrators are brought back to the village where the crimes were committed. It's a very important difference in this genocide from many others like the Nazi Holocaust or most others, where the genocide and the killings are unfolding in some hidden, far-away place and the leaders of the country are lying about it. They're pretending it's not happening. That's not what happened in Rwanda. It all happened in the plain light of day. Everybody knew what happened and they know who did it. They watched it. There was no attempt to hide it.

So the perpetrators come back to the village and every business must close, and every person in the village is required to attend. The judges are from the village, they've received a period of a couple of months of training and they've been elected as responsible respected leaders by the village. And these tribunals are retributive – they have the opportunity to impose sentences up to thirty years. But that's not all that they're about. They're also very cathartic; it's an emotional event in which anyone can stand up

after the charges are read and the defendant has had a chance to speak, and speak about his or her own experiences. And I've attended ones where the defendants are cross-examined quite sharply by the audience. Everyone in the audience knows this guy. They've known him since he was a kid. And they say things like, "But where did you get that gun?" or "Don't say you weren't part of the gang, because I was hiding in a hole in so-and-so's house and every time the gang came looking for me, you were in it!" So there's a lot of tears shed there.

In many cases it's the first time that the people in these villages have the chance directly to confront the criminals. And in many cases now, you've gotten to the point where these defendants have already served some years in prison and in most cases they are then sentenced to what amounts to time served. In Rwanda it's traditional anyway that fifty percent of all the jail sentences are usually served at home.

Now you have the situation where, in many towns, the survivors of families that were slaughtered are living side by side with the killers, because they're out now and they're coming back, and they're living at their old homes. I asked one woman in Nyamata, where a thousand people were killed in the Catholic Church, "How can you do this? How can you live knowing that the people you see, individuals, are the ones who slaughtered your family and your neighbors?" And she had what I guess is the obvious answer, which is, "What choice do we have? We have to do this." It is now in Rwanda virtually – it's not illegal but it's really taboo even to mention the words Hutu or Tutsi. The whole mantra is, "We're all Rwandans now, that's our only identity."

Criticisms have emerged of the gacaca system. But I think the style of criticism, or the topic of criticism, has changed. At the beginning, the outside world was critical of the gacaca tribunals because they don't afford the legal protections of American or Westminster styles of justice. The defendants don't have defense lawyers and they do not have opportunity to call witnesses or subpoena people or subpoena documents. So that was a subject of criticism. But I sense that that criticism has largely faded away in the face of the fact that, although it would be great maybe to have the Westminster system of justice everywhere, it's just totally impossible in a situation like Rwanda. They had to develop a system on their own.

Now, I sense that there is a new sense of criticism that has emerged, which is that these gacaca tribunals are focused on trying the people guilty of the genocide. Now, there were other crimes committed, not just in 1994, but in the years that have followed. Those have been crimes that were committed by soldiers who were fighting against the genocide regime. Then, as you know, the genocide's army *en masse*, hundreds of thousands, was escorted into the Congo by the French government, and from there started a new insurgency in northern Rwanda that lasted all through the 1990's. The suppression of that insurgency by the Rwandan government was very brutal; many crimes were committed there.

Following that, the Rwandan army – Rwandan soldiers – invaded the Congo twice. They went in and overthrew Mobutu, which was an amazing feat. The Congo was a hundred

times bigger than Rwanda. And during the fighting in the Congo, there were also many atrocities committed. So there is a feeling among outside critics that when the gacaca tribunal says, “We’re here to try the perpetrators of the genocide, not to try soldiers who participated in war crimes under other circumstances,” that could be interpreted as saying, “The gacaca tribunals are to try Hutu.” And the Tutsi, who are in many cases the soldiers responsible for these other atrocities committed in war situations, are not covered by the gacaca system. So the response of the Rwandan government – and this is what Kagame told me in the interview – is these are totally different situations. One is an actual genocide. The others are crimes that may or may not have been committed in the context of war, which we are trying to deal with on an individual basis through a military justice system. This is not an explanation that has convinced everybody in the outside world.

So the gacaca system, to put it mildly, is somewhat controversial, but it’s truly a remarkable effort by a country that had very limited resources to try and deal with a highly complex situation where criminal justice is not enough. You need reconciliation for this country to go forward. I’ve asked many people in Rwanda, “Do you think there could be another genocide here?” Most people say yes. They say, the only thing that’s necessary for what happened last time to happen again is that the government – the authorities – would promote it. The guy who heads the reconciliation study intake at the national university gave me a little bit of a broader answer. He said, as long as this economic development process is going on, I think people’s hatreds fade back into their minds. In Rwanda, there’s a tremendous sense of excitement and enthusiasm, a feeling that something’s really happening here, and our kids might have the chance to go to school and have electricity and running water. And this guy said, as long as that’s going on, I think people really are focused on the future. But if this economic development process sort of falls apart and grinds to a halt and people start thinking, “It’s not working, we’re just going to be poor forever, just like Burundi and all the other countries around us,” then he said, I fear that then these hatreds can re-emerge. So that makes this economic development process doubly important.

Now, one of the interesting facts about Kagame and the group that has come into power with him, is their – I don’t think this is too strong of a word – their contempt. Their disgust, their disdain for what they call the international community. There is no phrase that they pronounce with more dripping sarcasm, “Oh, I guess we’re going to be saved by the international community.” They really have a chip on their shoulder. Where does this come from? Well, I think it’s an accumulation of experiences. First of all, this generation, including Kagame himself, grew up as miserable refugees in refugee camps mostly in Uganda but also in Tanzania and Burundi and Zaire. When they first got there they were just planting six month crops because they figured, well the world is going to see that hundreds of thousands of people have been chased out of their country because of pogroms, one of which came literally within one minute of claiming the life of two year old Paul Kagame. So the world will come and get us back to our country. But that never happened. Instead of going back in six months, they were there six years, and then sixteen years, and no one ever came to help them.

Then, of course, they had the experience of the genocide. The world never lifted a finger, never came to help them. Then, they had this experience of the French under the protection of the United Nations, creating a zone in Western Rwanda – a turquoise zone – into which the entire genocide regime and all the killers flooded in by the hundreds of thousands and were then escorted with their attack helicopters, their armored personnel carriers, and their artillery pieces into the Congo. During that period when they were in the refugee camps, as some of them still are, they were launching attacks out of those refugee camps. Those refugee camps were maintained in explicit violation of humanitarian law. In the first place, you're not supposed to have weapons in refugee camps, and there were not only small arms and machine guns, but as I said, artillery pieces, helicopters, and armored personnel carriers. These were essentially military bases with also a lot of refugees in them.

And the United Nations, the UNHCR, was allowing this on the argument, privately, that cooperating with the gangs, the militias, that controlled these refugee camps, is the only way we're ever going to be able to send any aid into there. They not only tipped their hat to the fact that these genocide perpetrators were running the camps; they hired a number of them. That was one of the conditions of allowing the UNHCR in. And, as was documented in a book by the New York Times correspondent who covered this episode, Howard French, the UN in some cases even allowed those killers to move weapons from one camp to another, or from outside Zaire into Zaire, on UN refugee food shipment airplanes. So that was an explicit violation of humanitarian law, plus you're not supposed to have refugee camps right on the border of the country when they come. They're supposed to be moved inland. I believe the standard is ten kilometers away from the border. That also never happened. So, this also led them to intensify their feelings about the outside world not caring about us.

Then they had episodes with NGOs, in which many of these NGOs came in and essentially felt that they wanted to take over the country and run their own projects, and they got very upset. They expelled a lot of NGOs. They don't like this outside world pointing a finger at them. It's really part of the Kagame mentality. Never ask for help from anyone. Because our experience tells us, it's never going to come. And the other side of that is, when they come in and lecture you about "your legal system isn't good enough" or "your human rights record isn't good enough," don't listen to them. They don't know anything about our situation. Now, they have a lot of basis I just said for that feeling. On the other hand, it also spills over into a prejudice or disposition against groups that are legitimately and sincerely working to protect human rights inside the country. This is a very difficult balance to bear. Just recently, probably one of the world's greatest critics of Kagame and the government, who is a woman, who is the Rwandan specialist for Human Rights Watch, has been banned from coming back into Rwanda. Now, their argument is, I think, very strong. They say that now, there really is no communal sense of Hutu grievance here, but she's going around trying to encourage it. And that's a good argument. Now there our argument would be, no, we're not encouraging it, we're just documenting it. Who is really right? I guess we can argue that forever. But this just gives you a sense of this conflict.

Now, just in these last few weeks, we've been seeing another example of Rwanda's involvement, and how central Rwanda is to this entire conundrum in that region of the world, particularly this horrific struggle that's unfolding in the eastern Congo. Now, that struggle has many different facets and bases, but two are very important. First of all, all wars ever fought in that part of the world have an economic overlay. This is probably the resource-richest piece of land in the entire world, and every warlord and every clan leader and every army commander and every very respectable European and American business owner who abuses those resources, who was active there, is active there in part to loot resources. I hadn't even heard the word coltan before I started covering Rwanda. Now I see that coltan is the grey gold that the world really wants and there are huge deposits of it there. If Hitachi and Microsoft were not so eagerly lusting after coltan, that war would not be so intense. And you can extrapolate from that about many other minerals, and gold and diamonds and so forth. So there's always an economic component.

Rwandan forces that have been active there have been accused of trying to loot their share of the resources. If that's not true, then it would make them the only army that ever functioned there that didn't do that. So I think there is every reason to believe that it is true. But there's another very important factor about this particular war and that is that it is essentially the continuation of the Rwandan civil war inside the Congo. That genocidal militia can no longer function inside Rwanda, and it can't even attack inside Rwanda because of the security state that Kagame has built. And Rwanda is undoubtedly the safest country in Africa, and the capital – Kigali – I used to call it the safest capital in Africa, but then people would say to me, "Well, what about Washington, D.C. or London? It's way safer than them." So maybe it's the safest capital in the world.

So what do these Hutu killers do if they want to slaughter the Tutsi and they can't do it in Rwanda? They're doing it in the Congo. This is what has drawn Rwanda into that struggle. I'd say maybe it's been drawn in by both of these factors. Their public explanation for why they're involved is that the people that are carrying or have started this war originally were these hundreds of thousands of genocidal militia men, and we want to make sure they don't come in to Rwanda, and we want to protect our Tutsi brothers in there who are victims of these killings. Now, the economic factor was an unspoken one, but there have been enough reports suggesting that it's another reason why Rwanda is active there for us to assume that that probably is true.

As part of this campaign, the Rwandan government, as it has done in the past with other leaders, including the current President of Congo, Mr. Kabila, has gone in to support the local figures there. The local commander who they have been supporting over the last year or so is Laurent Nkunda, a renegade – he's an ethnic Tutsi from the Congo who was a general in the Congolese army, but before that he was in the Rwandan Patriotic Front. He fought under Kagame's leadership during the war to overthrow the genocide regime. So the idea that there might be a connection there seems very logical. Now as reports of the horrific war crimes being committed by the Nkunda army began to emerge only in recent months, I think in public view, this caused great consternation in the outside world.

Here I want to make just a small digression and tell you that while I was in Rwanda, I think I met the ambassadors of just about every Western country and every one of them is in the same situation – it's a fascinating one. Everyone told me the same story. This is a great country; this is the best country in Africa! This country is really going somewhere, it's fantastic to be here, I love being part of this. Kagame's my hero. This is a spectacular process unfolding in front of me. But when they send these cables back to their capitals, they get the same cables back. Are you crazy?! He's a brutal dictator. He doesn't allow any freedom; there are no human rights in that country. There's a huge gap between the way Rwanda looks to people in Rwanda and the way it looks to groups, to governments, that are hearing from human rights organizations all around the world. While I was there, there was a big fight going on, it was the buzz of the diplomatic community, between the U.S. State Department and the U.S. Embassy in Kigali, because the State Department had prepared a human rights report. It was very negative about Kagame and Rwanda. And the ambassador refused to sign it. He wouldn't sign off on it. And he was saying, "It's not true. You're listening to lobbies up there. You're not here."

So, that takes me back now to what's been happening in these last few weeks. The government of the Netherlands has been one of the most generous donors to Rwanda, and they donate in a very positive way. No conditions. As long as they know you're operating honestly, they let you decide how to spend the money. And that's the kind of aid Rwanda wants. They don't give this to very many countries, only the ones they really trust. So the Dutch government – and now the Dutch ambassador was one of the people very involved in this back and forth constantly with his foreign ministry – has decided, as a result of a decision in The Hague, to suspend all aid to Rwanda as a protest over Rwandan support for Nkunda in the Congo. I read this and thought, well given their attitude towards the outside world, which is essentially "Rwanda to world: drop dead," they're not going to like this. They're going to bristle with this. On the other hand, not only is this a very important donor, but the complaints of this donor are not easily dismissed. The complaints are actually quite legitimate. And whether they should result in the cut-off of aid is another question, but you can't just say that it was just an invention by certain lobbyists that don't like Kagame.

So I really was wondering, what's going to happen now? Are they just going to say, "We don't care," then let the British cut off their aid and get themselves into a pattern that really can kill their development process? They have a huge base of support here in the United States, and if they're seen as supporting mass criminals like Nkunda for a long period of time, this is really going to hurt them. And that's what I think led up to this startling development of last week in which the Rwandan government arranged with the Congolese government to be invited into the Congo to suppress these Hutu killers that are the remnants of the genocide regime. And suddenly we found out that not only were they doing that, but they arrested Nkunda. This was the guy who was supposed to be their proxy. And I'm sure this is producing some reassessment now in places like The Hague. I don't exactly know what they're going to do with Nkunda, because there are a lot of secrets in that part of the world and he knows a lot of them. If he turns up in the Congo – I think the Congo has asked for his extradition – or is in an international criminal

tribunal, who knows what secrets are going to come out. And that's why, frankly, knowing the way the world works in that area, I was surprised they even took him alive.

The Rwandans are very skeptical of international justice. They were opposed to the creation of the International Criminal Tribunal for Rwanda and the way the tribunal has functioned has come under tremendous criticism inside Rwanda. Nonetheless, I do think that the arrest of Nkunda showed that "Rwanda to world: drop dead" does not fully encapsulate everything they think about the outside world. They are making calculations. I am the author of the advance obituary in the *New York Times* for Pervez Musharraf, which they kept telling me to update because we think we might need it anytime soon, and there's a quote in there that I still remember from Musharraf. They asked him, "You were supporting the Taliban, you didn't want the Americans to attack the Taliban, and ultimately you opposed the Taliban and you agreed to cooperate with the attack. Why?" And Musharraf replied a very wise line. He said, "Policies are shaped in accordance with environments. When environments change, policies change."

So here's a way where I do think the outside world in a constructive way, in a way that was based in reality, was able to confront this Rwandan regime and lead the regime to overcome its instinctive skepticism. There's a hugely important project underway in Rwanda right now, and its success will not only determine whether there will be a new model for development in Africa and whether Rwanda can leave genocide ideology behind, but I think it really can help shape the whole world. In the last century, it was possible for a couple of countries, superpowers, to maintain a modicum of stability in the world. But in the new century, that's not going to be possible. The only way there's going to be any measure of stability in the world in this century is if this huge gap between rich countries and poor countries somehow narrows. Any country that can come up with a formula how to do that, a model of how to do that, is going to make a huge contribution to the world.

