

ATROCITY CRIMES LITIGATION YEAR-IN-REVIEW (2009) CONFERENCE
Center for International Human Rights
Northwestern University School of Law
Chicago
February 4, 2010

OPENING REMARKS

David Scheffer, Moderator
Northwestern University School of Law

Well welcome to the third annual Atrocity Crimes Litigation Year-in-Review Conference, which will cover the jurisprudence and practice of seven international and hybrid war crimes tribunals during the year 2009. I am Professor David Scheffer and I will moderate the discussions today. I had the privilege of being the U.S. Ambassador-at-Large for War Crimes Issues during the Clinton administration, which, for better or worse, locked me into this subject.

This is the only conference of its kind in the United States. The Center for International Human Rights at Northwestern University School of Law, a center I humbly direct, is proud to host these discussions. The financial sponsor this year, as it was last year, is the John D. and Catherine T. MacArthur Foundation, headquartered here in Chicago. We are extremely grateful to the MacArthur Foundation for its support, without which this conference simply would not be possible. We also are grateful to the Chicago Council on Global Affairs and the National Security Journalism Initiative at the Medill School of Journalism, Northwestern University, for their financial and other support for the evening event at the Chicago Club, which I hope as many of you as possible will attend as well. Finally, I want to thank the Bluhm Legal Clinic at Northwestern Law, on whose premises we meet today, and its director, Professor Tom Geraghty, for the privilege to occupy this much sought after student study area overlooking Lake Michigan for our discussions today. You should all realize that we decided to give the students this view rather than provide it for many of our faculty offices. Some of we faculty have regretted that decision ever since [audience laughs]; only kidding, whatever inspires our brilliant law students—dare I say among the best in America—inspires us of course.

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

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

We have a stellar cast of jurists to learn from today. It is simply not that common to have this stature and brainpower regarding the war crimes tribunals in one room at the same time. Although you have their biographical statements in the brochure, each panelist merits a brief introduction by me. They have all traveled great distances to be with us today, and for that we are very, very grateful. Then we will turn to substance for the rest of the day.

Joining us from the International Criminal Court is Deputy Prosecutor Fatou Bensouda, a native of Gambia. She has helped lead the ICC since 2004 and heads the Prosecution Division of the Office of the Prosecutor. She was formerly senior legal adviser and head of the legal advisory unit of the International Criminal Tribunal for Rwanda. She arrived at the tribunals after a distinguished career in the halls of justice in Gambia. The prosecutor at the International Criminal Tribunal for the Former Yugoslavia, Serge Brammertz, from Belgium, was Ms. Bensouda's predecessor at the International Criminal Court and then served as the commissioner of the U.N. International Independent Investigation Commission into the murder of former Lebanese Prime Minister Rafik Hariri. He also had a distinguished legal career in his country prior to joining the tribunals.

I turn now to two defense counsels of high reputations. François Roux, of France, defended Duch (pronounced "Doyk") last year before the Extraordinary Chambers in the Courts of Cambodia, and is now the head of the Defence Office of the Special Tribunal for Lebanon, based in The Hague. His long career in criminal law and human rights includes work before the International Criminal Tribunal for Rwanda and the International Criminal Court. Courtenay Griffiths is defense counsel to former Liberian leader Charles Taylor before the Special Court for Sierra Leone. He is a British barrister born in Jamaica and has had extensive experience in the major Crown Courts in England.

David Schwendiman was, until recently, the deputy chief prosecutor and head of the Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina. His rich legal background includes a series of top prosecutorial posts in the United States, particularly with the state of Utah and the U.S. Justice Department, where today he has returned to the United States and is an assistant U.S. attorney. Alain Werner is a Swiss lawyer and senior counsel on the International Justice Program of the Aegis Trust in England. He had a five-year career as a prosecutor at the Special Court for Sierra Leone, including the Charles Taylor case, and then, in 2009, represented civil parties before the Extraordinary Chambers in the Courts of Cambodia during the Duch trial. Unfortunately, he received his L.L.M. in International Law from Columbia University rather than Northwestern, but we will not hold that against him [audience laughs].

Joining us from the International Criminal Tribunal for Rwanda is Christine Graham, who serves as senior appeals counsel in the Appeal and Legal Advisory Division in the Prosecutor's Office. She led the prosecution of *Kalimanzira* and was a key player in the prosecution of *Bagosora*. She joins us with very short notice, and I am deeply grateful at your rush to the aircraft, Christine, in Arusha. That is because Judge Erik Mose, who long ago

committed to join us, had to withdraw several days ago due to judgment writing demands in Arusha before he joins the Supreme Court of his native Norway. But we hope Judge Mose will join us by videotape later today for a short statement of his own to us, assuming FedEx delivers it ultimately. It was lost in Memphis last night.

I dare not forget our eminent scholar, Göran Sluiter, in the middle, who is a professor of international criminal law at the University of Amsterdam. He also is a judge at the Utrecht and The Hague district courts. I envy your ability, Göran, to occupy both the academic and judicial halls of the Netherlands. Professor Sluiter is the scholar one imagines fits the mold of a “qualified publicist” in Article 38 of the Statute of the International Court of Justice; namely, someone whose writings you consult for authoritative pronouncements of international law. You can see his book is always on my desk. His books are invaluable guides to what you will hear about today. Professor Sluiter is our distinguished academic commentator, so whenever we need clarity or are confused, he will clarify the murky and enlighten us. Finally, in the audience, I think, is Ambassador Wenaweser, perhaps. Not yet. Anyway, he will join us for lunch as the keynote speaker. He is the president of the Assembly of States Parties of the International Criminal Court, and I’ll introduce him more formally later.

Note that a transcript and video/audio recording of these discussions will be posted on the website of the Center for International Human Rights in the coming weeks. Also the Northwestern Journal of International Human Rights will publish a special edition, as it does each year, with articles by some of our panelists, including Professor Sluiter examining the jurisprudence of 2009 complete with footnotes. The special edition is always posted on the website of the journal, and past issues are available on that site. All those websites are on the back of your brochure. Some of our participants today, of course, will be limited at times in what they can say because they are involved in cases that are under prosecution or on appeal, and they have to be, of course, careful at times as to what they can actually address and what they cannot address. We welcome our CLE lawyers from across the law school and the Chicago area and perhaps beyond, we know you will enjoy the day for us—or with us. We will take a short break at 10:30 or so. Coffee is available in the conference room behind you. Feel free to get up and seize a cup and bring it to your seat at will. We will end the morning session close to noon. Invited guests will proceed to the luncheon on the fifth floor of the Wieboldt building next door. We will all reconvene at 2:00 p.m. and proceed until 4:30 p.m.

Now this is not a conference of speeches, but rather a moderated discussion. I will direct questions to the panelists; then I will occasionally turn to the audience and seek your questions throughout the day. You will not have to wait until the end of any session to ask questions, so, just hang on.

So let us begin.

I’d like to direct my first question, if I may, to Deputy Prosecutor Fatou Bensouda of the International Criminal Court. Yesterday, and, if it’s alright with all of you, I’m going to slip into first names so that it’s a little more informal here as we move along. Yesterday, Fatou, there was news made with respect to the International Criminal Court. The Appeals Chamber came down with a judgment with respect to President al-Bashir of Sudan and the fact that there is already an

arrest warrant out on him with respect to the Darfur situation. And this issue before the Appeals Chamber was whether or not that indictment can include beyond war crimes and crimes against humanity the charge of genocide. And the prosecution, of course, had a very, very serious equity and interest in this, and perhaps you could enlighten our audience as to what happened yesterday and your impression of the result out of the Appeals Chamber.

[11 mins 42 secs]

PANEL DISCUSSION

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Good morning. First of all, I am very happy to be here with you at these panel discussions.

Yes, yesterday was a good day for the Office of the Prosecutor. The Appeals Chamber decided that -- with respect to our appeal, including the charges of genocide, which the pre-trial chamber has rejected-- the Rome legal test was used and has remitted the case back to the pre-trial chamber for them to apply the appropriate standard. What the Office of the Prosecutor has always maintained was that it is the intention of Bashir to destroy the Fur, the Zaghawa, and the Masalit. We've always maintained that, and we have submitted before the pre-trial chamber, as well as during our appeal, to say that Bashir is using this as a weapon to destroy them.

The court—this is from yesterday—basically agreeing with the Office of the Prosecutor saying that really it was a legal error to reject the genocide charges, and if you will recall, the Office of the Prosecutor's appeal was based mainly on one single issue—one single legal issue—which was that the test should apply for drawing inferences in order to establish reasonable grounds to believe the issue of the arrest warrant. This was the test that we said, and we argued that the majority of the chamber has used the wrong test by saying, for example, that the inference of reasonable grounds was the only one that should be drawn. Of course the [Inaudible] has disagreed with that; that it was not the only inference that could be drawn at this stage of the proceedings because here we are not determining the guilt or innocence of the accused. It is not a trial. It is a proceeding for arrest warrants issue, and for the majority of the chamber to say that this was the only reasonable inference that could be drawn; we said that this was the wrong test that was applied. And fortunately yesterday we were vindicated when the majority of the court decided that it was the inappropriate—you know, that it was quite inappropriate (for) at this stage of the proceeding to apply that test.

David Scheffer, Moderator
Northwestern University School of Law

In fact you got a unanimous decision I believe.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

We got a unanimous decision. We got a unanimous decision agreeing with that and agreeing of course with what the Judge Ušacka has also said in the, er, during the pre-trial.

David Scheffer, Moderator
Northwestern University School of Law

So the next step now is, er, of course they didn't accept all of your appeal, uh, you had wanted them to actually decide that there are reasonable grounds to issue an arrest warrant on the charge of genocide. They did something else.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

They did something else. They said that, um, at their level they were not in a position to appreciate fully the facts that were before the pre-trial chamber and preferred to remit the case back to the pre-trial chamber for them to apply the appropriate standard, instead of them doing it as we had requested them to do. And, as I said, this is a good decision that the genocide charge has been included—will be, I mean, at least the appeals chamber has said that it should be included, because I think someone like Bashir, you know, should be isolated, you know, should be isolated, he should be apprehended, and he should be transferred to the ICC.

David Scheffer, Moderator
Northwestern University School of Law

You know interestingly I just noticed that a comment by the U.S. Assistant Secretary of State for African Affairs yesterday actually backed up the deputy prosecutor's statement. Johnnie Carson stated that "It is the firm belief of the United States government that President al-Bashir should appear before The Hague under the arrest warrant"; so, just an official position from the U.S. government. Thank you very much, Fatou.

You know what I wanted to do right off the bat was bring that to your attention. Now, I want to step back for a moment and ask Professor Sluiter to give us a little bit more of a "cosmic" introduction to this subject that we're going to be talking about today.

Göran, would you describe—and I'm sorry that, er, I should stand so that I can be seen; I don't want to stand right there. Would you describe 2009 as a year in which international criminal law evolved significantly in the tribunals' jurisprudence or did international criminal law actually experience muddled and less decipherable characteristics due to perhaps conflicting signals from the tribunals? What's your sort of general assessment of the performance of the tribunals in the year 2009?

Professor Göran Sluiter, Panelist
University of Amsterdam

Thank you David. Good morning everybody, I also would like to thank you for inviting us and for having this wonderful event here.

Before I answer that question, may I briefly react on what my neighbor here said? I think it is a wonderful decision to include the charge of genocide, especially from a procedural perspective. In the Genocide Convention we have this clause, which has long been forgotten, that the state must either arrest and try the person accused of genocide, or extradite that person to an international tribunal of which the state has accepted jurisdiction. That is the ICC- I would say the tribunal meant in that provision is clearly the ICC. That is the international tribunal with jurisdiction. The issue now is whether states have accepted the jurisdiction. I think you can argue that if you say the Security Council has created the jurisdiction of the ICC over Darfur on behalf of all its members, then all U.N. members can be said to have accepted the jurisdiction of the ICC. This could mean that Al-Bashir can no longer travel safely to a number of states where he thought he could travel safely to because those are not state parties to the ICC. However, if that state is a party to the Genocide Convention, the prosecutor could then point to that state and say, “Wait a minute, you are a party to the Genocide Convention. You must either try that person yourself or extradite that person to the ICC.” So it’s very important to have genocide also for that reason now in relation to Mr. Al-Bashir.

Now coming back to the general assessment of 2009, it has been a very exciting year and also a very difficult year but these are of course very much clichés. I have one big concern which will not make me very popular among my neighbors— I am surrounded by prosecutors on both sides. And in the jurisprudence my biggest concern is the rights of the accused at all levels— at the pre-trial level, at the trial level, and at post-trial level. If you look at the case where in 2009 we have, for example, at the ICC an Appeals Chamber decision saying that you cannot be released prior to trial if no states want to accept you. As was the case of Mr. Bemba, the Appeals Chamber said, “Before we can release somebody, we must have a state that is willing and able to accept the accused person.” Well what if no state wants to do that? Does it mean that the accused must always stay in detention prior to trial? So I think that’s a very fundamentally wrong decision from a human rights perspective.

Then at the ICTR we have the case of 2008 actually, of December 2008—a military one—but it was only published in 2009 so I still want to treat it as a 2009 case. It said that the accused were tried within a reasonable period of time. These are persons that were arrested in ’96 and the judgment in this instance—we still have the appeal—was in 2008, actually 2009 it was published. So we have twelve years—for one accused it was twelve years and for another accused it was eleven or ten—of pre-trial detention, and ten-twelve years of waiting until you know what, as an accused, the judgment and decision would be. Now how can there ever be a trial within a reasonable period of time? I am very puzzled, and I also don’t like the reference in that decision to, er, saying that the accused now have life imprisonment such that there was no prejudice to the accused. I mean this is not correct because you are entitled to the presumption of innocence until the judgment in your case. And this is a general big problem: the length of these trials—and these are extreme cases at the ICTR but also at other tribunals. These lengths are sometimes absolutely unacceptable. We must find a way to shorten the trials, or, if that is not possible, of provisional release.

Then in the ICTY we have an appeal decision, *Krajišnik*, where one of the issues was ineffective representation, and there was a list of problems relating to the performance of counsel in that case. And it was not prepared. He did not have enough time to prepare; there was no defense strategy and a lot of the Appeals Chamber judges said, “Well it’s not perfect but it will go; it can do.” And I wonder then what really should be the standard for the Appeals Chamber to say: this is a situation of ineffective representation. It was a very puzzling case to me, and I wonder whether if there had not been a completion strategy, then maybe they would have the situation where they could have said, “Well, we should have a retrial.” But now with a completion strategy, so those trials must go on. And this was a problem for me.