This process in Rwanda therefore is extremely important and I found it actually quite encouraging to see that, even though cutting off aid is a very dramatic measure, it did seem, perhaps in concert with other kinds of things that were going on behind the scenes, to have an effect. And I was glad to see that despite the chip on the shoulder that really characterizes Rwanda's relationship to the outside world, the Rwandan leadership was able to see that if their collaboration with Nkunda was as it has been reported, it had gone too far and Nkunda had gone too far, and that this was not sustainable anymore. Given the fact that tiny little Rwanda, which in the past has never featured at all in the geopolitics of Africa, now has such a powerful army and such a very appealing government and development model, they realized, I think, that without calm in the region, Rwanda's development project cannot succeed. They have no natural resources, they have no port, they're landlocked. They want to become the trade and commercial center for East and Central Africa and they have a whole plan for doing this – it's a plausible plan. But that can only work if Central and East Africa is peaceful.

I just attended a dinner here in Chicago a few weeks ago. I was invited by a woman who was bringing a large group of about a dozen wealthy Chicagoans to see what's happening

in Rwanda. And I said to her, “So how is the planning for your trip going?” and she said, “Oh, we cancelled it.” “Why?” I said. “They’ve been reading about the Congo. They don’t want to go.” Multiply this by investors and entrepreneurs and development workers. Instability anywhere in the region is bad for Rwanda, for very selfish reasons.

Therefore I do think now that the military power of Rwanda – and to a certain degree its political influence, because the success of its model has given it considerable political influence – could actually become a factor for stabilizing the eastern Congo. My favorite faction in the eastern Congo is any faction that is going to establish security. And Rwanda has been tremendously successful in that, and there can be no debate. There’s a lot of debate about the Rwandan model and about Kagame. It’s very much an open question. You can posit how Rwanda is going to become the model for development in the world and be a huge success. You can also posit lots of reasons of why it’s going to collapse and it’s not going to work. It’s a very open situation. It’s unfolding every day. And it’s an untold story, I think, and a fascinating one. And that’s what brings me here today. Thank you all for your attention.

David Scheffer, Moderator
Northwestern University School of Law

Thank you. That was tremendous, Professor Kinzer. We have, oh I would say – Brenda, I know you need some time to make the transition. Let’s try maybe seven minutes or so of questions, if we can. And then our cameras will actually have to shut off and we’ll take them downstairs. If you want to go on to the questions, we can do that. But there has to be a little transition time to move the cameras. Why don’t we do this – is this mobile? Yeah. Well what I thought it that they could simply stand and answer questions from their table, unless you want to do... Actually, why don’t you come up here, because we have a camera working. John and Stephen, if you could just come on up, that would be great. I’ll point out to the questions. So why don’t we start here with Mr. Holladay. Why don’t you begin?

Mr. Holladay: I have a question actually for both speakers, but particularly for the Rwanda case. It’s about powerful leaders and small nations. To what extent is a model like Rwanda dependent on a single charismatic leader? And if that leader for whatever reason is no longer there, can the model be sustained? And John, do you have other examples of where small but morally influential countries like the Netherlands can actually exert on countries, where there have been atrocities or there is a response to atrocities, an influence way beyond their size and their economic power?

Stephen Kinzer, Keynote Speaker
Northwestern University

Let me answer very briefly, first of all, about the impact of President Kagame in this process. I think you've put your finger on what might be the greatest weakness of this process. There is a very interesting ruling group there; there are some fascinating people in it, including lots of women. You know that Rwanda has recently elected the modern world's only majority female parliament. Nonetheless, Kagame is by the force of his personality and the legitimacy that he's gained from overthrowing the genocide regime, the hugely dominant figure. This is the greatest weakness in this process: so much depends on one person. I've asked people who are doing huge projects in Rwanda, "What's gonna happen if Kagame gets hit by a truck or the French send somebody to kill him one of these days?" And he said to me, "I think I'm gonna leave. Because then I wouldn't have faith in this process much anymore." So, you've put your finger on a weakness of the process, no doubt.

As to the effect of outside countries, I don't know enough to be... I can't pick out models in the world right now but I will make one comment. It's not just that it's a small country, the Netherlands. It's that this is a country that has a moral legitimacy. If it were the French, or God forbid the Americans, the Rwandans would say, "Who are you? You're kidding me, you're going to tell me about human rights? You cannot be serious." But you can't say that to the Dutch. This is another reason why I think it's so important for Western governments to hold themselves to high human rights standards. Otherwise, we have no moral authority to urge other countries to live up to those standards.

John Hagan, Keynote Speaker
Northwestern University

Well, it's a fascinating question and one actually I've thought a lot about. And to answer, I'll go back to my previous book on the International Criminal Tribunal for the former Yugoslavia. I was very struck in writing and doing research on that tribunal to think about the role the Prosecutor played – all our Prosecutors played extraordinary roles in these institutions. In that particular institution, Louise Arbour played a crucial role and I was struck by the way in which she did it. She did it with personal charisma, which goes to your question, but she also did it with a great sense about how you create a sort of collective sense of morale around you, and build an institution in terms of the people working within it. But then what particularly intrigued me was that some of the reason that she could do what she did was because she did come from a small country, Canada, that would like to think of itself as a moral superpower. I am a Canadian citizen, so I share in that and it draws me to this particularly moral tale, I'm sure. But one of the things that intrigued me about the way Louise Arbour operated, and David worked with her so closely and could say much more about it in other ways, but she was able to do things because she was thinking more about her position in her country of origin and her background and aspirations. She was less worried about the United States perhaps, and could operate with some degrees of freedom which were quite unique and emboldened

her, I think, to operate in a way with regard to the indictment of Slobodan Milošević that perhaps would have been harder to do had she not had that sort of country of origin context in which she operated.

David Scheffer, Moderator
Northwestern University School of Law

Marc Kadish?

Marc Kadish: My question is addressed to the speaker about Rwanda. I thought that your information made a lot of sense, and was based on empirical data that you yourself had viewed and lived through, but I still didn't quite understand how it got from the genocide and human rights violations to the model of development. Is that purely the president, or are there other forces, and is it basically microfinance or what are the things that are moving that forward?

Stephen Kinzer, Keynote Speaker
Northwestern University

Now you're getting me back into my other speech. I don't have time to give that speech now. But very briefly, I'll put it this way. To some extent, the question is, how do they do this? One of the questions I asked President Kagame during my thirty hours of interviews with him was this. I don't know how many hundreds and billions of dollars the world has poured into Africa since the foreign aid era began, and if you could take all the reports that have been written on how to develop Africa, you would probably be able to circle all of Africa. But yet nobody has figured out how to develop Africa. Why is that? And he had a typical answer. He began by saying, "I reject the premise of your question. The premise of your question is, nobody has figured out how to develop Africa. But that's not true. Everybody knows how to develop Africa, it's just that nobody does it." And then he said, "You can take those ten thousand reports and you could just boil them down to one page and everybody would know what's on that one page, but nobody does it."

Okay, so what would be on that one page? And essentially I paraphrase now, but this is what he said and I think this more or less summarizes his model. First thing he said is, of all the lists of things you want to do, take one out and you do that first. And don't think about any of the others; ignore all other challenges until you get one finished. And that one is security. If people can't walk on the streets, you can't send your wife to the market, and the kids can't go to school because the soldiers are going to steal the windows of the school, you cannot build anything. So forget everything until you have a secure, safe country. When I heard that, I wished he had been advising the U.S. before we invaded Iraq. Then he said, OK, what are the points on the list? It's simple, he said. You want to develop a country? The people have to be healthy. You must have a good healthcare system. Second, you must have a good education to produce an educated

population that can serve business and promote entrepreneurship. Third, you must promote business. Don't think of business as the enemy of democracy. Three days is the maximum to establish a new business in Rwanda; to bring in a specialized worker into Rwanda, thirty minutes is maximum to get the visa. Make it easy for businesses to work. Then, infrastructure. Have good roads, have good internet connections. Have good airports. They want to build the best airport in eastern-central Africa.

Next, gender equality. You cannot have a country developed if you're only using half the people. And they've now – you're not supposed to say population control anymore – it's called family planning, that's the politically correct term. You must have family planning so that all of your gains are not eaten up by population growth. And they have now embarked in the most far-reaching family planning program ever seen in Africa. And then, you administer all of this with a state that's not corrupt. It cannot steal money. And I'll tell you, you could build at least two Rwandan governments with the cabinet ministers that Kagame has fired for doing things that were not only normal in the rest of Africa but are normal in the rest of the world. The anti-corruption campaign is very intense. Any police officer that takes fifty cents is finished for life. And that goes for cabinet ministers and others as well. So he said, it's that simple. Everyone knows how to do it. The only thing that's different about us is that we are actually doing it.

PANEL DISCUSSION

David Scheffer, Moderator

Northwestern University School of Law

We ended the morning session with a very, very good discussion that was inspired by one of our students here at Northwestern, Vicki, from Pakistan, about rape and sexual violence issues in the tribunals. I know that over lunch, there was some continuing discussion. And Deputy Prosecutor Farrell from the Yugoslav tribunal, I think you might want to say a few words about this from the Yugoslav tribunal's perspective, and I believe Defense Counsel Gill Higgins will want to add something to that from her own work both with the Yugoslav tribunal and with the Rwanda tribunal. So I want to follow that up now and continue it for a few minutes, then we'll jump back into some other different cases and issues that confront the tribunals.

Deputy Prosecutor Norman Farrell, Panelist

International Criminal Tribunal for the former Yugoslavia

I just wanted to mention a few practical aspects of prosecuting rape, crimes of sexual violence. I agree with Mr. Petit and others that there has been, and Professor, there has been finally a development and a recognition and a taking seriously that rape is not simply a random act committed by wayward individuals in times of conflict, and that rape can be and has been used as a tool during armed conflict. I just wanted to note

though that there's a certain difficulty, as with other crimes and not necessarily just with rape, and that certain caution when we talk about prosecuting rape or other forms of sexual violence or gender crimes, which is that like all crimes, there has to be an intent on the perpetrator's part to either intend to commit rape or that it was foreseeable depending on whether it's recklessness or *dolus eventualis*. But that when you're talking about crimes committed from a large scale and you're trying to attribute the acts on the ground to the person at the highest level, the president, or the top political officer, it's extremely difficult when you're talking about joint criminal enterprise, which is one of the modes of liability we use. I just think we should be conscious of the fact that it's difficult because of the necessity to demonstrate that the person who is the top political commander intended to rape – either intended or foresaw under various forms of liability. That's the requirement you have to have for the commander, or not for the commander, but in many cases, for the top political leader. I mean Vogel is clear evidence of rape on the ground or sexual offenses on the ground. If you're charging someone with joint criminal enterprise, which is having a criminal objective, that criminal objective must entail and encompass the crime of rape.

So, there's a difference between rape as a war crime and recognition of it in the jurisprudence, in the very progressive, and thankfully progressive, development of the recognition of these crimes. There's a separate step that needs to be taken into account, a separate step in doing these cases where it is extremely difficult, maybe unfortunately so, maybe a hesitation on certain people to recognize it, maybe as Prosecutor Rapp has said, a certain hesitation on the judges... but it's not so simple as with all the crimes to simply equate crimes on the ground with something which is in the intention and the willingness of the top perpetrators, the top participants, basically the presidents and the top political leaders, who have to have that intent themselves or have to foresee the likelihood of it being committed and accept it as their own. It's just the distinction between the recognition of the crime and the ability and the likelihood of getting a conviction, which I think people should be aware of.

David Scheffer, Moderator
Northwestern University School of Law

And Defense Counsel Higgins?

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

Just to sound a very brief note of caution and to cite an example from the ICTR, we have to also, I think, be aware of the fact that there must be an adequate, evidential basis for charging in the first place, and of course proper disclosure of exculpatory evidence in relation to those charges to the defense. The brief example being in the case of Alfred Musema, who was convicted before the ICTR. He was the director of a tea factory in Gisovu and was charged with genocide and respective acts committed by others in the

hills of Bisesero. One of the charges was rape. He was convicted at trial of the rape charge in addition to others. Before the appeal was heard, the defense was provided in an unauthorized manner with statements from a current accused, not in the trial but from an accused who sat in the detention center with Mr. Musema, statements that said that the rape was committed by someone else. Those statements were not disclosed to the defense during the trial of Mr. Musema, and in fact, the conviction was overturned on appeal. So one has to take into account the very important considerations of evidential basis for the charging and the point made about the proper disclosure to the defense in these charges.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much, Ms. Higgins. I'd like to actually jump into the sphere of Judge Fahey's experience in Sarajevo. You actually have had a very unique experience in Sarajevo with the War Crimes Chamber of the State Court of Bosnia and Herzegovina domestic court. In contrast to the other tribunals, your court prosecutes individual perpetrators of mid- and low-level rank who allegedly, in most cases, personally engaged in cruel, barbaric, and murderous crimes against other human beings. What perspective did you bring to the bench as a judge, particularly an American criminal court judge, to the War Crimes Chamber, that might differ from how your counterparts here have been really speaking about leadership crimes? You've really been in the trenches with the mid- and low-level perpetrators. Is there anything you can bring to us in terms of your perspective on how these war crimes and crimes against humanity and genocide are being prosecuted against mid- and low-level perpetrators?

Judge Elizabeth Fahey
War Crimes Chamber of the State Court of Bosnia and Herzegovina

Yes. I'm not sure that it's a hundred percent correct to say mid- and low-level. Yes, they're not the Karadžić's and the Milošević – they're all at The Hague. But there was just a verdict on genocide in July, the written verdict I think came out this month, for the genocide of a thousand people at Srebrenica. That's by no measure a mid-level crime. But what is being prosecuted in Bosnia, in the War Crimes Chamber, is what we would call here sort of the "street crime" level. It's not the people – the politicians or the generals – who are ordering it, but those platoon commanders who might be commanding it and the people who are actually participating. So you still have some command responsibility issues, so the same elements have to be satisfied, but it's to some extent less determined by paperwork, but by the practical aspect of: was he the commander of the detachment or the platoon?

David Scheffer, Moderator
Northwestern University School of Law

Is the witness testimony more easily available to you for these individuals? Do you think?

Judge Elizabeth Fahey
War Crimes Chamber of the State Court of Bosnia and Herzegovina

The Prosecutor has always brought in enough evidence, from what I've heard, to prove each of the elements. You can have in Bosnia a verdict beyond reasonable doubt, but it doesn't have to be unanimous. It's three-judge panels. So two of us can agree on who's convicted, but it does not have to be unanimous. So the Prosecution does not seem to have insufficient witnesses for that. The one aspect from, when you say "counterparts," I didn't know if you were meaning the nationals...

David Scheffer, Moderator
Northwestern University School of Law

No, I meant your counterparts here who are prosecuting leadership crimes in the international tribunals.

Judge Elizabeth Fahey
War Crimes Chamber of the State Court of Bosnia and Herzegovina

Well, the witnesses, the civilians in Bosnia are, even thirteen years later after the war ended, intensely interested in these prosecutions. They can be video streamed; they come to attend the delivery of the verdicts; they are intensely interested. Even, I saw once on a Bosnian television – I took Bosnian for eight months twice a week, but I didn't make enough headway to be able to deliberate or anything – but I saw on the news channel that it was reported when our verdict was delayed a day. That was reported on the Bosnian news. And so the people are intensely interested in following this and, as a result, they do not run out of witnesses to make their case. The court is able to use adjudicated facts that have been adjudicated usually at ICTY in terms of whether there was a widespread and systematic attack or whether it was within an international or national armed conflict. And for whatever reason, the nationals in Bosnia have still not declared it an international armed conflict. Who's kidding whom? I mean, thirteen years later they can't step up and accept that that's what it was? It's just easier for them to say it's a national armed conflict than an international. So I don't know if you've found the same – if you have to make those same determinations. So that gets us to the prosecution of the street crime. If the context, whether it was within a widespread systematic attack or within even a national armed conflict, then we just get to determining, was there the street crime and did this person commit it beyond a reasonable doubt? So I think it is, in that sense, easier.