And one final point, um, post-trial: at the ICTR—this was the year 2009—was marked by two acquittals...

David Scheffer, Moderator
Northwestern University School of Law

At, the, the Rwanda Tribunal?

Professor Göran Sluiter, Panelist
University of Amsterdam

The Rwanda Tribunal...

David Scheffer, Moderator
Northwestern University School of Law

Yeah, the Rwanda Tribunal, yeah...

Professor Göran Sluiter, Panelist
University of Amsterdam

...two acquittals: one in first instance and another by the Appeals Chamber and using the language, I’ve cited it here, that “the Trial Chamber violated the most basic and fundamental principles of justice” in the way the Trial Chamber dealt with a defense of the, er, defend, alibi defense. Um, okay...

David Scheffer, Moderator
Northwestern University School of Law

Do you...Can...Let’s...I was going to ask that question Göran. Let’s talk about that. Did the alibi save the defendant in that case? This is, um, I won’t pronounce this correctly, but it’s Zira...Zigiranyirazo.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

[In unison]

Zigiranyirazo

David Scheffer, Moderator
Northwestern University School of Law

Yes, Christine will help me on this. Was that...um, was the alibi the deficient...was the sufficiency of the alibi suddenly discovered by the Appeals Chamber in that case and actually led to an acquittal?

Professor Göran Sluiter, Panelist
University of Amsterdam

Um, no, it was not...no, no that's...and that may be also the frustration of my neighbor because...

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Can someone gag me now?

[Audience laughs]

David Scheffer, Moderator
Northwestern University School of Law

No, you may jump in Christine.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

No, I'll wait.

David Scheffer, Moderator
Northwestern University School of Law

I mean I know you lost this case, so just jump on in. What happened in that case? Because I was looking at it here and, uh, you know, he had been sentenced to twenty years in prison by the Trial Chamber and then he gets acquitted on appeal.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Well, er, what happened was...of course the whole case revolved around the issue of alibi. But what saved him at the end of the day was not the strength of his alibi evidence, it was rather the mistakes by the Trial Chamber in handling the issues of low impact relating to the alibi. Of course, the remedy that the Appeals Chamber chose at the end of the day—a reversal, as opposed to a retrial—was a very drastic one. And you can certainly have opinions about that whether you’re a prosecutor or an academic because in the interest of justice, given the fact that there wasn’t evidentiary basis against Zigiranyirazo. In fact, the prosecution’s case at the trial level was strong. However, for reasons best known to the Appeals Chamber, they chose a reversal as opposed to a retrial. And the paragraph that all the language that Göran quoted comes from Paragraph 75 of that judgment, where the Appeals Chamber pretty much says that “We feel our hands are tied here. This is what we had to reverse because of the seriousness of the errors committed by the Trial Chamber.” Of course, as a prosecutor you do your best to defend the case you have when you go and appeal within the limits of the law and your ethical obligations, but this was a situation that the Appeals Chamber felt that they could simply not sustain—the conviction that had been imposed on the Trial Chamber level. But it wasn’t a question of lack of evidence or of the strength of the alibi, as such.

David Scheffer, Moderator
Northwestern University School of Law

Okay, very good, um, Göran, I wanted you to cover one other question before we move back into more tribunals and cases here. Among all of the tribunals, which judgment or judgments stand out as the most significant for you during the year?

Professor Göran Sluiter, Panelist
University of Amsterdam

Um, most significant, I would say, at the ICC—but I must declare an interest here because I was myself involved in helping the defense—are the complementarity decisions in *Katanga*—and I’ve seen this also on the agenda later on in specific relation to the ICC...

David Scheffer, Moderator
Northwestern University School of Law

Well you should feel free to just jump right into that case if you want to.

Professor Göran Sluiter, Panelist
University of Amsterdam

Okay, it was, er...two levels: Trial Chamber and Appeals Chamber; they both said the case is admissible. This was an individual, Katanga, who was detained in Congo, and the question was whether he should be better tried in Congo or at the ICC. And my disappointment is not so much that we lost that case—that was not totally unexpected—but more the reasoning, and especially by the Appeals Chamber.

I think many, especially the U.S. and other states who were not yet a party, would have hoped for clarity. What would complementarity now really mean? What is the correct and precise test under the statute? And also, what is the protection for a state? If a U.S. court or any other court, national court, deals with a situation, deals with a case, under what circumstances can the prosecutor intervene and when is this intervention legally not permissible under the statute? And these answers have—and these questions have not been answered in those decisions, so it was, from the development of the law perspective, I think, at both levels, quite, quite disappointing. And one other decision most...

David Scheffer, Moderator
Northwestern University School of Law

By the way the *Katanga* is the Democratic Republic of the Congo situation before the ICC at this point, and Katanga was arguing that it should be a DRC court that adjudicates this case at this stage and not the ICC.

Professor Göran Sluiter, Panelist
University of Amsterdam

Yes.

David Scheffer, Moderator
Northwestern University School of Law

But that was rejected by the ICC.

Professor Göran Sluiter, Panelist
University of Amsterdam

Yes.

David Scheffer, Moderator
Northwestern University School of Law

Sorry.

Professor Göran Sluiter, Panelist
University of Amsterdam

One, one other decision which was very significant—is the Special Court for Sierra Leone’s Appeals Chamber judgment in the *RUF* case of, uh, October 2009. And that was the last decision, uh, pronounced in Freetown—there is now just only one trial going on and that is *Charles Taylor* and that is down in The Hague—that was actually their legacy for Sierra Leone and for Freetown. And this is the, what I call the “monster of joint criminal enterprise,” and, uh, the majority basically said [paraphrasing] “Well, there’s joint criminal enterprise for all of the accused.” But there is one really strong and powerful dissent saying [paraphrasing], “This is

going too far, this is one accused who does not share the intent of the other participants in the joint criminal enterprise, and therefore he should not have been convicted by the Appeals Chamber.”

David Scheffer, Moderator
Northwestern University School of Law

Now let me take that as a jumping off point; I’m going to jump around here a bit. I know that Courtenay Griffiths, defense counsel to Charles Taylor, has some strong views on how the court is handling joint criminal enterprise (JCE). Can you start with just, um, a comment on the *RUF* case, uh, you know, and what came out of *RUF* and then jump into *Taylor*?

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Well, just a couple of quotes to begin with, from the dissenting judgment of Justice Fisher in the Appeals Chamber in the *RUF* case.

Quote number one: “Notwithstanding the Trial Chamber’s finding that he did not share the common criminal purpose with the other participants of the JCE in the case before us, the majority holds that Gbao can incur individual criminal responsibility on the JCE, thereby entirely detaching JCE liability from the requisite *mens rea* that defines it. I am compelled to dissent from this unprecedented holding, which abandons the keystone of JCE liability as it exists in customary international law. Common purpose or design liability demands that the accused share with others a common criminal purpose, and I cannot agree with the majority’s decision to abandon this legal requirement.”

Quote number two: “For Gbao, the Trial Chamber in the majority have abandoned safeguards laid down by other tribunals as reflective of customary international law. As a result, Gbao stands convicted of committing crimes which he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend. The majority’s decision to uphold these convictions is regrettable. I can only hope that the primary significance of that decision will be as a reminder of the burden resting on trials of fact applying JCE and as a warning of the unfortunate consequences that ensue when they fail to carry that burden.”