David Scheffer, Moderator
Northwestern University School of Law

And just to follow up, Judge, your perspective on the sufficiency of these, what we call 11bis referrals, from the Yugoslav Tribunal down to the War Crimes Chamber. I think I counted at least three during 2008 being tried before the Chamber, and I wondered from your perspective – these were cases that really originated in The Hague with the Yugoslav Tribunal, and were then referred down to a domestic adjudication within the War Crimes Chamber as opposed to being adjudicated in The Hague. Did these referrals work? Was there sufficiency in how the process worked procedurally and substantively before the Court?

Judge Elizabeth Fahey
War Crimes Chamber of the State Court of Bosnia and Herzegovina

Yes, yes. I'd say that there was, and as I understand it, it's a Prosecutor's office at the ICTY and a State Prosecutor's office at this court, and it's the Prosecutor's decision where to bring it. If it's brought at ICTY, the court can make a decision to refer it to the State Court for prosecution for the trial. And there is an NGO that monitors what happens, and issues a report, I think every three months, as to what has happened in the interim. And the reports that I've read have all been satisfied with the progress, and one of those became a plea during 2008. And at that point, I think it was the fourth guilty plea that had been given since the court was established and began with the trials in 2005.

David Scheffer, Moderator
Northwestern University School of Law

Thank you. I wanted to go to Prosecutor Rapp, of the Special Court for Sierra Leone. 2008 was the Charles Taylor trial. You've been prosecuting it. Now, it's not concluded yet, obviously, but could you give us a sense of how you saw the trial progress during 2008, what some of your most difficult issues were, that you confronted. I know there's one with respect to your prosecution witness, Vice President Moses Blah, who delivered significant testimony. And perhaps you could tell us a little bit about that and anything else that would sort of bring this case to life as it's unfolding. A true leadership crime, or prosecution, I should say.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

Indeed, and a lot to say about the trial, but the news is that I was on the phone before I came, and it appears that tomorrow we have a three-and-a-half hour court session. It's almost certain that we will conclude the prosecution against Charles Taylor tomorrow,

the 30th of January. Approximately forty-five weeks of trial stretched out over a period of thirteen months since we began calling evidence on the 7th of January, 2008; a trial that hasn't received, I think, a lot of attention from the international press. We were a little surprised by that because it's been a very dramatic testimony. We presented, there's something like thirty-one linkage witnesses, against Charles Taylor to link him to the crimes, and of course that gets us back to the fundamental challenge that we have here, and that I confront every time I visit Liberia. I've been there a dozen times in outreach sessions and working with the government and the various things that have to do with witnesses there.

And that is, we're not trying him for the crimes he committed, or allegedly committed in Liberia, but for what he did next door in Sierra Leone. And, we don't allege that he ever set foot in Sierra Leone. And of course one has in Sierra Leone an eleven year civil war, in which Taylor was quite active in March of 1991. At the original beginning of the conflict, his rebel force from Liberia outnumbered the RUF when the war began in March of 1991, but that's outside our temporal jurisdiction. Our temporal jurisdiction doesn't begin until the failed Abidjan Accords of 30 November 1996.

So we've got a couple hands tied behind our back as we try to prove this case and that's meant that the case has largely turned on linkage. We've had linkage witnesses, many former close insiders, including his own vice president, who succeeded him for sixty-one days as president, Moses Blah, whose testimony I heard personally last May. Also, the person who was the alleged head of the death squad, "Zigzag" Marzah, who gave a chilling testimony in March of various people he killed, cutting out their hearts and eating them, a fellow who couldn't remember whether he'd killed more or fewer than a thousand people, but many acts in Liberia, which would have been presented as similar acts, but also many acts in Sierra Leone as well. His top body guard testified against him, and then people all through the chain in linkage between Monrovia and Freetown, including half a dozen radio operators, reporters in communication, and rebel leaders on the Sierra Leone side.

Almost all the testimonies were presented in public session. Indeed, we have many witnesses who said they were only going in closed session. Our judges were reluctant to allow that, even to the point of, in one case, overriding the prior protective order, but we won an appeal on that. We ended up, I think, with only four witnesses entirely in closed session. One was a UN witness that didn't need to be, but that's what the Office of Legal Affairs insisted on.

The trial has been streamed by video, the internet to the region – of course most people don't have internet – but in terms of knowledge about the case, there are two things that have been helpful. One has been the program that the BBC World Service Trust supported by a number of charitable institutions that have allowed a total of six journalists to come from the region to do daily reports – three from Liberia, three from Sierra Leone – two at a time, but one Sierra Leonean and one Liberian at a time, on three month shifts. But they do fantastic reports with actualities that are often in the native languages of the people who are actually testifying and doing an extremely great job of

reporting. When I'm in Sierra Leone or Liberia, and I'll hear the interviews on the radio stations, I always think that everybody is listening to those reports, and I hear them myself as I'm coming and going. So that's been good.

The other thing is the website, which has been supported by The Open Society Justice Initiative, that has provided sort of daily reports on the testimony. In the early stages, it was actually a transcript, often an unofficial transcript, available two or three hours after each session ended. You go on charlestaylortrial.org, you'll see the report of the 90th witness in the trial and the beginning of the 91st witness. And that has been, in Liberia, picked up by a number of newspapers that have often printed it verbatim. I know you have a question later about 92bis...

David Scheffer, Moderator
Northwestern University School of Law

Yeah, well, if you want to take it up now.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

There are other things that deal with it in the case. We can talk about that later, because we ended up bringing in the end fifty-two prime victims and eye witnesses, support crime base witnesses. We had hoped, frankly, to save them grief, and have forty of them represented in writing, but the defense insisted on cross-examination. The judges ordered it whenever the defense demanded it, and so we had to bring people to The Hague, and once we brought them, often they never gave their testimony, rather, they were put in the court statement. In two cases, when their testimony was extensive, it was there for reasons, because we had to prove a crime scene on a particular crime indicted, and in the indictment, in a particular location, we had to have it. Sometimes we did use pure 92bis and just get across, but...

David Scheffer, Moderator
Northwestern University School of Law

Well, let me just close the point on that then, so that we can cover it now. This 92bis in the rules was intended to enable you to provide an alternative to oral testimony, and thus facilitate your trials, I understand. Did you as a prosecutor, have you felt comfortable that, frankly, the court hasn't – well, you haven't really resorted to that convenience in terms of putting on the trial. You've been able to have the witnesses physically present in the court room and testify.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

Well, first of all, of course any Prosecutor who wants to put on a dramatic case would much prefer to have human beings A human rights victim barely survives, his entire family murdered by a customs road blocks, I mean just the most incredible testimony. The person that's going on tonight is a man whose hand was chopped off by rebels and his four-year-old boy starting saying, "Don't, don't, don't chop off my dad's hand. Don't chop off my dad's hand!" They said, "Bring that boy over here," and they were going to proceed to chop off the four-year-old's hand. And the father put up his second hand and said, "Chop off this one instead." And he's testifying now and his then four-year-old, now thirteen-year-old, is actually escorting him and taking care of him, and indeed, will for the rest of his life. So, we're going to present that guy in writing. Now, you know, why? Well, because we don't have all the time in the world. These cases take too long. Some lawyers took four years and didn't finish. We needed to be able to get this case done. We support ourselves by voluntary contributions. We can't run out of money or it's all wasted. If we run out of money – and we were down to \$6,000 in August, you know - the judges have said they'd let the accused go. So, we realize that we've got to try to do this thing efficiently. So we are prepared to put on ten good ones and bring the rest in in writing. We thought the defense would welcome that, that they'd throw their arms around us and say, you know, as I think Andrew Cayley said at the first session, don't bring any of them, we'll be glad to go along. But the point is, they didn't. They didn't want the testimony at all, and one of the witnesses there to be...

David Scheffer, Moderator
Northwestern University School of Law

You said, defense?

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

The defense. They didn't want the witnesses to come in in writing; they wanted to make sure they actually came in physically and were accepted for cross-examination and, potentially, knocked about a bit. So they insisted on cross-examination. In the end of the day, just last week, they allowed one that they didn't demand cross on. And the judges have basically said, where they demanded cross, the witness had to physically come to The Hague. That was concerning us a great deal in terms of the cost, in terms of the fact that a lot of these people need to have like a thirteen-year-old boy come with them. That adds further to the costs. There's visas – you can't get them in Sierra Leone, you have to get them at Dakar, or Prague, and it's just immense logistical problems bringing these people there, but we did it. We brought everybody there that we wanted to. And the crime victims were quite enthusiastic about coming. They wanted to physically testify. So we used it, but it added to the length of the trial. I don't know why the defense demanded it.

Now in terms of the law, as we understood it after the Milošević appeals decision, 92bis, just to brief everybody on this, is basically a rule – it came to us initially out of some judicial decisions, but I think was codified at the ICTY back in 2001 or 2002 – that basically said that for a testimony that doesn't go directly to the acts of conduct of the accused, you can bring that in with a verified statement, but it's got to be more than just a signed statement. There has to be some kind of indicia of its reliability. Cross-examination can be ordered after the statement goes in. But the law, basically, has indicated that in terms of direct acts and conduct of the accused, that the acts and conduct of subordinates of the accused, of people involved with the accused in a joint criminal enterprise, do not go directly to the acts and conduct of the accused. So of course, every one of these witnesses saying an RUF rebel did it to me, that doesn't accuse Charles Taylor. Other testimony has to tie Charles Taylor to the RUF, and that testimony has to be live and in person. Now, if the person is accusing someone that's proximate to Taylor, then indeed, perhaps cross-examination is required. And that sort of question goes to serve the proximity. Our judges have basically said any accusation is proximity. We weren't able to find any, no matter how clean we made them, no matter how many paragraphs we took out, that didn't require cross-examination, so we had to go through that. And that cost us a couple months. I was hopeful to get out of the trenches by November. But it didn't hurt our case, to bring these people along.

David Scheffer, Moderator
Northwestern University School of Law

Very, very helpful perspective, particularly on a procedural point. Professor Van Schaack, I know you wanted to weigh in. And then, I actually want to ask you an additional question. So, go ahead.

Professor Elizabeth Van Schaack, Panelist
Santa Clara University School of Law

I just wanted to pose a question, if I could. I'm curious about, given what you've described as the logistical difficulties, the decision to go forth with this trial in The Hague. Do you think that was the wrong decision, given what we know now about the stability in the region, or do you still think that was the right decision, that this trial could not have gone forward in Freetown, because it would've been too destabilizing?

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

First of all, it was not our decision.

Professor Elizabeth Van Schaack, Panelist
Santa Clara University School of Law

Right.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

It was basically at the insistence of President Sirleaf, who we have enormous admiration for, who fears the instability of having Charles Taylor next door, being tried, and things that could happen. I mean, she was scared to death when he was on the runway at Spriggs Airport for ten minutes, that somebody would come and spring him, and something would happen, and that the bad old days that they've managed to get behind them had gone. And of course, without her demand to Nigeria, he never would've come. So, it wasn't something that the president of our Court could really compromise on.

That said, I would have preferred to try it in Freetown. We all have this symbolism, which of course the ICC is running into with these three African, four now, situations of trials appearing to be happening in Europe for African problems, and we see Bashir and others sort of waving this and saying, "Oh, we're being dragged off to Africa." Prosecutor Jallow was at the Banjul Summit in June, was it, July of 2006, which was a few days after Taylor flew to The Hague. Omar Kadafi said it was the worst thing since the middle passage of slavery, seeing an African leader in shackles taken to Europe. And of course, we've got Julia Sebutinde of Uganda presiding in the trial. We've got Courtenay Griffiths of Jamaica, representing an English bar, for examining them. I've got a team – I gave the opening statement; Mohamed Bangura, a trial attorney from Sierra Leone; you've got a mixed tribunal with two out of five judges from Sierra Leone and another from Nigeria. So, we're sitting in Europe, but that's it.

And just in terms of that kind of impression, and of course, it's been the virtue of our Court that we were at the scene of the crime. That we tried these other cases, right there, within sight of Congo Cross Bridge, which is the place where the Freetown invasion was stopped. We drive by every day places where thousands of people were amputated and raped. We talk to people who went through that horror, who live and work with us. So, that is a very valuable thing. And that was a difficult thing, to establish that court in that place in a country that was 189th out of 190 on the UN development list. But we did it, and it would've been good to have a trial there.

That said, not that many people come to trials – people are following the trial through the same sort of media that they would've followed it through if it had been in Freetown – and so I think we've largely overcome it. But the symbolism of it, I think, was unfortunate. Having to spend all this effort to develop this important symbol of trying a country, trying it in place, in a court that involved a unification of African tradition and law with the international community, which is one of its greatest assets. That's the way it was. But we had to deal with all these expenses and be at the ICC, and there's a chance

come September, we may be thrown out because the Katanga case will start, and I don't know where we can try our case then. I mean, it will cause us a lot of difficulties, not to mention the high cost of the Euro and our Court, which has a lower pay schedule than the other ones. Most of my attorneys work for half of what Norman's do. And we can't afford to pay more, so it's tough for us.

David Scheffer, Moderator
Northwestern University School of Law

And for those of you who've had the privilege of visiting the Special Court for Sierra Leone or Freetown, it does have a very, very good facility. It's a shame that the trial cannot be held there.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

Yeah, the other places are just, you know, we've got the ICC court room, which is built in the parking lot out of plywood. We've got an international conference center with court rooms that are four times wider than they're deep, and then places in the V of an insurance building for the ICTY. This really has real court rooms that just really fit. There's more about Taylor, but we don't have to... it's an exciting trial. The big question now is when the defense's case will start and how quickly we can get it done.

David Scheffer, Moderator
Northwestern University School of Law

Well, I'm sure we can come back to it, Mr. Rapp. Professor Van Schaack, I wanted to start this with you, and once we finish this particular issue, I want to go to Mr. Rastan on the Bashir issue before the International Criminal Court if there's time. But first, I'd like to talk a little bit about the endgame, which is sentencing. Particularly in academic circles, there's almost a cottage industry of analyzing now the rather chaotic and disorganized, it appears disorganized, character in the way in which these various atrocity crimes, in fact, once there are convictions, the way in which sentencing is unfolding within the tribunals – not only within the tribunals, each tribunal itself – but between the tribunals. Could you get us into the subject a little bit? Then I want to ask the other participants about particular sentences during the year 2008. What is the problem, here, with sentencing for the tribunals?

Professor Elizabeth Van Schaack, Panelist
Santa Clara University School of Law

It's so interesting, because that's always the question that journalists ask. Because they look at someone who's gotten a sentence of, say, twelve years or eight years or even thirty years, and yet they've been associated with and convicted of horrible atrocities that are really impossible to translate into a domestic context, almost – short of a serial killer or a domestic act of terrorism. And what I always try to say is that it is incommensurate. You cannot try and graft on a schema that would be drawn from what you're used to on the domestic scheme and try and apply it to the international community. In part, because the most extreme sentence that's available is life imprisonment, right. We don't have the death penalty in international criminal law; most of the world has abrogated the death penalty and international criminal law has followed that trend. So you have to reserve those sentences for the architects, and really those most responsible for large scale atrocities and crimes. And then inevitably, once you do that, as you move down the chain of command, you get shorter and shorter sentences for people who were actually directly involved in the crime.

So Erdemović was the classic case. I remember a journalist was just outraged on that case. He, if you did the math, probably killed seventy people. It was a death squad situation, or firing squad situation, so it wasn't clear exactly how many he killed, but if you do the math, it was seventy people, and he ended up pleading, and got a sentence that many people thought was just ridiculously short. But when you're dealing with lower-level perpetrators, you almost have to calibrate it that way so that not everybody gets a life sentence, in which case then, the sentencing is sort of meaningless. So, the calibration is different, and you really can't, I don't think, superimpose what we would expect to see in a domestic realm on the international realm.

You also see the judges really grappling with both aggravating and mitigating circumstances. The idea of superior order is not a complete defense that would exonerate somebody at the level of guilt or not guilt, but is being used to mitigate sentences – recognizing you were young, you were part of a group, everybody else was joining, you were under compulsion, you weren't really given options. These sort of mitigating factors are being heard by the judges, I think, with some of the lower-level perpetrators, which I think explains why some of the sentences are reducing.

Where things are also a little dicey is with respect to the defendants that are being incarcerated in Europe having the opportunity to get out on good behavior, and you're not seeing that with respect to the Rwandan defendants, and so it's creating some concern there about unequal justice.

David Scheffer, Moderator
Northwestern University School of Law

Well, that's exactly what I wanted to ask Prosecutor Jallow. Let's talk about the one hundred percent fulfillment of the sentences for the Rwanda Tribunal while the Yugoslav Tribunal defendants seem to be walking the streets a little bit earlier. Can you give us your perspective on that as a prosecutor, and particularly the Bikindi case, where we had aggravating circumstances – Bikindi being a music star of sorts who had incited genocide, but the Court found in 2008 in its judgment that, exactly because he was a music star, that itself is an aggravating circumstance – we hereby sentence you to fifteen years. But talk to us both about Bikindi and this disparity, seemingly, between the two international tribunals.

Prosecutor Hassan Jallow, Panelist
International Criminal Tribunal for Rwanda

It does seem that there's a disparity in sentence ranges between the ICTY and the ICTR, the ICTY ones being lower. In fact, recently we had a petition from the detainees at the ICTR on this particular issue, addressing the President, Prosecutor, and the Registrar, complaining that the sentencing regime in the ICTR is harsh and unreasonable compared to the ICTY. I know there has to be some sort of calibration, but I'm still trying to understand how you could have mitigating factors in connection, in respect of somebody who has been convicted of genocide. I still find it difficult to accept that. I mean, a conviction for genocide cannot have mitigating factors and for me, I think, anybody convicted of genocide should probably go for the maximum imprisonment for the remainder of their lives. The lower-level people who are convicted of public incitement or crimes against humanity or war crimes could attract lower sentences, but the offense of genocide is so serious that for me, I think it really carries with it an imprisonment for life.

We've had some low sentences at the ICTR – Bikindi, the one you've mentioned. Bikindi was a musician in Rwanda, very well-known, very influential. He was convicted not of genocide, but of direct and public incitement to commit genocide. And the facts were as simple as this: that he went around the city of Gisenyi in a convoy using a loudspeaker, urging people to go out, come out of their homes, and kill Tutsis. He went around the whole city. And later on, a few hours later, he again went around asking, "Have you carried out my instructions?" He went around the town. He was convicted for that public incitement and the Chamber noted that there were aggravating circumstances; he was so influential, very popular in the community, that people would follow his orders. And surprisingly, he has a fifteen year sentence for that sort of offense. We have filed an appeal against that. We think the sentence is very low. It doesn't take into account the aggravating factor sufficiently.

But the same Trial Chamber, and we seem to think there is a sentencing problem in that Chamber, again convicted Protais Zigiranyirazo of genocide and sentenced him to twenty years. The Chamber found that Protais Zigiranyirazo was a member of the Akazu group.

They called it Akazu; that is the kind of family in a house group in Rwanda. The Chamber found, as a matter of fact, that parallel to the government there existed the shadowy group in Rwanda called the Akazu – a group of very influential people linked to the first lady – who almost ran the government, and that Protais was a member of that Akazu group. So he was a very important person in Rwanda, respected – more feared than respected, I would say. He is convicted of genocide, and he gets twenty years. And we think that’s absolutely low as well.

Earlier on, we had the case of Seromba, the priest – Father Seromba – who had also received a sentence of fifteen years for actually authorizing the felling down, the destruction of his church when there were 1500 or so refugees seeking shelter in it, as a result of which all of them died. He got fifteen years, too. And we went on appeal against that. Fortunately, the Appeals Chamber changed that to a sentence of life imprisonment.

And I remember, when the appeal was being heard, Judge Meron, who was on the panel, recalled an incident during the Second World War when a number of Jews also had sought refuge in a village and German soldiers had come in. And they had asked the population to turn in these people. The people looked up to the priest for direction and it was the priest who authorized the public, the civilian population in that village, to cooperate with the Nazi soldiers and turn in the Jews, leading to their death. When he cited that example of course in the trial, he said the people looked up to the priest. It was by virtue of his authority and respect for him that they looked up to him. And they would not have done what they did but for his authorization.

And the same happened in Father Seromba. When the bulldozer driver was asked by the militia to knock down the church, he turned to the priest and said, “Should I do it, or should I not?” And the priest said, “Yes, you go ahead. Knock it down. And this is the best place to start with – those pillars over there. They are the weakest. You knock those and the church will come down.” In situations like that, I think the appropriate sentence – I’m glad the Appeals Chamber agreed with us – was nothing but life imprisonment. So, even though we are accused of being stiff in terms of our sentence, we’ve had a few of these instances where some inappropriately low sentences were meted out. At least in Seromba, it was rectified. I don’t know what will happen now for Bikindi and Zigiranyirazo. They were both very influential people in Rwanda at that time.

David Scheffer, Moderator
Northwestern University School of Law

Right. I wanted to, if I may, Judge, I want to go to the end, here, because... if you could add to this, and also talk to us a little about the Appeals Chamber’s reduction of sentences in the Kubura case, and whether that seems to indicate some kind of, if I may just go off brief here. I’m sure there must have been some kind of perspective here, at least in Serbia, that it might have shown a little bit of bias towards Bosnian Muslims in terms of the reduction of that sentence. But that’s just my speculation. If you could just expand on that. Mr. Farrell?

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

Yes, thank you very much. Just a few quick comments. Professor Van Schaack mentioned the calibration is different. There are other people here who know more about sentencing than I do, but the calibration is extremely different. I, coming from a national jurisdiction and being a prosecutor for a number of years before going to the ICTY, do find, despite the recognition that there is a separate calibration, that the calibration to me is not reflective, necessarily, of the crimes. And some of the mitigating factors – I’ve argued these before the Appeals Chamber, both in Rwanda and the ICTY and have lost them famously – so obviously any comments I make do not reflect my ability as a lawyer or an advocate. But a number of the factors that are considered in mitigating a sentence – a war crime, a crime against humanity, or even genocide – are, first, the fact that they surrendered. Now, that may be relevant to provisional release, of course, that they surrendered so they may not leave the jurisdiction, or they may not flee. I’m not sure how it mitigates their crime. Second, is that they have good behavior in court. Well, I’m not sure how that mitigates the sentence for the crime. Third, in one of my cases, the military commander, a mid-level major, one of the things he did after the war ended was he helped some kids who were stuck in an area that had landmines. Now, besides the fact that he had an obligation under the laws of war to do that, secondly, the landmines weren’t marked, which they’re required to be under the laws of war, and thirdly, he was responsible for the landmines that were put in there illegally. Never mind all those factors; that was considered a mitigating factor on sentencing for a crime he committed previously. Having sympathy for the victims, not remorse, but sympathy for the victims is considered a mitigating factor.

Now, I understand that there has to be a recalibration, and factors have to be reconsidered and applied to the particular circumstances we find ourselves in. They don’t apply directly, nor are they analogous necessarily from national jurisdictions to the international context. On the other hand, I, speaking as a true prosecutor, find that some of the sentences are somewhat difficult to comprehend. The one that Professor Scheffer mentioned was the Kubura and Hadžihasanović case. In that case, Hadžihasanović was a commander who was convicted for superior responsibility. He had originally got a sentence of five years for a number, two, separate murders and cruel treatment in five detention centers. We appealed that thinking that was somewhat low. At least, we expressed our concern about it. On appeal, he was acquitted for the murders and the cruel treatment was upheld in relation to detainees in a music school, where people were detained and ill-treated. The sentence was reduced to three-and-a-half years. Three-and-a-half years for a commander whose troops – under 73, so he didn’t commit them themselves – but whose troops committed acts of cruel treatment in relation to a number of persons who were under their supervision and who were detained by his troops. In one sense you could understand, as has been mentioned, that the victims in this case, or the Serbs – the Serb ethnic group of the Bosnian Serbs – would consider this to be extremely difficult to accept in light of the fact that they felt as a victimized group, the sentence

should have been a lot larger. And they were troubled considerably by the fact that someone who is a commander, who didn't punish his troops for committing these types of crimes against Bosnian Serb detainees, who were at their mercy, would only get a three-and-a-half year sentence.

I don't think that there's much merit to the concern. I wouldn't suggest in any way that the court is biased, but it is my personal view that because of the calibration of sentences, this is clearly at the low end of some of the types of crimes that we see and convictions that have taken place at least at the Yugoslav Tribunal. And as a result, the Court tries to somehow calibrate the sentencing so that it reflects and is comparative to other sentences that are past, and puts it at the low end of the sentences. If the sentences are not that high for others who have done more, the Court somehow puts itself in a position where it must, in comparative terms, give a sentence that is lower than someone who's done more. So, it may in a way result in the Court being put in a situation where it may feel it has no choice to ensure that there's consistency in the sentencing scheme, to reduce the sentence to reflect that this is one of the least, if I can put it that way, crimes in terms of scope, magnitude, or its impact. Is that correct? I'm not sure. At some point in time, I think the sentences have to reflect the crimes, as opposed to also trying to be comparative to the range of sentences. But I don't think it's fair to say that there was any bias in any of this. I think it was just the calibration and the approach that was taken in relation to all the sentences and where this individual fit in.

David Scheffer, Moderator
Northwestern University School of Law

And Ms. Higgins, did you want to contribute?

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

Yes, please, just very briefly, at one point in the spectrum of what Mr. Jallow said about Bikindi, the pop star, before I come on to Hadžihasanović. Mr. Jallow, if I could just ask a point of clarification from you. You referred to the fact that the case was about the fact that Mr. Bikindi went around with his speaker phone inciting genocide. I think it's right to say, is it not, that Mr. Bikindi was in fact charged with numerous counts – you may perhaps know the precise number – but it was numerous counts. The reality being, of course, that he was only convicted of one count in respect of one speech. Is that accurate?

Prosecutor Hassan Jallow, Panelist
International Criminal Tribunal for Rwanda

He was charged on a number of counts, you're right, including genocide. He was acquitted on the others, but convicted only on the count relating to direct and public incitement for genocide in relation to the Gisenyi incident.

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

Yeah. Briefly, in respect of the comments on the sentencing of Hadžihasanović and Kubura, what I'd like to say is that from my perspective I see it more as a court giving a reasoned decision rather than any signs of bias. If you look at the judgment, what the Court was actually doing was substantively reversing many of the findings that the Trial Chamber had made. There was a reversal of an aspect of failure to punish. The Trial Chamber had said that Hadžihasanović had failed to punish – that was reversed. The Trial Chamber had said that Hadžihasanović had reason to know of the mistreatment – that was reversed. The Trial Chamber said that he had effective control over the El Mudjahadeen detachment – that was reversed. Now evidently, if you look at the fact that the sentence that was given originally was five years, one might be able to just reasonably conclude that the Appeals Chamber has analyzed the Trials Chamber's reasoning and given a reflection of the fact that substantive changes were made. The same can be said to Kubura, to a lesser extent, in respect of an allegation he was convicted of concerning plunder in a location called Vares. The Appeals Chamber found that he did, in fact, take necessary and reasonable measures to prevent plunder. So that, again, one aspect was reversed. Logically, there has to be some reflection of that in the sentence that is handed down by the Appeals Chamber.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much. And Judge Fahey, I wanted to ask you if you wanted to add to any of that, but also whether the at least four plea agreements that came into play in 2008 had an impact on sentencing in the War Crimes Chamber.

Judge Elizabeth Fahey
War Crimes Chamber of the State Court of Bosnia and Herzegovina

Let me add first, before I answer that, to what's been talked about on sentencing already. In my experience, and I was on four different war crimes panels with four different nationals and four different internationals, that all of us tried, to the extent you could reach accommodation, to find numbers that are fair for the crime and fair in comparison to others who were found guilty of similar crimes. It's hard to be exact in that, but we all

tried to make our best efforts. I do agree with you in terms of, if a person is convicted of genocide, it's really hard to take into account mitigating factors. In the Kravica Warehouse case, where a trial panel determined in July that a thousand people were killed and that it was genocide, six people – five for participating and one commander responsibility for failing to punish – were convicted. The sentences ranged, as I recall, from forty-two and forty years. The maximum sentence you can receive in Bosnia is forty-five years. And so it's difficult to find mitigating circumstances for genocide to get down to forty or forty-two.

When I was dealing with what was an appropriate sentence in a different case – the Vukovic case, where three people were convicted of a massacre of twenty-three Muslims, and I was recommending the maximum – one of the judges said to me, “Well, we need to reserve that for those who do the really, really heinous, the maximum cases.” So, we reached an accommodation and the one who was sort of the second in command, the first one having absconded and being unavailable, received a sentence of twenty-nine years. And as I've said before, I think the public comes to the delivery of the verdict, and the verdict – I was hearing it in English on a headset, so – but there was clapping when the sentence of twenty-nine was given out. I've not been party to that in any sentencing prior to that.

And in terms of mitigating factors, there's much of what you said that I agree with. It is routine, basically standard in war crimes cases, for the court to consider and put in their decision and their verdict in mitigation, “He's a family man.” Well, what do we know about it? Whether he's an abusive family man or a good family man – and what's the relevance to the crime? Or, “He behaved well before the court.” Well, he'd have to be a bloody fool not to, right? What's the relevance of that?

And, one factor on the plea agreement that I was involved in, there were two accused charged with – one was commander responsibility and one was the guard of a detention facility. And this detention facility was basically a very small – maybe you could call it a bar. It's where animals were kept, and it was very small. It didn't have more than seven or eight detainees. And it was very close to the front lines. But there was a village there, and the village was very poor, didn't have much in the way of food or anything, and these detainees got the dregs, because even the people who were really living there had not very much more than they did. And the guard, who was accused of raping one of the seven prisoners, decided to plead guilty. And the Prosecution and the Defense came to us with an agreement, with a range of sentencing – I believe it was between six and eight years, I forget exactly the number – but we had no problem accepting the plea and giving a sentence certainly within that range. But one of the mitigating factors that the defense asked us to consider was that this man is so poor, he is a shepherd for animals not his own. For me, it was another world in terms of mitigating factors.

This has not happened and I couldn't figure out how to help it happen when I was there. The Prosecutor's Office has done an inventory of all the war crimes that they learned happened and it's over a thousand. And as I've said, they only had thirty-three verdicts by October 3 when I left, so they have hundreds of cases to go in terms of investigation

and even filing indictments. If they want to speed up that process, I don't know. But how to get more pleas – we're used to more pleas in the United States, also. Range of sentencing is certainly one way to do it, if they could come in with an agreed upon range, if someone is willing to. So, it would certainly be very helpful in terms of resolving more cases, putting history, guilt, the record – because we have to make findings as to what happened and he has to admit to at least portions of the indictment to satisfy the elements of the plea. I think there were two in the year that I was there – Ljubičić and Bjelić. So, hopefully as time goes on, if they can even double the number of pleas every year, it would be a huge increment in the processing of the cases.