What we need to appreciate is this: this is the second of two important decisions made by the Appeals Chamber in the Special Court for Sierra Leone. In this particular instance, the *RUF* appeal, there was no need for the judges in fact to come to a decision on this fact. But as they said in their judgment specifically, “We take this opportunity to adumbrate on the wider implications of JCE.”

I for one certainly wished they’d resisted that temptation. For the simple reason that this is the second time in effect that they’ve watered down the concept of JCE. The first was in the AFRC appeal a couple years ago when they said the purpose for the common enterprise didn’t have to be criminal so long as the means to achieve the purpose were. Now in effect they’ve

detached the mens rea, which is the defining characteristic of JCE. That is what sets the contours and boundaries of the crime. The essence of that offense, or of that mode of liability is the intentionality of the heart of the co-conspirators, if we may style them as such. They've totally detached that, but there's a reason for it. The reason is quite simply this: the trial chamber is setting a legal framework for the conviction of Charles Taylor, their most high profile defendant. Because the problem the prosecution has with Charles Taylor is this; there's no evidence that he was ever in Sierra Leone.

The evidence that he supported the RUF is tenuous at best. But Taylor has admitted that at an initial stage in the Sierra Leone revolution, he did provide them with assistance, in the same way that the defendant Gbao in the RUF case. So consequently, now we have a situation in which Charles Taylor's involvement outside the period of indictment in '91-'92 they can nonetheless convict him for offenses committed in the indictment period even though they cannot prove the requisite mens rea to link him to the offense as a mode of liability.

And one of the reasons I've taken a time out from my time at the Hague to come address this conference is because of my concerns about this step. Taylor is still giving evidence, having begun on the 14th of July last year. I should be in the Hague right now, because at any moment the judges might call upon me to reexamine him. But this issue is so important in the overall scheme of things that I think it important that all of us become aware of what is actually happening in international law, that what we have here, in reality, is a political decision being made by the Appeals Chamber to water down the concept of JCE in order to create a scenario in which Taylor can be convicted, which in my mind is deplorable.

David Scheffer, Moderator
Northwestern University School of Law

I know. Thank you very much, Courtenay. I'm sure Alain Werner will want to jump in here [Berner laughs] with his experience at the Sierra Leone Prosecutor's Office.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Okay, a few things. First, let me say thanks to you for inviting me. Maybe just one word for us presenting civil parties and victim parties' participation. I would say that 2009 was a great year, because it was the year that on two trials, one in the ICC and one in Duch with Francois Roux there were victims and victims' lawyers in the courtroom. So I will be here to defend the . . . our legacy and what has happened and I'm sure that I will be scrutinized on that. But for us, 2009 was a great year for civil parties and civil parties' participation.

Now let me just tell you why the reason I studied at Columbia was that I was not accepted at Northwestern [Laughter]. That's why I went to Columbia. So let me be very clear about that.

David Scheffer, Moderator

Northwestern University School of Law

Our shortsightedness and embarrassment.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Finally one thing I want to say is that I was with Courtenay, which was a great honor, in Charles Taylor, and I was with Francois, which was a great honor, in Duch. It's a bit daunting for me at my level to have to react to the pleadings of two very, very senior, very important lawyers in this field. But because I spent five years in the Office of the Prosecutor with the RUF, AFRC, and Charles Taylor in the Court for Sierra Leone and for two years I was on this case that I left in December 2008, I need, I need to react and to say this just briefly. Whatever the appeals chamber said on Gbao, on Kanu --there are people here who know much more about JCE and can elaborate on that—let me just say that from the prosecution's prospective that has little to do with the Charles Taylor case. I believe, and Goran will disagree and that is fine, but we do believe that for a year, in 2008, we presented a very, very, very strong case for one year we had 93 or 95 . . .

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

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Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Thank you. Ninety-seven prosecution witnesses and I do believe that we do have an extremely strong. We have about 30-35 linkage . . .

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

That's true.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Thank you. We have 32 witnesses who directly linked Charles Taylor to the RUF. Let me quote from the decision of the Trial Chamber in the '98 submissions because the defense of Charles Taylor said, at the end of the prosecution's case, that there was no case, and that Charles Taylor should be acquitted and so moved in the Trial Chamber to acquit Charles Taylor. So we explained to the Trial Chamber what had been the strength, according to us, of our case. The

Trial Chamber came with a decision, and I will quote from this decision. It's a novel decision, so can find it in the transcript of the 9 of April 2009. About the JCE, let me be clear. The Charles Taylor trial, is not JCE three that we alleged. Primarily, it's JCE one. Gbao was JCE three. By the way, Isassisi and Calum was JCE one.

Can I just quote to show you what I think is the strength of our case?

David Scheffer, Moderator
Northwestern University School of Law

I might just say we won't go into what JCE one, two, or three means to this audience. But it's a very dynamic issue in the tribunals as to what is the character of the joint criminal enterprise, the common purpose. They've gotten into the weeds and divided it up into three different categories. But Alain, go ahead.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Just five lines. Here is what the Trial Chamber said, page 24209: "In relation to the participation of the accused, Charles Taylor, the Trial Chamber finds that there is evidence that the accused participated in the joint criminal enterprise. In particular, the prosecution has introduced evidence that the accused provided arms, provided ammunition, provided financial assistance, provided manpower, provided supplies to other participants in the joint criminal enterprise in furtherance of the common purpose, that he provided safe haven to other members, that he provided moral encouragement, military advice, that he facilitated the export of diamonds in return for arms, that he facilitated communication between the various members of the joint criminal enterprise, and that he had persons he believed would endanger the joint criminal enterprise killed."

Then they said, and then I will be done, "The evidence is based on, inter alia, the testimony of witnesses and then starts to list the witnesses. They didn't list one, two, four, ten. They listed fourteen linkage evidence witnesses that we have produced . . .

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Out of thirty-two . . .

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Fine. That we have produced to show that. And my contention is simply that I do not believe that it is correct to say that our [Inaudible] did something because down the road there

was a very weak case under Charles Taylor and that we need JC3. I believe that Charles Taylor will be convicted on JC1 and I believe that we have presented a very strong case on JC1.

David Scheffer, Moderator

Northwestern University School of Law

Thank you, Alain. You know, what I'd like to do is—we're going to shift gears a little bit here. Give the defense a rest, here. [Laughter]

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

I don't want one.

David Scheffer, Moderator

Northwestern University School of Law

No, I know. I'd like to turn to Serge Brammertz, who is the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia in the Hague and just ask you to kind of switch away from cases here for a moment.

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

Your office has prepared, as has Fatou's and has Christine's for her tribunal—well no, Fatou, not you, I'm sorry . . . sorry, the International Criminal Court goes on forever [Laughter]. But Christine and Serge have completion strategies to actually work itself out of a job. And Serge, if you could give us a take on what is the status of the work before the Yugoslav Tribunal and what is a realistic assessment of a practical completion strategy?

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Thanks for inviting me. The short answer would be that indeed when the Tribunal was created sixteen years ago, nobody was thinking about having a Tribunal for sixteen years. For that reason, in 2004, the Security Council decided on the principle of the completion strategy: that no new indictments could be issued after 2004, that the Tribunal had to concentrate on the main perpetrators and that they had to transfer other cases to the region, to the country of the former Yugoslavia. They also decided to help work on capacity building in the region. Now, at that point, the timing for the completion strategy was 2008 for first instance cases and 2010 for appeals cases. We are in 2010 and we are still running first instance cases. [Inaudible] just started.