David Scheffer, Moderator
Northwestern University School of Law

Well, we could go on with sentencing. In fact, I'd love to explore plea agreements and the international tribunals, as well. But, Prosecutor Rapp – and then I want to get Mr. Rastan on the Darfur case.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

It was one of the other topics we looked to get to at one point, and that's our CDF case.

David Scheffer, Moderator
Northwestern University School of Law

Yes, yes. You want to explore that.

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

It's an interesting case in terms of what happened in sentencing, but still, a difficult case when we go out on outreach expressing to people exactly what occurred. But, those of you who were here last year, we discussed the business of prosecuting those who fight on the right side, so to speak, on the just side, who fight to uphold democratic values and restore the government. And my predecessor, David Crane, made the decision to indict three leaders, including the person who's effectively the Minister of Defense of the country, and probably the most popular man in the country, Sam Hinga Norman, for the crimes committed by certain elements of the CDF, Civil Defense Force, that fought against the amputating rebels and their allies in the FRC, but during the course of that, committed a lot of atrocities. And we were successful.

Tragically, Norman died between the end of the evidence and the verdict, so two remained – his commander of war and essentially the spiritual leader of the movement that initiated the young men and made them believe that they were invulnerable. In the Trial Chamber, one judge – Justice Thompson – voted to acquit them completely on the grounds of necessity, also on the Roman maxim that the State can do anything when its own survival is threatened. The other two rejected that, but nonetheless, having found them guilty of murder and cruel treatment and collective punishment and, in one case, recruitment of child soldiers and pillage, they found that because of the fact that they'd been fighting on the right side – and they sort of related this to the individual fact that they hadn't been motivated by monetary gain or anything like that – but because they were fighting to restore a democratically elected government, they were entitled to substantial mitigating factors. And so even though they've been convicted of two hundred murders, including cases where women had been impaled through their genitals and out their throats, they got the sentence of six and eight years. We appealed that conviction, a very unpopular appeal politically in the country. One of the accused appealed his convictions. To some extent, his appeal was successful in knocking out a murder conviction, the child soldier conviction, and the collective punishment conviction. But nonetheless, the Trial Chamber by a vote of three to two agreed with us that it was an illegitimate factor...

David Scheffer, Moderator
Northwestern University School of Law

You mean the Appeals Chamber?

Chief Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

I misspoke. The Appeals Chamber found that this mitigation for fighting on one side or the other is inconsistent, inconsistent was what we all followed this area along, and there's *jus ad bellum*, *jus ad bellum*. And you don't look whether it's a just war. International humanitarian law is all about the conduct of people once the conflict has started. And so, even while decreasing some of the criminal conduct, for which they're responsible, even in one case for the guy who didn't appeal, the judges nonetheless increased the sentence to fifteen years in one case and twenty in the other. But they did it in a split verdict of three to two with the international judges, including the African judge, Justice Ayoola, voting to increase the sentence and the two Sierra Leone judges voting in one case to acquit completely and the other to affirm the convictions and keep the sentences short, in part because the President was reading the decision himself. There was a lot of confusion on how people had been acquitted of certain additional conduct, but nonetheless, their sentence had gone up. In the end, we went out on an outreach explaining it to people, and in our view, it compares with the AFRC case, where people who were directly involved in the attack on Freetown were given very long sentences of forty-five, fifty and fifty years, which we had asked for. And we don't have a life

sentence in our court, so those were essentially life sentences. A fifteen or twenty year sentence comparatively, for these people, I think is an appropriate sentence. The elimination of the discount was also I think a very important victory for international humanitarian law.

David Scheffer, Moderator
Northwestern University School of Law

And the AFRC sentences, that judgment also came down in 2008 at those higher levels. Very interesting, that comparison between the two and also the up-tick in the CDF sentences. I would like to jump, now, to the permanent International Criminal Court and Legal Advisor Rod Rastan, who's with us. 2008, at least from, oh shall we say July to the present day in 2009, has shown us the political minefields of the International Criminal Court. The Prosecutor, in July, applied for an arrest warrant against the President of Sudan, Mr. al-Bashir, and that created a little bit of a fire storm at least within some member states of the UN Security Council, as well as the African Union, the Arab League, etc. Mr. Rastan, could you tell us what happened here from the Prosecutor's perspective, how you all have viewed what has transpired in the Security Council, and of course, we now await a judgment in the pre-Trial Chamber with respect to the fate of that application for an arrest warrant. If you could walk us through this.

Rod Rastan, Panelist
International Criminal Court

Maybe I could just add in a comment on sentencing before I go – obviously we don't have any convictions yet, but I think it's an interesting thing in terms of the ICC where you have a permanent court that's dealing with multiple situations. I think within a situation, for example the former Yugoslavia or Cambodia or Rwanda, already there, there are difficulties in terms of establishing a certain consistency with sentencing parity between different perpetrators, different accused. That will inevitably exacerbate it, that difficulty in finding parity, where you have a permanent court that's dealing with multiple situations in hugely different contexts with also great disparities in terms of the nature of the crime, looking at it quantitatively or qualitatively. So I think for the ICC, the challenge will be even more exacerbated and that may pressure some type of approach from the court to establish clearer principles that may guide the sentencing.

David Scheffer, Moderator
Northwestern University School of Law

Well, let me just jump in. I don't know if you can say anything about this, but has the Office of the Prosecutor tried to develop any sort of internal protocol on sentencing requests yet, or...

Rod Rastan, Panelist
International Criminal Court

Yeah, definitely, it's something that we are already thinking. For example, in the Lubanga case you have a very narrow charge, where we're prosecuting for only child soldier offenses. And that arises out of a number of circumstances we can talk through, in terms of what our initial focus was, which was the broader range of crimes, and then we had a window of opportunity to secure his surrender at the relevant moment. And we sought to move ahead with the case that we had ready for trial. But we still will be, for example, at the sentencing stage wanting to point out certain aggravating factors – what type of crimes these children were exposed to, and that they also committed under orders, while they were child soldiers. But you also capture the fact that, for example, the female child soldiers were also sexual slaves. They were the wives of the commanders. They themselves were raped within the camp, so even though they weren't necessarily on the front lines, they were just as much a risk inside the camp as those children who were sent to the front lines, who were being used as child soldiers. So, the sort of complexity, the nature of the crime, is more than the traditional understanding of enlistment. This wasn't just a simple enlistment. It was the way they were recruited as well; it was the way they were used. So we'll see how much of that we'll be able to explore. But definitely, thinking into the future as people know, apart from Darfur and Central African Republic and DRC and Uganda, we're also examining the possibility of opening investigations in places as diverse as Colombia and Afghanistan and Kenya, and then of course for us to do something in Gaza. So there are all types of possibilities in terms of where this court may direct its interests in the future. So even more of a call for some kind of principled approach to issues like sentencing. But...

David Scheffer, Moderator
Northwestern University School of Law

Darfur?

Rod Rastan, Panelist
International Criminal Court

Turn to Darfur, exactly. As Professor Scheffer knows better than anybody on being involved in the negotiations, the Rome Statute as a treaty instrument – as a creature of negotiations over many years, at least from 1940 to 1948, if not looking back to early IRC provisions – has bits and pieces that different people were insisting upon. And one of the provisions that was essential for some countries but was anathema for others is this provision relating to the role of the Security Council, both in terms of referring types of situations to the Court as well as stopping proceedings before the Court. And this isn't something that exists in the other courts and tribunals to the same extent. You could analyze the ad hoc tribunals and compare them to the sense that they were established

pursuant to the direction of the Security Council and that the ICC should be a facility available, so that you don't have to get an ad hoc tribunal for Darfur. So that receives, if you like, broad acceptance. But the possibility for the Security Council, by reverse, to defer a prosecution doesn't exist at the ad hoc tribunals or the other courts and tribunals, except to the extent that they will decide when the tribunals terminate their mandates; and they could, at any moment, say that the process must stop. In terms of individual proceedings, you don't see that there. So the ICC has that as part of the package that was negotiated in order to create – what was perceived to be a need to have – checks and balances in the international system of how a permanent court would act, particularly a permanent court that wouldn't act necessarily at the bequest of the Security Council or at the invitation of States. A court that would have the possibility to independently initiate investigations, although those investigations will be subject to judicial authorization under pre-Trial Chamber – that was also one of the negotiated aspects. There was the perception seen by the negotiators from different positions that perhaps there should be a role for the Security Council given its primary responsibility in terms of international peace and security, to have a role in terms of the sequencing of prosecution efforts.

So what you do have, as probably most of you know, in terms of the Statute: article 16 provides that the Security Council may request the court to suspend its proceedings for a twelve month period and that can be renewed on a new vote, which is already quite different to how the original draft was done, but I guess, we can go into this in more detail. It's interesting that article 16 has reared its head, actually in all of our situations, but most specifically in the Darfur situation. And in the Darfur situation, which is something also that Professor Scheffer has written about, it's interesting because this is not a case where there is a concern about the Prosecutor having acted on his own initiative and the Security Council has to rein him in. This is a situation where the Security Council invited the Court and the Prosecutor, asked the Court to initiate investigations, and then after several years, there are questions as to whether or not the Security Council should intervene.

We, as a court, and particularly as a prosecutor, are not involved in that type of political discussion – it's a discussion for states, in terms of how that works – but certainly from our perspective, we don't see a tension between peace and justice in the way that it's being portrayed. And I think that's a familiar phrase now, amongst all the courts and tribunals, and also the UN Secretary General, that peace and justice have to work together. This mantra of no peace without justice, I think, rings true year by year. However, there are discussions at some levels, in terms of whether or not our indictment or our request for an issuance of an arrest warrant for the President of Sudan is something that warrants a type of external intervention.

But also, I think it should be remembered that this statute has another avenue for resolving this type of a difference between the ICC's prosecutions and the effects on the domestic level, and that's the principle of complementarity. Under the principle of complementarity, as you know article 17, the ICC is not vested with primary jurisdiction. The national authorities always retain the right to be able to request that a case is transferred to the domestic level, if they're able and willing to do the case themselves

genuinely. So when it comes to the situation in Darfur, there have been voices that the cases that we've brought forward should be prosecuted domestically. The same issues have been raised in Uganda, and in the Central African Republic there have been requests in relation to the possibility that the ICC may investigate more recent crimes. And more recently in the DRC also, there's been some suggestion there about the possibility of an article 16 request.

One can see that the statute has a range of different possibilities, and I think the fear on some quarters is if the possibility of the Security Council to intervene to the Court is introduced at the cessionary stage now, then it will become a routine expectation, and what message would that send out in terms of perpetrators? If the message is that all you need to do to stop a prosecution against you is to basically create a threat to international peace and security, does that undermine the preventative role of the ICC? Joseph Kony today is committing, perhaps, even more serious crimes than the one he's been indicted for. He has become a regional threat in his current position within the DRC and is operating in DRC, in Sudan, in Central African Republic and perhaps back in Uganda. And again, he's also said that his condition for coming to the negotiating table and signing any peace agreement is that the warrants for the ICC are removed. And if they're not removed, he'll commit more crimes. So, one can see that the notion of negotiating with these types of individuals is perhaps not a reasonable option in a situation where the international community's being blackmailed, being threatened, that more crimes will occur unless you drop the prosecution. So, I think that one has to look at this on a principle level, but it raises a number of interesting questions.

David Scheffer, Moderator
Northwestern University School of Law

Very, very full explanation, and thank you. We can get into that with some questions. I think what I'm going to do is this. I want some coffee, frankly. And this is what we're going to do, though. I'm going to ask Prosecutor Petit a couple of very pertinent questions on the Cambodia Tribunal, then we'll take our coffee break and when we come back, I'll open it up for some questions from the audience for about ten or fifteen minutes, then I'll go back to some moderated points. Prosecutor Petit, I wanted to ask you, the year 2008 has to have been the year of provisional detention challenges at your tribunal. The Court has rejected all of these applications, these motions, by the five individuals before your Court – five accused. Could you walk us through your understanding of why is it that so many motions for provisional detention actually failed before the Court? For release from provisional detention – they were obviously moving to get released from a pending trial.

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

Ok, I feel the pressure. I'll try to get you your coffee as soon as possible.

David Scheffer, Moderator
Northwestern University School of Law

No, no, no. Don't worry about it. (laughs)

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

But you're right, it did keep us very busy for about a year and a half. Part of that is due to our statute or to our procedure. Detention is ordered after the Prosecutors request it by the investigative judges after an adversarial hearing. That decision, obviously, is appealable. A year after that initial decision, there is a mandatory revision by the investigative judges. That decision is appealable and in between, accused can present motions if they feel like it, basically. There's no criteria. So we've requested detention of all the accused – all were detained by the investigative judges upon arrest, following the arrest. And all those decisions were appealed.

Now, there's basically three aspects to this. There are discrete points for each of the accused's cases that were raised. There are the conditions for doing detention themselves under our Rule 63(A) and (B). And there are the alternatives that were proposed or contemplated in some of these cases, alternative to detention, which I'll get to. Each of the cases had some interesting points; all of them failed eventually.

The first one to go was Duch. Duch was a torture center leader, or chief. He had been detained previously for about seven years by the national government under military law in what I think is fair to say, certainly challengeable conditions and probably in violation of ICCPR, or at least it could be argued. And it was argued. At his appeal on detention, his attorney (familiar to some of us at ICTR), based on that detention and alleged violations of his rights, asked the Court to release him. And basically, our pre-Trial Chamber found that the military detention could not be a factor because the ECCC was an internationalized tribunal. Even though the name says, "within the courts of Cambodia," they found that they were removed enough by their internationalized statute not to take into account the actions of this national court, the military court. They did, however, recognize that such detention could be taken into account, should the accused be found guilty in terms of sentencing.

Ieng Sary, who was, under the regime, the Minister of Foreign Affairs, was a very particular case. He, along with Pol Pot, was found guilty in absentia in 1979 in a trial held by the Vietnamese, or under the Vietnamese auspices, of genocide. He was found guilty and sentenced to death, as I recall. And then, under a twist to the case, when he did come in from the bush, when he joined the government, as an incentive, he got a pardon from the King for this absentia conviction. And for the twist, a year or two before that, the then government passed an amnesty law for Khmer Rouge crimes. So aptly defended by Mr.

Karnavas, or at least actively, I should say, he actually at the initial did not want to raise that point on his bail hearing, but he reserved himself the right to do so and he argued simply on sixty-three grounds.

We said, and we argued in our response, that either you raise it or you don't raise it. If you're saying that the Court has no jurisdiction on you, then there is case law that says you should raise that at your earliest opportunity and is not an issue of saving that for later on, especially in our system, where the pre-Trial Chamber has said that once a case gets before it, it is free to do whatever it wants with it: to review whatever it deems appropriate or relevant, and then to substitute its decision to that of the investigative judges. And indeed, the pre-Trial Chamber agreed and Ieng Sary did have to argue the point in his appeal. Basically, the pre-Trial Chamber found that the issue of *ne bis in idem* did not have to be examined at this stage, because he had not and still has not been formally charged with genocide – he's charged with humanitarian war crimes – and that if he were to be eventually charged, then that court could deal with it. The pardon itself, the court hinted that it may or may not be valid because of the conditions of the trial, but again did not have to evaluate this at that stage. And finally, the amnesty law was not applicable to the ECCC, not within its jurisdiction.

Another accused, Nuon Chea, raised an interesting point on the adversarial hearing in terms of his right to counsel and a full and fair hearing based, among other things, on his age and on his health issues. Now that's going to be a recurring theme in our Court. We have a geriatric issue because of the length of time that has passed; most of our accused are elderly. The youngest one is sixty-six now. The oldest one is eighty-three at this point. And none of them are getting any younger, neither are the victims and the witnesses. He basically argued that he did not have a full understanding of the adversarial hearing's purposes and his rights because of his health issue. He also, at the same time – and actually in a later filing – raised the issue of his mental health and requested that a mental evaluation be done.

Now, interestingly enough, although the Prosecution, we said that the Defense had not met the criteria, had not established the basis to order such an evaluation, we suggested to the Court that out of abundance of caution – because again of the particular issue of this Court, that all this is going to be an issue of all the defendants, and raised in the media, at least, as it has been by all the defendants – we suggested that perhaps the Court out of, again, an abundance of caution, would want to appoint a psychological expert to evaluate the defendants. The Court first decided that, in the initial appeal, Nuon Chea had been aptly informed and represented and therefore, his detention had been done in accordance with the law, and refused to appoint an expert. In subsequent decisions, again, the Court said that a factual basis had to be established and they were not going to appoint one without it.

Khieu Samphan is an interesting case and perhaps you'll want to talk about that a little bit later. Khieu Samphan is represented by Jacques Vergès, a French defense lawyer who was the subject of a documentary a couple years ago, *The Devil's Advocate* I believe, which you may or may not have seen. Khieu Samphan was detained, appealed. They filed

a substantive appeal based on the evidence in the file. I point this out because once came the time of the hearing, Jacques Vergès, the defense lawyer, said that because none of the evidence in the file had been translated into French – we are a trilingual court, the only one – he was not able to represent his client and refused, basically, to present his case. Although, as I said, he had filed a very substantive filing at the time. And basically, since that time – since, that was 2007, I believe, or late 2006 – since that time, that has been the only argument presented by the defense in Khieu Samphan: the fact that there has not been a full translation of every element in the case file into French, therefore, he could not collaborate with the Court and could not defend his client. I'll leave maybe to other members of the defense bar to evaluate if that's the best defense that could be brought for an accused of such crimes, but this is where we are with that case.

Ieng Thirith was the last of our accused, and also presented an appeal, again based on or alleged to be based on her health, but actually when it was filed, was based on 63(A) and (B), which are our grounds. Our grounds are basically that there must first be a belief based on the file that the accused could be held responsible, and then 63(B), the various criteria: failure to or risk of absconding, difference of witnesses, public disorder, etc. In evaluating these criteria, actually, our Court has had a very interesting approach to it and will readily evaluate all the evidence that it deems relevant in basing its judgment. Part of the arguments of the defense was that this was thirty years after, nobody is going to mind, nobody's going to take to the streets, nobody's going to threaten witnesses, etc. And consistently, except one exception, I found that all the grounds, including that danger of interfering with the witnesses or public disorder, have been met and upheld.

And lastly, because again of the particular conditions of our accused, most have suggested that alternative forms to detention must be found – hospital, detention house arrests – based again on the health and age of the accused. And again, consistently, the pre-Trial Chamber found that there is no such alternative to the rules, nor is it warranted, especially because we have taken great care to ensure that there are medical facilities and personnel 24/7 at the Court in the detention center, and in fact, all the reports that have been shown on the progressive health of the accused have shown that they're doing quite well – everything considered, of course. But again, members of the defense board might not agree and probably will. But detention so far has been the mainstay of the pre-Trial Chamber's work and interestingly enough, which was not anticipated in the initial statutes or the law, the pre-Trial chamber was supposed to only consider disagreements between the co-Prosecutors and the co-investigative judges, which is one of the things that the judges tried to remedy when they passed the internal rules because they figured there would be a need, and indeed it is a need.

David Scheffer, Moderator
Northwestern University School of Law

Very, very interesting. And thank you, Prosecutor Petit. I think what we'll do now is, there will be strictly a ten minute break – I don't want to lose any of you. There's lots of

coffee, everything you ever wanted with it around the corner here. And then come back, we'll start again at four o'clock and go for another hour. OK? Thanks.

David Scheffer, Moderator
Northwestern University School of Law

Well thanks for everyone for our final hour here. We're going to go until five o'clock or maybe five-oh-five, whatever works for us. As I promised before the coffee break, I'm going to open it up for a few questions from the audience and then we'll pore back into some of the cases that have reached judgment before the tribunals in 2008. Do I have a question from the audience from what you've heard so far? Andrew Strong, in the back. Stand up, Andrew. And I think there's a mic that Lee is going to maneuver to get to you there.

Andrew Strong: My question is just about 2008, the sort of expanding role of technology in the courtroom and how it's being used to present evidence, and specifically I know video links for witnesses must be a very useful thing for the Prosecution because you can avoid all of the logistical problems of getting a witness from location to say, The Hague. But I imagine that the defense have some trouble just with getting the whole character of the cross-examination out and where to draw the balance. And I guess I'd like to hear from both prosecution and defense.

David Scheffer, Moderator
Northwestern University School of Law

I think Prosecutor Rapp actually addressed that question in some detail in respect to his court in terms of the Charles Taylor trial and the availability of witnesses under the 92bis issue. But, let's ask in terms of IT and technological access to witnesses, any experiences from any of the tribunals that you wish to address? Mr. Jallow?

Prosecutor Hassan Jallow, Panelist
International Criminal Tribunal for Rwanda

From another angle, the use of technology and video links of course is common now in terms of hearing witnesses, but in the context of our 11bis cases, for instance, in trying to make the argument that witnesses may be afraid to go to Rwanda to testify, it was put forward that the evidence could be taken by video link. But the courts have held that if the majority, for instance, of defense witnesses were to be held by video link, as opposed to prosecution witnesses who had live, that would offend the principle of equality of arms. So it places a limitation on the element of how far you can go in using video link for taking testimony of witnesses. There has to be the balance. You can't use it preponderantly in relation to one party, but not in the case of witnesses for the other

party. The Chambers were saying, if most defense witnesses testify by video link, that puts them at a disadvantage. I do not necessarily agree with that. I mean, I think if you can use video link for one particular witness, what is good for one witness is good for three witnesses, is good for five witnesses, is good for the whole lot of witnesses that the party wishes to call. But as for the limitation, there is a legal limitation which the courts have now put on the use of video links testimony.

David Scheffer, Moderator
Northwestern University School of Law

OK. Yes, Mr. Farrell?

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

In regards to the use of technology in the courtroom: first of all, the technology we use, at least in our courtroom, as I'm sure in some of the others, is much more advanced than anything I had experienced when I was practicing as a prosecutor in Canada, still I think a first world country. But you do have to become familiar with the technology yourself and you have to use it appropriately. Just as a word of caution, we had in one of the cases – the Haradinaj case – a gentleman who didn't speak, wasn't particularly literate, had his own difficulties, was living in a refugee camp, and it took us two hours to do the oath by video link. He kept asking about the solemnity of the occasion and the judge kept saying "Will you make a solemn declaration?" and then by the time it was translated and explained to him and came back by video link, it took about fifteen minutes before we realized that he thought we were speaking about something different than what we were doing. So there are some disadvantages in the sense that you're not there, you're not present, you can't explain, you can't with the consent of the defense and the Registrar take the witness outside just to explain the process to them. It's sometimes much more difficult.

Secondly, we at the moment, and the judge may know more than I on this, we send a lot of our material to the region, to the state courts in Bosnia and Serbia or in Croatia, for the purpose of assisting them in their prosecution and sometimes our use of technology does not actually coincide, is not reflective of the needs of the state prosecutor's office of the region. We may be using technology which we think is used universally and it becomes much more difficult for them to prosecute using the material.

And lastly, we've attempted to use a certain new technology called 360, a technology which is basically a video which makes you... you can stand in the middle and the video takes 360 all around you. So for cases like the Galic case, the Brdanin or Milošević case, which was the case of the snipping in Sarajevo, we could get the witness to stand in the position where they were hit during a snipping incident and do a 360 technological view so that the judges who don't go to the region often and don't know the location and area

can actually see it. The downside of using that technology is, I think, that for the most part some of it hasn't been used that much and therefore, as a result, it hasn't been tested. If I was the defense, I would want the technology tested, and in the crucible of trial to understand whether it was giving an objective point of view. But there are lots of other things in relation to technology that's developing, which is fascinating, but we can't get too far ahead of ourselves in terms of its utility.

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

From the defense perspective, I have to say I was very skeptical of the concept of e-Court, where everything would pop up on screens and magically we all would be able to see the same document and look at the same page at the same time. Initially I thought this would create difficulties for cross-examination. Those of us who cross-examine are used to having the files and paper in front of us and conducting that as we go along with the witness. We all know that there are interpretation difficulties that we have to take into account when we cross-examine. So the whole process is slowed down. However, having used it, I think it's an excellent tool which just means that from the defense perspective that you have to be that much more prepared, because if I want to use a document, I have to make sure that it's being what we call "uploaded" into the system the day before, so that I'm then able to have it produced on the screen within seconds. But once you've got used to structuring your cross-examination in that way, it works brilliantly, and you can also of course have your paper file, and you can have the back-up of having paper copies of documents that have not been uploaded. So I'm actually a convert.

David Scheffer, Moderator
Northwestern University School of Law

OK. Let's have another question from the audience. Yes, sir. Right here. The mic's coming to you from Andrew here.

Unknown speaker: I am the President of the American-Bosnian Association here in Chicago. During the so-called internal clash in Bosnia, crimes were committed by forces of the Fifth Corporal B-H army against the civilians of the region. These crimes were totally ignored so far. Tens of thousands of people were displaced, hundreds were tortured, and thousands were killed and raped. Their property was destroyed and stolen. Why is it so? That's the first question, if I may. The second one, Croatia prosecuted and sentenced Mr. Fikret Abdić, who was falsely accused on the basis of accusation from Bosnia-Herzegovina. Why did the International Tribunal for War Crimes in the former Yugoslavia not want to prosecute Mr. Abdić, although he's obviously one of the major players in the former Yugoslavia and Bosnia, since he was the winner of the first Democratic free election in Bosnia-Herzegovina? Thank you very much.

David Scheffer, Moderator
Northwestern University School of Law

Mr. Farrell, can I punt those to you, and perhaps Judge Fahey, too. Do you want to go first, Mr. Farrell?

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

Thank you. For those of you who are not aware, Mr. Abdić was the commander of a small region in the northeast of Bosnian-Muslim. He was in Bosnia. He didn't fall under the Bosnian-Muslim army for a portion of the conflict and set up his own autonomous region. As the head of that autonomous region, he had fighting against the Croats on the one side and at times the Bosnian-Muslim army, so the question related to the Fifth Corps is actually, or Five Corps, of command structures under the Bosnian army. The Fifth Corps was the military structure, the military command in military units in the northwestern part of Bosnia, around the area of Bihać, which is where Mr. Abdić was, where he set up his own self-proclaimed autonomous region and was the head of it. Mr. Abdić was also a fairly wealthy businessman at the time and used the funds that he had to try and defend the area that he claimed was his autonomous region. That's a general overview. I may not have gotten it completely correct, but that's my understanding of who Mr. Abdić was.

There was conflict in the region in that area throughout the time period, both between the Croats because the region was right next to the Croatian border, and at one point in time by the Fifth Corps as they were trying to get the autonomous region under the control of the Bosnian army. In terms of the crimes that were committed there, the Office of the Prosecutor investigated extensively throughout the region of Bosnia and Croatia and to a certain extent the area of Kosovo and Serbia. I don't actually know why it was decided or not decided. I don't know if there was any particular decision, Sir, I'm sorry. The investigations in that area I wasn't involved in nor am I aware of them. I'm not sure why there weren't ultimately any charges that were related to the Bihać area or to the autonomous region of Velika Kladuša or some of the other areas in which Mr. Abdić was involved.

And, in terms of the Croatian prosecution, to answer your question, "Why do we not want to prosecute Abdić himself?" – I'm not sure of that either. I'd have to go back and look into that. Also to be frank, the internal decision-making of the Office of the Prosecutor in terms of who we decide and on what basis is not something we generally speak about in public. In terms of Croatia's prosecution, obviously we have jurisdiction primacy over certain prosecutions if we choose to take them, as I'm sure you're aware. Since we didn't take the prosecutions for any of the alleged crimes, I can understand why the Croatians might have decided to do it, whether it's legitimate or whether there's evidence to support that, I'm sorry I actually don't know anything about it. I wasn't involved.

Judge Elizabeth Fahey

War Crimes Chamber of the State Court of Bosnia and Herzegovina

When you say the Office of the Prosecutor investigated, you mean ICTY?

Deputy Prosecutor Norman Farrell, Panelist

International Criminal Tribunal for the former Yugoslavia

The ICTY investigation is what I was speaking about.

Judge Elizabeth Fahey

War Crimes Chamber of the State Court of Bosnia and Herzegovina

David Schwendiman is the Chief Prosecutor of War Crimes in Bosnia and he is a former Assistant U.S. Attorney and U.S. Attorney actually in Utah, and I'm sure if you wrote to him, he would tell you at least what is a matter of public record in terms of that. The Court and the Prosecutor's Office as I understand it appreciates that there is sensitivity still by ethnic groups, particularly the Serbs, that the Court is anti-Serb or prosecutes more crimes against Muslims than against any other ethnic group. And so I'm sure he would be sensitive to that if that is a perception. His office has done an inventory of all of the crimes that occurred as far as he knows in Bosnia during the war. I'm assuming, if your office investigated it that it would be known to him, but I don't actually know. I know that they did learn of a crime where an entire village was massacred and no one had ever known about it, because nobody had survived to report it. So, it can't hurt to write to him and make inquiry. I can give you the spelling at the end.

Rod Rastan, Panelist

International Criminal Court

On the Prosecutor's discretion to choose which potential cases to focus on, which individuals to bring charges against, there's the additional issue of which situations to even consider in terms of the scope of your possible investigations. At the ICC this issue is I think particularly compounded because we are going to probably do much fewer cases than the other standing ad-hoc tribunals. Compared to the ad-hoc tribunals, for example, we're probably not going to be looking at the situation in Uganda and in the DRC for fifteen plus years and bringing maybe hundreds of prosecutions in each of those situations. That would simply be unmanageable. And also, we're a system that is not set up on the principle of primacy. We have this division of labor with national authorities, and it may well be a division of labor with the hybrid courts, even, that's assisted to bring on cases. And already in the DRC situation, we're looking to see how we can possibly work together with local prosecutors to capture the current crimes, the more recent crimes

in the region. So definitely it's an issue that's very important. I think it's an issue that is consistently raised by affected communities and it's an area where we have tried to develop some type of a policy to show the principles that guide us. And we've done that also in consultation with colleagues from the other tribunals and getting input from other experts. But it will be always be a question. It's a question going back to World War II; it's a question that faces the tribunals today. Why did you prosecute this person and not somebody else? So I think it's a very valid issue to raise.

David Scheffer, Moderator
Northwestern University School of Law

Let me take one more question from the audience, and then I need to get back to a few focus questions on some cases. Would anyone else like to raise a question? Vicki, yes. Well, let's wait for the mic. Andrew, you're being so kind in walking that mic around.

Vicki (student): Well my question is with reference to the prosecution of the child soldiers, the case you refer to, the Lubanga case. As far as my limited knowledge goes, there's a separate chamber for the Prosecution and it focuses more on the rehabilitation and not actually criminalizing, penalizing the children, but penalizing the persons who had been using them. But if you look at the studies at the domestic level on these child offenders, if they are not penalized, they often get into a criminal act again. So how is the International Criminal Court taking that aspect into... is it just focusing on the rehabilitation or also prosecuting them for the crimes they have committed?