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

Very much lucky for us, we have, in the region, partners helping us. When the Tribunal was created, there was no judiciary in the countries of the former Yugoslavia. So in fact we were replacing the local judiciary. That is one of the reasons why 161 people have been indicted by the Tribunal since its beginning. With the U.N. enlargement process, with the democratic revolutions in the countries of the former Yugoslavia, the region has strengthened their own judiciary, which means we have transferred, the Tribunal has transferred ten cases to the region. We have transferred additional 25 other cases to the ITP and we have today partner organizations in the countries of the former Yugoslavia, with war crimes prosecution offices in Serbia, in Croatia, and in Bosnia and Herzegovina in Sarajevo where David had the leading function.

So we are, on the one hand, finalizing our cases in The Hague, and on the other, transferring remaining material to the region. I can say more later on, if you want, about our interaction with the region. But we are in this lucky situation where we have partners who can somehow take over, because for the next ten, twenty years there will be hundreds of war crimes cases conducted in countries of the former Yugoslavia.

Perhaps one question, you said about the lack of an ICC completion strategy. In fact, I think the ICC needs a completion strategy for each situation. The ICC cannot stay forever in the DRC and cannot stay forever in Uganda. You need a completion strategy since the ICC is dealing with only a very limited percentage of cases. And they also need a partner in the region. I see this as one of the main challenges for the ICC, having a partner to deal with the impunity gap, where we are today in with the former Yugoslavia so you can . . . the country in a totally different situation where we have partners that are there. Also thanks to the financial support of the international community . . .

David Scheffer, Moderator
Northwestern University School of Law

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

Judge Fatoumata Dembele Diarra
International Criminal Court

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

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

David Scheffer, Moderator
Northwestern University School of Law

My suggestions were more aimed at: have you determined that—have you said anything publicly yet about whether or not you have exhausted your indictments on Uganda, or are you leaving open the possibility of further indictments?

Judge Fatoumata Dembele Diarra
International Criminal Court

We haven't made any declaration that we have exhausted it. What we have said is that we continue to receive information about other parties who are involved in the conflict in Uganda and that we continue to analyze this information and to see whether other parties could be charged in the situation of us investigating in Uganda. This is what we have said publicly.

David Scheffer, Moderator
Northwestern University School of Law

Anything else, Serge, on completion, or not? For the moment?

Serge Brammertz
Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

[Inaudible] for the problems. One being, for example, what is our dilemma today that, for one we have to finish all those remaining cases and in the interest of making sure that justice, fair

trial is preserved. Because, of course, with a completion strategy means trying to move as fast as you can. But we also have two fugitives and we want to have those two fugitives—Mladić and Hadžić—arrested before the end of the existing Tribunal. So that's why we are still in very regular discussions with the international community and last week with the Parliament because we wish very much to create incentives for the countries and for the Former Yugoslavia to have the remaining fugitives arrested. Information is perhaps a subject to be discussed afterwards.

We are also working on the worst-case scenario: what would happen if the Tribunal closes its doors and the fugitives are still at large? Who would be competent to judge them? To deal with them once they are arrested? That's why the Security Council is discussing the creation of a so-called residual mechanism which has two components. It would be for the ICTY but also for the ICTR, with two components. One component, to deal with residual questions: witness protection, provisional release, and requests for assistance coming from the regions. All these requests will come in even once the Tribunal is closed. But also with a kind of, I would say, sleeping Tribunal with a legal basis, a legal framework for the Tribunal to be activated once one of the two or the two fugitives are arrested. To really, very clearly give this message that wherever and whenever the two fugitives are arrested, there will be an international judicial mechanism dealing with them, that nobody can sit it out and wait for the closure of the Tribunal. And I don't think there's anybody more competent to do so in our case.

David Scheffer, Moderator
Northwestern University School of Law

And this, of course—I want to get to Francois, but first, just on this point. Christine, you obviously have more indicted fugitives out there than the Yugoslav Tribunal. I know that three of the eleven are of extreme importance to the Tribunal. Can you talk a little bit about the dilemma you face with eleven fugitives and perhaps slip in to some of the ideas about referring eight of them and trying three? Can you discuss that a little bit?

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Sure. Our three main accused at large, of course, were in Kabuga in Paranyia. And they were all high-level offenders at the time of the genocide. Those ones have been earmarked to be tried by the ICTR under the sleeping residual mechanism should they be apprehended. For the rest of the other eight, the intention of the Prosecutor has been to transfer those cases to any jurisdiction that's willing to try them. It's only Rwanda that's demonstrated any such intention and as some of you I'm sure know, the trial chambers of the ICTR are not comfortable with that solution because of fair trial issues. So it's of course a problematic situation for the Office of the Prosecutor for what to do. We have these eight fugitives who there's clearly evidence against. Because of completion strategy, we are most likely not in a situation to try them ourselves. We are trying to find a jurisdiction willing to try them and the one jurisdiction that is willing doesn't meet the necessary requirements for fair trial standards. The work then has been in capacity building to ensure that Rwanda meets that standard. At some point there will be a fresh request to transfer some of those cases to Rwanda. That is the work that has been going on the last couple of years since we got the negative 11bis decision.

David Scheffer, Moderator
Northwestern University School of Law

Now that tempts me—Rule 11bis is where they can refer cases to domestic courts. Christine, I must extend this for a moment though because the Rwanda Tribunal referred two cases to France in 2007. And I haven't heard anything happening in France on those cases. The presumption was that French courts would dive in and do the job they should be doing. Christine, could you enlighten us on these two cases that were very in good faith referred by the Tribunal to France?

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Yes, I'm sure Adama has some comments on that as well. There were two cases transferred a couple years back and very little happened on those cases, which prompted the Prosecutor to go speak to high-level French officials early this year. And at the same time, France announced that it was putting together a special War Crimes Prosecutor's Office, a War Crimes Office, in order to speed up the cases, which concerned not only those that were transferred by the ICTR, but there were additional cases that were also transferred where you have Rwandan nationals or former Rwandan nationals living in France who are suspects of . . . well, have genocide charges brought against them and have other charges against them as well.

David Scheffer, Moderator
Northwestern University School of Law

And this announcement was just in December. Paris announced that . . . in fact, I think it's a unit of the courts, not the prosecutor's office, that was created.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

So we're hoping that, while on paper I'm sure it's a very genuine attempt on the part of the French authorities to deal with this situation, which of course is a difficult one. And it is demonstrated by the fact that there are so few national jurisdictions that are willing to try genocide cases and when they do, they actually get a taste of what it's like. You have the fair trial issues, the length of trials . . . You know, this is . . . I appreciate . . . cost, yeah . . . I appreciate the fair trial issues in terms of how long we take to try these cases but I am more than happy to hear constructive suggestions on how to do it. Because, being involved in very lengthy cases, especially Milo I, we spent 400 trial days over 5 years and we're still sitting at any given moment, and still it took us as long as it did.

So fear is one thing. The practical aspect of running these trials is another

David Scheffer, Moderator
Northwestern University School of Law

Now, I definitely want to get to Francois and David, but I've got some immediate interventions on this particular point, so bear with me gentlemen. Alain?

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Just to take very quickly. The organization I'm working with in London on universal jurisdiction. And on that aspect, we are helping the civil party French lawyers working on those cases. So just to tell you that things are moving forward because of political reasons. Because Sarkozy and [Inaudible] have decided to [Inaudible]. Diplomatic relations were established again in December, so things are moving forward, which is good news for us because we hope now the cases will move forward. And I can tell you, of course you know that the instructing judges, for the first time (I think it was back in November), went to Rwanda and to Eritrea, which had not happened for 15 years. Now that is good news.