David Scheffer, Moderator
Northwestern University School of Law

Prosecutor Rapp may want to weigh in on that, because it actually is very relevant to how you handle child soldiers, or theoretically handle them before your Court. But, Mr. Rastan?

Rod Rastan, Panelist
International Criminal Court

Sure, a very interesting question. With the phenomenon of child soldiers, the individuals are often both victims and perpetrators. So the question is, how do you approach it? I think in practice the issue is resolved by the fact that we've taken a policy decision at the Office of the Prosecutor to focus on the persons most responsible. And that is also a stand which is being applied by the different courts and tribunals; it's a statutory requirement in some of them. In other instances, in more recent years, the Security Council, for example the ad-hoc tribunals, has required the most recent indictments to focus on a certain level of seniority or a certain level of gravity. Interestingly, in the Lubanga case the Pre-Trial

Chamber actually established jurisprudence binding the Prosecutor and then later on we appealed that at the Appeals Chamber, in a decision that was only released this year. The decision confirmed that no, this is not binding the Prosecutor, it's his policy decision to do it, and in fact making it a mandatory requirement may actually limit the preventative impact of the Court if the perpetrators have a sense of not being prosecuted. So for us, there's always possibility of prosecuting the actual perpetrator on the ground, but just in terms of judicial economy, strategy, and prosecutorial discretion, we've taken the decision to go off to the top commanders or the political figures who have set up the regime, who controlled the crime, who have put in process the system, who provided the essential contributions to allow the crime to occur, rather than the interchangeable perpetrators on the ground who may not be the most culpable in terms of that very phenomenon.

David Scheffer, Moderator
Northwestern University School of Law

Prosecutor Rapp?

Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

To some extent, it's the same answer, though we've had extensive experience with this issue dealing specifically with Sierra Leone, where there were thousands of child soldiers and where they were used on all sides, and in our indictments – every single indictment – is included a count of recruiting or using actively in hostilities persons under the age of fifteen. We won the case that found that that was international customary law as of the 1990's as a preliminary matter, and then one of the first convictions in history for that crime in the FRC case, with three individuals there, and it was affirmed on appeal.

Our statute did provide that the Prosecutor could prosecute people of a certain age for having been a child soldier, provided I think at least they're sixteen when the prosecution occurred. But... David Crane, the first Prosecutor, made a public announcement that he believed people of that age and given the circumstances of the commission of those crimes could not be individuals that were appropriate for prosecution by an internationalized court. And we are the first court to have this specific provision, being one of the innovations. The Rwanda and Yugoslavia courts were told to prosecute those responsible for these crimes. We were given a mandate to prosecute only those bearing the greatest responsibility. And David Crane said you couldn't have a child who would fit that particular category.

And we have... even while recognizing that these children sometimes committed heinous acts, our fundamental point is that this was coerced and they were certainly under the age of fifteen and not in a situation to fully understand the criminality of their acts. It would be inappropriate to prosecute them and they haven't been prosecuted at the national level

either. There are difficult issues – we’ve talked about, what do we do in terms of rehabilitation and all of that? And of course we’re criminal courts and we don’t have the sort of range of services or social services that the national domestic system would have. But on the other hand, there are aid agencies and NGO’s and certainly the United Nations and the UNICEF that’s been actively involved in working to rehabilitate the former child soldiers, though we often find when we go out and talk to victims – rape victims and amputees, and others, they say – folks that had greater intention. But, that said, that’s part of the broader challenge of reconciling, dealing with the wounds created by these atrocities, and it goes beyond our capacity, which is to hold those responsible for committing the crimes in the first place.

David Scheffer, Moderator
Northwestern University School of Law

What I’d like to do now is focus on one particular case. Actually, I’d like to flip back to the Balkans, if I may, and ask Deputy Prosecutor Farrell to bring us into this case. It’s the Boškoski case, which pertained to a very unusual territorial area in the former Yugoslavia. I think when this Yugoslav tribunal was created, I’m not so sure we even imagined that the territory of Macedonia would fall within the jurisdictional scope of the court. Although technically of course it does, as part of the former Yugoslavia. But this was a fascinating case, which came to judgment with one acquittal and one conviction in 2008, and it has several fascinating issues to it, including how one determined an internal armed conflict and how terrorizing civilian population plays into the determination of whether or not one is looking at an armed conflict. And I’m wondering if you could walk us through that a little bit. It’s such a fascinating case. We actually have a student of mine, Ronit, here who was interning for six months at the tribunal and working in Chambers on this case and knows it extremely well. But no one else does. So Mr. Farrell, if you could brief us on this case. It’s fascinating.

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

I’ll try to be accurate not only because it would benefit you but because I would be called out by the person who knows more than I. The case was of two individuals, Boškoski and Tarčulovski. It took place in Macedonia. It was in relation primarily to an operation in a town called Ljuboten, which was in August – August 19th if I recall – in 2001. The Macedonian authorities were dealing with the NLA, which was a rebel group, for lack of a better word, that was interested in some form of independence. There was conflict that took place, skirmishes, violence, for a relatively long period of time, sort of March through September or October, though the increase in the activity was not in March but later on. There was an increase in activity, including the time in August where there was the skirmish fight, the crimes committed in the town or village of Ljuboten in August of that year, 2001. Mr. Boškoski was the Minister of Information, I’m sorry, Minister of the Interior at the time, and therefore had commanding control over a certain level of control

over the Ministry of the Interior security forces or police forces. Tarčulovski was a commander who was ordered to lead the police in the operation of Ljuboten and the question was: what was their level of responsibility?

To summarize very quickly, Tarčulovski was found to have led the operation, and was convicted and found guilty of the events in Ljuboten at the time. The operation was – in their defense they claim that it was – an operation to attack the rebels, the terrorist group, the terrorist activities of the NLA. They entered into the town of Ljuboten because in their view it basically was a staging ground. It was also a location of a number of the NLA, and they took over the town to try and remove this rebel terrorist element that was there. The allegation is that it was primarily a conflict of the people who were killed and the crimes that allegedly were committed were part of this attack, and that there was a definite attack by the NLA in the village. Mr. Boškoski was charged as a superior for the crimes that were committed by the forces in the town or the village of Ljuboten, but he was also charged for other crimes related to the actual detention and cruel treatment of a number of the persons after they were captured from the village or at check-points and put in police detention facilities.

A couple of interesting issues arose in the case. Mr. Boškoski, the Minister, was acquitted. He was found not guilty and found that he did not have – though he was a superior of the forces and had superior responsibility, and though he knew of the crimes or would have become aware of the crimes committed by them – his duty to prevent or punish. In this case, his duty to punish ceased because some members of the police actually reported two events to the Judiciary and, without making it too simple, the result was that Boškoski no longer had an obligation. Once the information was reported to the Judiciary, they then had the obligation to prevent and punish – in this case, sorry, to investigate and punish – those persons who committed the crimes, and Mr. Boškoski no longer had that obligation even though he was in a position of superiority and he knew about the crimes. His obligation to punish the perpetrators ceased once that obligation was shifted to another authority, that being the investigative authority, the Judiciary.

The Prosecution appealed that, and I can explain to you why we think that rationale was wrong and wasn't actually reflective of the facts, but the interesting issues that arose in this instance relate first of all to an armed conflict. Now, part of the defense was that this was not an armed conflict; it didn't reach the level of an armed conflict. This was the government attempting to assert law and order over people who are committing crimes within the country. Although it was fairly intensive and it rose to a certain level of violence, it didn't result in an armed conflict. The Court found that it did reach armed conflict. For those of you who are aware of the Tadić decision, you have to find two different elements: one is the intensity reached and secondly, the rebels that the government is fighting have to be sufficiently organized. The Court found that it reached the level of the intensity of the armed conflict, and the one point that was mentioned by Professor Scheffer was the issue of whether or not the acts were terrorist in nature, and if they were terrorist in nature, is that relevant?

Now, without getting into all the details, the law relating to whether or not the type of conflict rises to the level of an international armed conflict excludes acts which are isolated, sporadic, single acts of terrorism, or acts which would be criminal. The Defense made an interesting argument; they said that acts of a terrorist nature may not be taken into account because they're terrorism. Because they're acts of terrorists against your country, they're criminal and it's not an armed conflict. And therefore, acts of a terrorist nature should not be or cannot be taken into account in determining whether there's an existence of an armed conflict. The implication the Court noted would seem to be that all terrorist acts should be excluded from the assessment of the intensity of the violence in Macedonia in 2001. This argument is that acts of a terrorist nature cannot be considered because acts of a terrorist nature are by definition acts against the State, of a criminal nature, to overthrow or to subvert, or to disrupt the normal functioning of the State, but it's not an armed conflict. It's individual terrorist groups taking steps to reach their goal, but it hasn't risen to the level of an armed conflict.

Now the Court rejected that determination and said that ultimately what they have to find is whether or not the actions that took place reached the intensity level for an armed conflict. It doesn't matter how you classify the group that has caused the level of intensity, and it says it will take into consideration such acts even if they're qualified by the State as terrorist acts because they go to the issue of the level in intensity of violence. In this case, the facts were that it reached the point where there were agreements made by the rebel group with NATO for a ceasefire, there was the intervention of the international community, there was armed conflict that went on for a lengthy period of time, and there was a geographical expansion of the armed conflict in areas that were used by or under the control of the NLA. So essentially they found that this classification of something as "terrorist" wasn't something that resulted in it being excluded. Also, terrorism often is the way in which these actions are taken. It doesn't mean that it's not an act of armed conflict.

There were some other considerations that went into the decision, including the intensity, the organization. It's an important decision because it lists the number of factors that would be relevant to determine when something which might be an internal terrorist act or an internal rebel act reaches the level that it's a form of armed conflict. Once it reaches that level, international humanitarian law applies. And once it reached that level in our instance, the ICTY had jurisdiction over the crimes that were committed, and that's why we subsequently prosecuted Mr. Tarčulovski and Mr. Boškoski.

It also raises interesting issues about the obligations to prevent and, as I've said, the Prosecution takes a different view than the Trial Chamber did. It felt that Mr. Boškoski still had an ongoing obligation, that the evidence itself was not that there was an investigation into all the crimes, but only into one instance. And the simple fact that they were informed – that the Judiciary was informed – of this did not as a result cause Mr. Boškoski to cease having an obligation, particularly when the information that was provided was inaccurate, incomplete, misleading, and the investigation that was set up by Mr. Boškoski was essentially in the Prosecution's view solely for the purpose to mislead

what happened and to cover it up. Those are some of the issues in the Boškoski case that I can recall.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much, Mr. Farrell. I do think it's fascinating because - I can assure my students that when we return to this case in our class, we will be talking about comparatively contrasting this case to how we rationalize the war on terror in the United States. I'd like to ask Professor Van Schaack, if I may, to jump into a little more of a cosmic atmosphere here for a moment. You know, the political environment in which all of these tribunals operate, including even the International Criminal Court in particular now, did you see in the year 2008 an improvement politically in how governments are interacting with, operating with, supporting, participating in, joining the International Criminal Court? And you are free to bring the United States into that equation as well. What's your perspective, from obviously an academic's view, of where the political dynamic came in to supporting or contesting and challenging all of these tribunals?

Professor Elizabeth Van Schaack, Panelist
Santa Clara University School of Law

I think it's hard to say there's any one overall trend because we have a lot of positive developments that happened on one front and meanwhile retrograde developments happening on another front. I think, from the perspective of the ECCC, the fact that the United States has now agreed to fund that is a wonderful development. I mean, they had taken a very hands-off approach; they had sort of funded a lot of NGO's that work around the Court. Now we're more actively a member with the new Obama administration. I think there's a very strong chance we will re-sign the ICC Statute, not necessarily send it to ratification, but at least signal our willingness not to oppose that Court moving forward.

The fact that there are still two at-large defendants in, probably, Serbia is obviously an enormous problem. The EU has done all it can do to exert pressure on Serbia and there's still this unwillingness to serve those two up. Maybe they don't know where they are, but it seems that if they really wanted to find them, they could find them. And so that's obviously problematic. And there are still issues with the rule 11bis referrals back to Rwanda. The Rwandans are not ... they've abolished the death penalty and that was one of the main obstacles to allowing those cases to be referred out, the lower level cases. But there are still problems with total isolation of the accused for life sentences, etc. They're not bringing their domestic criminal system into full compliance with international human rights norms, so that's prevented that rule 11bis from happening. Yes, states are continuing to join the ICC Statute and they're bringing a sort of massive global codification effort. They're bringing their domestic codes into alignment with the ICC Statute and then with international criminal law in general. But then you look at some of

the referrals – the rule 11bis referrals that were trying to go to Europe – and those all failed, because you didn't have a pure concurrency yet of the domestic and the international penal codes. So, again it's three steps forward and then three steps backward over here. So I think each tribunal probably has its own story of triumphs and also of backslides.

David Scheffer, Moderator
Northwestern University School of Law

And let me just ask... from the political dynamic, Prosecutor Petit, you obviously are dealing with an internal political dynamic in Cambodia every day and even more internally with how the Court itself is conducting its own administration, charges of corruption, and investigations during the year. How do you survive as a prosecutor within that political environment? Or do you?

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

I got a second job. (laughs) It's true that there have been a lot of discussions of peripheral, or what should be peripheral, issues for our Court. Just to make it clear, there have been allegations of corruption on the administrative side of the Court, in essence, as far as we can understand it, of people having to buy their positions or kick-back part of their salary to keep their position. Again, in the administrative side. However, that issue has already been litigated or started to be litigated. One of the defense teams has requested that an investigation take place in the municipal system, at the national court, of the judges – not necessarily the judges, but some of the personnel in the court – and the prosecutor in the Municipal Court has opened an investigation. There has as well been some discussion on how the disagreement that we have, my colleague and I, reflects larger issues or reflects on the commitment of the government to the rule of law and the process of our Court. The job is hard enough to do, interpreting the law and the evidence, without bothering yourself or letting it bother you, if that's what you're asking.

I think this Court, as other courts, has always had other dimensions. Hopefully, the corruption issue has started to be addressed by the UN and the ECCC, the national side. I think it needs to be addressed more forcefully and more transparently. At this point there is a report that we don't have access to and there is a mechanism that has been drawn up between the UN and the Government of Cambodia to start addressing this problem. I think it's safe to say that a lot of the, at least on the international judiciary side, feel that more needs to be done. It could certainly impact on the commitment of some of the internationals to this process if things are not addressed properly. We need to give the government the chance to do so. It's under their own jurisdiction and ultimately they have stated that they are committed to addressing this properly, and we'll certainly see how they handle it. Obviously we're going to have to deal with it in court, the assumption being that if the administrative personnel are corrupted, so must be the judges, or at least

it reflects on the appearance of a fair trial. And I'm sure that's going to come up in our litigation into our Court. As I said, in terms of the political aspect of this, again, there's a law, there's a statute. We're applying it until we have evidence that there are other considerations in the law and the evidence and we must presume that it will be applied fairly and transparently. And if not, each of us will have to make our own decisions.

David Scheffer, Moderator
Northwestern University School of Law

Any other contribution on this point?