Now just one thing very quickly. The problem we have is that, let's say the first trials in France against the Rwandan will happen in two, three, four years. The ICTR may not be there anymore. On the completion strategy, there was a big issue of the archives. We want to have access to the archives, the exhibits, because maybe our suspects, their names were in the proceedings, maybe there was evidence against these people. I think . . . and I know everyone is working, of course I'm not saying that nothing is being done, but it's a concern with us civil parties in countries that we will still have access to the materials and to the archives, to the transcripts, once ICTR will not be there anymore. And of course, the same for the ICTY.

David Scheffer, Moderator
Northwestern University School of Law

Goran?

Professor Göran Sluiter, Panelist
University of Amsterdam

Yes, very briefly. It's very important that these outstanding indictments—something is done about them. We already have a precedent with this Timor panel. For example, the indictment against General Wiranto, former Presidential candidate in Indonesia is, to my knowledge, still there. And nothing has been done about it. So it is very important that something is done about these outstanding indictments.

And regarding the [Inaudible], the good news from the Netherlands. We tried it once with the Netherlands, and said we don't have jurisdiction. But they're changing the law now, so that could be worth another try.

David Scheffer, Moderator
Northwestern University School of Law

Okay, Serge? And then I want to get straight to Francois and David.

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Only one word on the archives, which is the important question. It will be a problem for the ICTR, the ICTY because, as I said, even after the closure of the Tribunal, people will need access to the archives, to the databases. So there has been, more than a year ago, a working group was established to study the alternatives. Where to put the archives? First the question: one archive for the ICTR/ICTY, or two archives? Where to locate them? Who will have access?

David Scheffer, Moderator

Northwestern University School of Law

I offer Northwestern University, but we can talk about that later. [Laughter]

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

It's too cold. [Laughter] No, but more seriously. What we are doing for example at the ICTY is to make sure that those who have to consult those millions of pages are able of doing so. We have since last year, with the financial support of the European Union, set up a project with prosecutors from Serbia, Bosnia, and Croatia integrated in my office, which also shows a totally different dynamic than fifteen years ago when it was very vertical, the corporation of the tribunals and the local jurisdictions. Today, it is very horizontal with such cooperation. We receive more requests for assistance from the regions than the requests we are sending there. So we have now liaison prosecutors integrated in our office, people who have very direct access to our databases. Every year we have ten junior prosecutors from the region who are running every six months in the different sections in our office to make sure that, once we leave in three years time, that there are at least 100 people who are familiar with and who are willing to consult all the databases in order to make sure that victims, perpetrators, alleged perpetrators, and the judiciary have access to the writings.

David Scheffer, Moderator

Northwestern University School of Law

Well it's an enormous challenge. And I want to jump to another enormous challenge. Francois, who was defense counsel . . .

[End of first tape]

David Scheffer, Moderator

Northwestern University School of Law

And how did that strategy play out over the year, in other words, did you have a strategy going in and how did the strategy survive in defense of Duch during the year? And then I think, since we haven't gotten to you yet, I'd love for you to tell us what lessons did you learn from that that might assist you in heading up the defense office for the Special Tribunal for Lebanon where you don't have any defendants yet to deal with, but you're obviously thinking and planning about the most appropriate way to assist with the defense of those defendants. And Francois will probably speak in French, which is his native language, obviously, and I have two star students here, L.L.M. students Anna and Henry, and they're going to pinch hit and translate off and on. So it will take a little bit longer but it's worth it. Francois is one of the best.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Thank you, David. I can [Inaudible] in English, so I apologize for my ambition. We will have a French Duch convers[ation]. First of all, I can ask something in English for the Rwanda tribunal. I worked for a long time in the ICTR.

David Scheffer, Moderator
Northwestern University School of Law

I think your mic . . . we just need to increase a little bit the sound.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Okay? Okay. So I worked in front of the ICTR for a long time. So I address a question for all of you: What about the other cases against . . . we say in French [French term] . . . RPF?

David Scheffer, Moderator
Northwestern University School of Law

The Rwandan Patriotic Front.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

And what about, my colleague Alain, what about the victims of RPF? Are you sure you are thinking about them? Because some Rwandan people are victims of RPF? So please don't forget that. So, I am going to try to speak in French about the Duch case.

[In French, with English translation]

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

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

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

So everybody knows that in Cambodia there were approximately 196 prisons, but only one S21. And it was clear that more atrocities had happened in other prisons, other than S21. And so the question arises: why not prosecute those who committed the crimes in those prisons? Why prosecute only Duch? This is one of the particularities of the Cambodian context.

Nowadays in Cambodia, there is no charge against any Khmer Rouge. Under pressure of the international community, the Cambodian government accepted the tribunal to prosecute just a few members, only the leaders. But it's not enough to say that we are only going to prosecute the leaders, that if a criminal is not one of the leaders, he would not be prosecuted. It's an extremely complex situation which they have to deal with.

So for two years, Duch pleaded guilty and he begged for forgiveness. But at the last moment, his lawyer said that because he was not one of the leaders, the tribunal did not have jurisdiction over him. So his lawyer asked for acquittal, his Cambodian lawyer. [Inaudible questions/comments from David Scheffer]

As for the transition, in Cambodia, they use a civil law system. In Lebanon, they will use both, meaning civil law and common law.

Three main things to say about the Lebanon court is that the Lebanon court is the first international tribunal to judge terrorists, and not the last. Secondly, they will have *in abstentia* trials. For the first time, the international community created an Office for the Defense Counsel, which would be the equivalent of the Office of the Prosecutor. That's huge progress for International Justice.

I always tell the judge in international courts, “Don’t forget why you have been nominated.” The reason I always say that is because when they establish an international court, it is to fight impunity. But when the court is created, it is there not to fight impunity, but to serve justice. And when the court is established, the prosecutor fights impunity, defense lawyers defend, and judges render justice. I believe that the title of the conference, instead of being War Crimes Litigation should be “Judgment of War Crimes.” When we say “War Crimes Judgment,” that means it is the Prosecutor who prosecutes and the Defender who defends. Thank you very much.

David Scheffer, Moderator
Northwestern University School of Law

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

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor’s Office of Bosnia and Herzegovina

It’s interesting that you would start that way, because the first comment I was going to make was that, in addition to the collective sigh or gasp I heard when Serge announced that there were staff cuts at the ICTY, it was easy to tell if you were a student that you were eager to, or hoping to have some chance, to work with Serge. But, it probably is not going to happen now, not like that.

I’m probably the only representative on this panel that comes from a purely domestic situation. What was going on, or what is now going on in Bosnia and Herzegovina, is not a hybrid court. It is a domestic court, and the domestic Prosecutor’s Office applies international criminal law through the domestic statutes that exist in Bosnia and Herzegovina, and have existed since 2003. Now, how we apply domestic statutes that were put into place in 2003 to address conduct that occurred between 1992 and 1995 is another issue entirely, and maybe we can talk about that later. But the problems that we faced, however, are fairly universal. Each one of the people who have spoken have talked either directly or indirectly—Francois directly—about the question of selectivity. How do you choose what to do now? Who do you choose to do it? And what are you going to do with them as you work your way through this large caseload?

The other thing—while Serge and Fatou and others have a specific group of people that their mandate covers, our mandate is much, much broader. We’re more like a DA than a U.S.

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

Let me mention one other very important problem and that is that we have witnesses that we have to use in the domestic proceedings that have been used over and over again at the ICTY, generating transcripts, but also, wearing them out. What we have had to do is come up with a means for organizing the work in Bosnia and Herzegovina to reduce the strain on that witness population. The killing was quite effective during the first part of the war, if you're talking about cases from Eastern Bosnia and if you're talking about Srebrenica at the end of the war, 1995. There are only twenty-eight living witnesses who are victim witnesses about what happened to the men in Srebrenica in 1995. These were people who were able to escape or were wounded and left for dead, but then survived. We have to use those people over and over again unless we're careful about the way we construct our cases.

So the domestic side of this has selectivity problems. It has evidentiary problems that follow from having an international tribunal come first. There are a couple of other things I'll mention very quickly. Uganda and France are both looking to Bosnia and Herzegovina. I met with the people from Uganda all summer, over how they were going to address some of these very same issues. Coming after a large international tribunal sweeps the field. France came to us—Bernard Prichard's representative came to meet with us—to talk again about some of the problems that a domestic jurisdiction is going to have dealing with these caches of evidence and material, that sort of thing, as well as domestically adapting what they need to do in order to prosecute these cases.

So that leads to the last point and that is, it's in the domestic courts where a great deal more of the development of this law is going to take place. We are incredibly grateful to the ICTY and the ICTR for the development of the jurisprudence up to now. But when these institutions begin to drop off, it is in the domestic courts where the crimes against humanity jurisprudence is going to be expanded, where the genocide jurisprudence is going to be expanded—and I'm sure Goran has spent some time looking at the IH decisions, and there are a great many of them this last year with genocide, with genocidal intent, with the definition of crimes against humanity, particularly rape as torture and some of the other cases. And also the development of techniques or methods for dealing with these large, massive cases that are not typical to a civil jurisdiction, such as plea bargaining, the use of immunity, plea bargains taken in atrocities cases. We have followed the jurisprudence of the ICTY when it comes to a great many

of these issues. So, while we always come last, figuratively and actually, technically, in what's going on, it's probably going to be at our level where these things have their greatest future. So there needs to be some very heavy attention paid not only to capacity building, whatever that means (and we can talk about that later), but also to the outcome of these decisions. In Bosnia and Herzegovina so far, we've tried over fifty cases in the three years that we've been doing this work. And there are about forty decisions that have been rendered in the first instance that are now translated and available to be studied; slightly less than that on a second instance, which makes it a final and binding verdict. So there is a growing body of this jurisprudence that needs to be very carefully scrutinized by people outside the system to see whether it actually meets international expectations or at least the quality the international community has come to expect.

David Scheffer, Moderator

Northwestern University School of Law

That's [Inaudible] Dave, thank you very much. I actually do not want to take a break, but I know I should offer you all a break, so we will take, let's say, a five to seven minute break because we really only have another hour this morning. Well, we'll make it ten. But we really only have another hour this morning before our lunch and I want to start the next component with a couple of questions from the audience, and then I want to turn to Alain Werner, because I want to give him a chance to talk about some of the really interesting civil party issues that arose before the Cambodian Tribunal and then we'll keep moving around, okay? So, 11 o'clock I start, whether you're sitting here or not. [Inaudible, people moving]

We'll hear some about the Duch trial, in which Francois is front and center. Then I want to show at least a few minutes of it to give you a flavor, but that's not quite yet. First what I would like to do is give any of you a chance to ask a question or two. We'll jump off with that and then I know where I want to start with our panel again. Does anyone have a particular question they'd like to ask at this point?

Yes, Tobias . . . [Inaudible question being asked . . . Now explain . . . you're talking about the joint enterprise . . . yeah, the joint criminal enterprise. What are you . . . Maybe right, maybe Professor Sluiter, maybe you could enlighten us a little bit on where we stand today with joint criminal enterprise. Obviously, it has undergone some expansive reasoning this year, by certain Tribunals?] [In the background, "Slightly"] Reached in to areas of common purpose that we might not have contemplated? So Goran, if you could give us a little bit . . . This gets you a little bit into the law, but it's not conspiracy, although it's like it for American law, how important it is. You know, in American courts, we're always talking about conspiracies. Well in the Tribunals, we're talking about joint criminal enterprises. [From background, "And there is a reason Goran is sitting right in the middle."]

Professor Göran Sluiter, Panelist

University of Amsterdam

Well, it is an extremely complicated topic, also because it is a mode of liability that is not familiar to most domestic legal systems and is something, according to the judges, that is part of international customary law. And that is also an extremely complicated concept. The good thing

is that you don't have it at the ICC. The ICC has modes of liability in statute. They have other concepts like joint control over the crime. But they don't use the particular concept and also they haven't used the particular case law.

Now there have been many articles and even books about the topic. I think it is something that is more for part of a concept that is part of commission. In every domestic system, there are concepts for co-perpetration and forms of collective commission of crimes. It's just where to draw the line. And we had a very negative example for the Special Court for Sierra Leone which indeed, I think has gone too far . . .

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Thank you.

Professor Göran Sluiter, Panelist
University of Amsterdam

I agree with the dissenting opinion of the American judge, Judge Fischer. On the other hand, we have also seen in 2009, in the Karadzic case, where the judges in abuse, we said no, here are the lines, these are the limits, and Karadzic was acquitted of certain elements of joint criminal enterprise. So the judges are still struggling with it, but I think in the end, something will emerge which we all can agree with. But then again it may be something only of historical interest for the future, because the ICTY will go its own way in the end.

David Scheffer, Moderator
Northwestern University School of Law

Any other questions? Yes, way in the back. I think that's B.J., yes? [Inaudible] Ah, Serge, you want to take that one?

Serge Brammertz
Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Sure. This is a key problem for sure for all Tribunals and particularly for the ICTY. Because, at the end of the day it's about justice, international justice, but you want to serve the victim's community and you want to have an impact in the country where the crimes have been committed. And to have an impact, you have to be understood, and you have to be understood as doing the right thing.

Now, if there is one area where I would say the ICTY could have done better, and probably other tribunals, too, it is in the area of outreach. Despite outreach projects and programs, despite work with local NGOs in order to explain judgments, the reality is that—just like Professor Sluiter explained the JCE concept—there are very many difficult legal concepts and judgments that are so complicated in terms of language used that everyone can more or less find what he is looking for. The experience we've had in the ICTY is that we've been criticized

by almost all communities. By being anti-Serb, because the majority of people across the region are of Serb nationality, by being bias against Serbs and not prosecuting enough people from other communities. So we are still working on this issue. What I have experienced in the two years that I have been in the job is the fact that if you do not have the local politicians with you, it is almost impossible. What we see still today—today it is better than five years ago—is that local politicians are to the international community what the international community wants to hear, saying we are committed to the principle of international justice, but saying domestically, you know we are still with you, they are prosecuting our heroes. That is very bad for justice. You can only be successful if you are so far away from the place where the crimes have been committed. If you have an outreach program, if you have the local politicians with you. That's why I'm so convinced that what the chambers, the War Crimes Chambers and other local courts are doing is the most efficient. Having a Serbian court try Serbian nationals for crimes committed against the Muslim community has a much greater impact than a decision in The Hague where everyone will try to use the nationalist example.