Prosecutor Stephen Rapp, Panelist
Special Court for Sierra Leone

As I indicated earlier, we support ourselves by voluntary contributions, so we're looking at the contribution list every month and worrying about whether we'll have the means to complete our trials. Frankly, it does affect us and worry us a great deal and divert the attention of myself and the Registrar and other court principals. But thus far, we've been able to deal with it. Just, however, on the general perspective of whether the cup is half full or half empty or whether it's filling, etc. I spent a lot of time on the road in Africa and the region talking about our Court and what we're doing, and what does amaze me is that even though these courts have only dealt with a few jurisdictions, a few places in the world – and the ICC of course is now in four situations, but still it's a relatively young movement – that this sort of popular expectation is very, very high almost everywhere you go. And the kind of thing that Jonathan Fanton talked about: reaching a day when there is no place to hide. People everywhere expect there to be investigations and prosecutions and they're looking for that, and I think leaders may be affecting in some cases other decisions because of their expectation.

I point to the example of Kenya, where at least 1,300 people were killed in this election violence by both sides last January and February of 2008. Some say that because the international court exists, because of ICC ratification, perhaps the situation didn't get worse. Perhaps people didn't pull back from the brink and that was one of the reasons, aside from Kofi Annan's brewing of mediation in the whole of Africa. But even with that, there's powerful impetus now in Kenya to go forward with investigations, commission report, a very strong popular and press support for it. Some reluctance on the part of the political leadership, but I do see this sort of pressure building because of what's happened in the Taylor case, the Karadžić cases, or the Kabanga cases or the Bagosora case or Lubanga, something that's really going to have to be fulfilled there. So I tend to be pretty optimistic about at least the popular support for this movement.

David Scheffer, Moderator
Northwestern University School of Law

I know several more want to weigh in. Prosecutor Jallow?

Prosecutor Hassan Jallow, Panelist
International Criminal Tribunal for Rwanda

In the early cooperation of states, we continue to rely on Rwanda for most of the witnesses who come to the Court, and the level of cooperation there has been very good with Rwanda. It continues to be good. We've had setbacks in the 11bis referrals to Rwanda, but following discussions with the government there, we've agreed to go back to the drawing board with some reforms. They've just passed, actually, an amendment which excludes the application of the imprisonment with special conditions for any case that is referred to Rwanda by the ICTR or transferred by extradition from another state to Rwanda. I expect they will be taking more measures, more reformed measures. We've indicated that if they do, we will again renew our applications to the judges for cases to go to Rwanda.

But there are also some difficult areas. You know, we still have thirteen fugitives, unlike the ICTY, which has only two. We have thirteen fugitives who continue to elude justice. Most of them we think are in the DRC. It's not been easy to get the DRC government to take any action. They don't have the capacity actually to take any action in the DRC against these rebels. MONUC has a live presence there, but initially there was a question about their mandate – whether their mandate empowers them to actually go out and arrest these fugitives. Subsequently the decision was arrived at that it does happen in their mandate, if it is requested to intervene by the DRC government. A few days ago we had this joint operation between Rwanda and the DRC in the Kivu area, that's where most of our fugitives are located, and we hope maybe that operation will reap some dividends for us, leading to the arrest of these fugitives.

But Kenya also – we've always had information about the presence of Kabuga there, Félicien Kabuga, he's our top fugitive. We've had evidence of his presence there and of him carrying out business activities, despite the fact that the Secretary General has reported this matter to the Security Council. He's acting under the agenda of the Security Council for the past seven months. We still haven't got Kenya to cooperate with the tribunal in locating him and also in taking steps against his assets and properties which are in their country, save for one particular home in respect of which they got an order for seizure from the courts. But they haven't taken steps against his bank accounts, against his businesses in which he is believed or suspected to be involved in Kenya. That continues to be a difficult area for us. At the level of the UN, of course, the General Assembly has just approved a supplementary budget which should help us to finish our trials this year. And so that should take us up to September.

David Scheffer, Moderator
Northwestern University School of Law

Excellent. I know - Prosecutor Petit, do you want to weigh in again on this?

Prosecutor Robert Petit, Panelist
Extraordinary Chambers in the Courts of Cambodia

Talking about expectations of justice, about two weeks ago an institute from Berkeley, which does a lot of studies on outreach and on expectations and on the justice for atrocities, did a study in Cambodia and found that, among other findings, that ninety percent of people want some form of justice for what happened thirty years ago when most of them weren't even born. So, talking about expectations, it's not only countries, it's just the victims. And this was the highest number that they had, even when they did their studies in Uganda or the Congo – thirty years after, people are still looking for some form of justice. So I don't think that need is ever going to go away, and I think it's one of the things as well that the donors must take into consideration. I think that's a powerful motivator for donors, is that this thirst for justice must be answered if stability and reconciliation and indeed reconstruction must take place.

David Scheffer, Moderator
Northwestern University School of Law

And actually, Prosecutor Jallow opened up an issue which I wanted to ask Mr. Rastan, and I know you may have something to weigh on in this issue too. But on two counts, on the enforcement side of... there being two types of enforcement, one where you incarcerate people, but I want to talk about now where Prosecutor Jallow took us in terms of arrest of those who are still at large. Prosecutor Ocampo of the International Criminal Court really made a very forthright effort in 2008 to press for the arrest of fugitives who are members of the Lord's Resistance Army, Mr. Kony of course being the prominent one in Uganda, or from Uganda. And secondly, Mr. Harun and Kushayb in Sudan. And he went to the Security Council, he went to these governments, he's made enormous efforts to try to focus on what I think he regards as almost an obligation to follow through on these arrest issues. Do you want to address that point?

Rod Rastan, Panelist
International Criminal Court

Sure. I think it's a fascinating question in terms of this interaction between the law as set up by a tribunal and then the enforcement regime, which is, if you'd like, in the political domain. There is sometimes this image that is used in terms of the ICC – I guess it applies to all of these courts and tribunals. You have really two pillars: you have a judicial pillar which is the Court itself, which is guided by law, procedures, human rights

standards and all the rest, and then you have the enforcement pillar about arrest, about execution of request for cooperation, which are really in the hands of states. They're outside of the control of the Court, per se. And the enforcement pillar is guided sometimes by legal considerations, but as we know often by non-legal considerations relating to issues of policy priority for states to... for example, in the context of the EU it's become a policy priority, a strategic choice, to link cooperation with the tribunal with accession to the European Union. So that's a positive example of political pressure being applied in favor of a judicial process. But in other instances one can say that there are those pressures acting perhaps not in favor of enforcement.

So I think for us as we go into the future, it will be fascinating to see how both the law impacts on politics and the law shapes the behavior where policy linkages are adopted, such as where the EU has done that, and whether or not we can benefit from the same type of policy linkages around the norms that are established by the ICC. That will be interesting. And to that extent the R2P discussion is relevant, because you have these atrocity norms, this atrocity law that has developed, these fundamental norms that everybody agrees with in terms of the prevention of these crimes and, by extension, one would think, the prosecution repression of these crimes. And then whether that sort of legitimized norm will influence the policy priorities of states to adjust their behavior to actually enforce those fundamental values. Part of the job is for the courts and tribunals themselves. The more they can establish that they are doing a legitimate job, that the prosecutions are fair and their cases are warranted, then they'll generate a broad consensus. And I think also the expectations of citizens around the world would also shape some of those things. At the same time, if the decisions and orders of these courts and tribunals are left dependent on the variable considerations of state actors to enforce or not enforce, depending on the considerations, depending on the situations, depending on whether the perpetrator in one situation is the president of a state or in another situation is a rebel, if that impacts upon the rate of enforcement or compliance enjoyed by the Court, then that will also impact upon the credibility of the judicial process itself.

So, we've definitely tried to appeal to states to uphold the judicial process and that the law is not something that can be bargained away, that they have to adjust their practices, whether it's negotiating peace agreements or considering how to move a country forward. The law is no longer something that can be a bargaining chip that's negotiated away, or in terms of the commitment to actively support the work of these courts and tribunals. So, it's a work in progress, and we'll see where we get...

David Scheffer, Moderator
Northwestern University School of Law

You know, it almost sounds as if we've reached a stage where we need to consider a new version of what we find in the Geneva Conventions of 1949, which is an obligation to search and arrest on your territory those who are alleged war criminals under the Conventions. We need to almost start thinking about that in terms of how the ICC actually operates in the future and whether State parties to the ICC need to have that kind

of obligation more firmly implanted both in their domestic law and in their treaty obligations with the Court.

What I'd like to do is... it's reached five o'clock. I'd like to close with a question to our Defense Counsel, Gillian Higgins from the Yugoslav Tribunal. Because it brings us full circle to where we began, way back in 1995 and that is – I'll never forget the cover of the American Lawyer magazine when the Duško Tadić trial was to commence in The Hague before the Yugoslav Tribunal. This was the first trial at the Yugoslav Tribunal. Big banner headline: Trial of the Century. Well, in retrospect I'm not so sure that was the case, but the editors thought so at the time. And here was the sort of camp-thug who was put up there on the cover as the man for the trial of the century. Of course it was a very long trial; a lot of first instance issues were dealt with in that trial. Ultimately, Duško Tadić was convicted for his conduct, particularly in a detention camp in Bosnia. Now he was convicted on eleven counts on May 7 of 1997 and in January 2000 he was sentenced to twenty-five years imprisonment. He was released on July 18, 2008. And I'd like to ask Defense Counsel Higgins: can you explain that to us?

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

I shall try. Anybody who has had the chance of reading the decision that was issued by the president of the tribunal... it was dated the 17th of July 2008 and it contains some of the background as to why the president decided it was appropriate to release Duško Tadić. Now, upon reading the decision, it is clear that the president not only went through the consultation process but considered the factors that he was entitled to consider with the other judges in deciding whether or not a request was appropriate. It's a fully reasoned decision and interesting from that perspective and others. The background being that in addition to what we've heard, Duško Tadić had been detained in a German prison and under German rules he was eligible for early release, as he had served two-thirds of his sentence. There seems to have been some confusion over the deliberations between the German authorities and the Tribunal as to Duško Tadić's conduct, because he had refused to consent to being early released and the matter was sent before the president of the Tribunal for him to determine Duško Tadić's making his own request for release.

This confusion seems to dissipate when one bears in mind that the president of the Tribunal considered two procedures. There was a deportation procedure and an early release procedure, which he was entitled to consider. And in doing so, he ordered reports from the German authorities and considered Duško Tadić's conduct and the factors that were raised by him himself in his own personal plea for release in accordance with the procedures before the Tribunal. Now the Judge himself has discretion on Rule 125 of the Rules. What's interesting first of all is how the Judge really disciplines the Prosecutor in this case for going behind and going beyond the scope of what the Prosecutor is entitled to do when an accused person, rather a convicted person, applies for early release. The Judge made it very clear that in fact, the Prosecution was only entitled to report on cooperation matters and it was not entitled to give substantive claims and comments as to

whether or not it was appropriate to release him, that being a matter for the Judge himself, the President, in consultation with the others.

Paragraph eleven of the decision lists the factors that Duško Tadić put forward himself, which feeds back into issues of mitigation that we were talking about earlier, which he's entitled to have considered upon an early release application. Those included the following: firstly, that he didn't have a prior criminal record; secondly, that he had not violated any laws of the prison during his imprisonment; thirdly, that he should be eligible, since other similarly situated convicted persons had been granted early release, and that he had cooperated with the Tribunal during contempt proceedings that had taken place in respect of one of his lawyers. He also claimed that he had endured hardship during his own imprisonment from other inmates and that his family had been financially unable to visit him on a frequent basis.

One factor that troubled the President and one which he clearly discussed at length in the consultation process was the fact that a letter from the German authorities indicated that Duško Tadić did not demonstrate remorse for his crimes. The President considered this observation could not be afforded great weight in the absence of any psychological report, which had not been provided by the German authorities. And while some of his colleagues expressed doubt as to whether Tadić had actually demonstrated rehabilitation as opposed to good behavior, none of the judges opposed the application. One has to bear in mind that there are specific rules in Part Nine, which deal with exactly this situation: terms of early release. We know that individuals are sent to national prisons who have signed enforcement agreements with the United Nations and there are provisions specifically put in place to protect the rights to early release, which in this case when one reads the decision, one has to conclude in my view that it's a thoroughly reasoned decision, which was taken with great consultation and care and is in accordance with the rules and in my view, a proper exercise of discretion.

David Scheffer, Moderator
Northwestern University School of Law

Thank you, Ms. Higgins. Do we have any comment on that from any of our panelists? We let Mr. Tadić enjoy his freedom? Mr. Farrell?

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

One thing, since I was the one who argued for the motion. (laughs)

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

Sorry.

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

No, I did make the submission and I do have comments in response to Gillian's criticisms of the Prosecution, but this isn't the place or the time to do it. The one thing that you should be aware of, which I think is just an interesting component of this release program, is that all the countries that have release at two-thirds have some form of ability to take into account the actions of the person who was released after they are released. So in other words, if you're released at two-thirds and you're on parole, you would then have parole conditions to meet. If you're released at two-thirds even without certain parole conditions and you commit another crime, you can then be pulled back before the Court where there are in some jurisdictions the ability then to cause you to serve the rest of your one-third of sentence. That does not exist at the Tribunal. At two-thirds you actually leave the country that you're detained in, in this case Germany, and you go back to your home country where you committed the crime and you go back to wherever you live with your family and your ability to start your life again. But there are no parole conditions. There's no ability if they commit further crimes.

So there is a disconnect between the adoption of the laws of a national jurisdiction where at two-thirds you're released because there are conditions and abilities to monitor your conduct and here, where at two-thirds you're released with none and your sentence is over. That's an issue that's never been resolved by the Tribunal, despite it being raised probably unfortunately by the Prosecution. There is this gap in the actual imposition and execution of a sentence, which has not been rectified in any decisions to date. It's just an issue to understand how sentences are executed and how people serve their sentence once they are released, which is different – I'm not saying it's right or it's wrong – it's just different from what we understand to be the release at two-thirds. It's completely different than the framework of two-thirds release in national jurisdictions, which are relied upon for the purpose of releasing the person at two-thirds.

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

Just one point. Can I just say that he wasn't actually sent back to Bosnia. He was deported to Serbia. Germany didn't want him on German soil and he actually went back to Serbia.

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

Well actually the fact is he went back to Serbia because in 2006 he applied to Serbia to get citizenship so he wouldn't have to go back to Bosnia, and when they granted him citizenship, as a Serb citizen despite the fact that he's a Bosnian, he was then permitted to go back to Serbia because he didn't want to go back to Bosnia, since that is the country where he committed his crime. (laughs)

Defense Counsel Gillian Higgins, Panelist
International Criminal Tribunal for the former Yugoslavia

That's the whole point.

Deputy Prosecutor Norman Farrell, Panelist
International Criminal Tribunal for the former Yugoslavia

Gillian and I have done many cases together. It's not unusual.

David Scheffer, Moderator
Northwestern University School of Law

Well, thank you very much. I think we'll bring this to a close now. I want to thank all of our very, very distinguished panelists here for first coming to Chicago...

Professor Elizabeth Van Schaack, Panelist
Santa Clara University School of Law

In February. (laughs)

David Scheffer, Moderator
Northwestern University School of Law

In February, well late January. Some of you came from very warm climates.

We'll do this again next year, next January. We'll do Atrocity Crimes Litigation Year-in-Review for the year 2009. So keep that in mind. I want to extend my thanks to everyone. I want to thank Cathy Peterson, who's in the red hair, right there. She is the one who actually organized this entire event. So thank you very, very much, Cathy. (clapping) She's going off to law school next year, by the way, so ultimately you all are going to see her here at your tribunals, first as an intern, and then perhaps later as otherwise. And also

I want to thank Caroline Kaeb, who is our Ph.D. and law student, from Germany by the way, a German lawyer who also helped very much with the preparations. (clapping) So thank you to all of you. We will now retire from this event and we'll see what transpires in the year 2009 in atrocity crimes litigation. (clapping)