How can we measure it? Quite interestingly, there have been in Serbia quite recently we see an independent organization manage a survey to see what people think about General Mladic. As you know, Mladic is one of the two main fugitives we are looking for. He's allegedly responsible, co-responsible for the crimes committed in Srebrenica, where up to 8,000 men have been really executed. So in those latest surveys conducted just a few months ago, nearly sixty-five percent of people interviewed in Serbia were against him being arrested and delivered to the ICTY. And a majority also still believe that he is a hero and not a war criminal. So as international justice and the international community, and also local politicians, I think we have a problem if today the majority of people consider this General to be a hero and not an alleged war criminal. It is still a very big issue for us, but I think it's a problem for the majority of tribunals.

David Scheffer, Moderator

Northwestern University School of Law

Okay. We've got some activities here. David, then Courtney, then Francois.

Deputy Chief Prosecutor, David Schwendiman, Panelist

Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Yeah I mean to have effective outreach, and I say this from the receiving end of some of this, and also from the end that's responsible for doing some of this on the domestic level, you have to have education, information, and explanation. I think the efforts to educate the public in the former Yugoslavia, and especially in Bosnia and in Herzegovina, got a slow start, but have gotten quite good in the recent past. The efforts to inform the public, the educated public, in Bosnia and Herzegovina, are a little more problematic. How are you going to do it? Because the media in Bosnia and Herzegovina, it's very polarized. There aren't many objective journalists in Bosnia and Herzegovina. So that becomes problematic. You have to inform yourself in our outlets, which are very limited. The third—explanation—becomes problematic if you look at the core values of prosecution, which are presumption of innocence, confidentiality, those sorts of

things that you need to stick to when you're dealing in any system, but particularly a domestic one. So there are these issues that are associated with outreach.

One of the things that is most important about outreach, and was not done well in the beginning, and it's a problem the international community faces because of the dynamics of this movement to make sure these cases get prosecuted, is that the expectation is often created that everybody who committed a crime, anyone who did anything, is going to be investigated, is going to be prosecuted, and in the end is going to be convicted and they're going to get a maximum sentence. Now that's extreme, but I can tell you that there are many people in Bosnia and Herzegovina who believe that's what we exist for. That's what the ICTY existed for, and the great deal of disappointment that leads to a lack of confidence comes from this expectation that just simply can't be met. So, the one thing I would say about outreach is that it's got to be done along these lines, but it has to peg expectations in a proper and realistic way in order for it to have any effect at all.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

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

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

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

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

David Scheffer, Moderator
Northwestern University School of Law

And Francois, you wanted to say something? Then we'll go to Fatou, then switch to another topic.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Yes. Very quickly I try to speak in English maybe? Just what Sluiter brought up immediately. For me, what is most important about the outreach is not only to show we fight against impunity. The most important thing is to show that we are building the right society. The world is not the white people on the one side and the black people on the other side. The world is not that. So we need, by the outreach, to demonstrate that we are building . . . that we are going to set up a world with rights, with law.

I would like to say something about Cambodia. One of the successes of Cambodia is the people who attended the trial; more than 20,000 people went to the trial! This is unique in the international community. But, on the other end, what I say also—it is important to try to understand how some of us can once become a criminal. And this was one of the issues on the Duch case. We were lucky to have as one of the witnesses David Chandler . . .

David Scheffer, Moderator
Northwestern University School of Law

David Chandler. Australia. Yeah.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Yeah? . . . who explains in his book not only what happened in S21 but why it happened. Why once a man committed a crime of obedience is also a reflection of an [Inaudible], you know. Why this kind of obedience . . . obedience?

David Scheffer, Moderator
Northwestern University School of Law

Obedience, yes.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

. . . obedience. And one of my pleas was to reflect about that and to explain, maybe the justice, maybe the democrats, have to learn to the citizen that sometimes, they have to disobey.

David Scheffer, Moderator
Northwestern University School of Law

Thank you. Fatou?

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

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

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

Again, we have the issue of victim participation, which the ad hoc tribunals did not have. And an obligation has been placed on us to make sure that the victims know that they have a right to participate in the proceedings. So this is an obligation that has been created not only for the Office of the Prosecutor, but for the judges and even the defense. And then we have the propaganda against the ICC. This has largely come about since we have issued the warrants against Omar Al-Bashir. There is propaganda against the ICC leveling the ICC as a neo-colonial institution that is targeting Africa. So we have to work against this propaganda to explain what the ICC is all about: that the ICC is intervening because the jurisdiction has been accepted by those states, except in the case of the U.N. Security Council referral.

There is also the lack of understanding of what the ICC is all about. We have to do a lot of work. We are still doing a lot of work going out in the field to explain that this is the ICC as opposed to the image that the ICC is only targeting Africa. For example, there is a lot of misinformation out there, deliberate misinformation. There are also a lot of . . . ah . . . I wouldn't call it propaganda but attacks, deliberate attacks against the ICC from persons who have an interest, of course, to gain. So these are all the areas that are stacked up against the ICC as an institution. And we are doing, at our level, all the organs, the OTP and the Registrar—there is a program, of course, there is a program for us to go out there, to go to the communities that are affected, to explain. For example, we have this interactive justice radio program, which is interactive, in which they come back to the principles of the organs and those dealing with the

cases and ask them questions—allow the public, for example, to ask questions and we answer those questions. At various other programs, we are trying to be as targeted as possible for the ICC to be understood. But it still remains that we have to deal with so many situations at the same time.

David Scheffer, Moderator

Northwestern University School of Law

Now I need to manage our time a little bit. I'll come back, Sean, to you, okay? I want to get to Alain, but Courtenay, do you want to do a short intervention on the African focus of the ICC at this point?

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

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

Now help me: what about Sri Lanka and what happened to the Tamils during the defeat of the Tamils last year? Help me: what about Israel and the Gaza last January? Help me also: what about the United Kingdom, and the role of my former Prime Minister Tony Blair? God help me, here in the U.S.A.: what about George W. Bush and his role in the invasion of Iraq? We all know now that the Iraq War was illegal. But let me just take a straw poll: how many of you actually think that there is a real possibility that either George W. Bush or my former Prime Minister Tony Blair will be put on trial before an international tribunal? Show of hands, please. Who actually thinks that is a realistic possibility? Why not?

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

And currently in the United Kingdom, Mr. Blair and the British government, there is an inquiry going on as to the propriety of the Blair government engaging in the war in Iraq. And I noticed a news program where they had an image of Tony Blair sitting in the defendant's chair of the ICC. And they had a professor of international law on the TV program asking, "Is it likely

for Blair to be put on trial?” The general consensus was that it was not going to happen, and you and I know that it is not going to happen.

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

David Scheffer, Moderator
Northwestern University School of Law

Quick response, and then we go to Alain. Alain, you’re my guy in just a minute. Fatou?

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

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

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

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

In the case of Kenya, what has the ICC done? The ICC has given Kenya the opportunity to investigate its own cases. I don’t need to go into all that has happened; I think you’ve been following it. But the ICC has given Kenya the opportunity to do it themselves. But we know, we

all know, that Kenya is not going to do it. And when we met in Rome in 1998, we said, “Under the Rome Statute, impunity will not be an option. If you do not do it, the ICC will do it.

If I want to address Iraq, if I were to address the role of the British, of the U.S., against complementarity kicks in. This is the statute that we have signed, that we have ratified. Today, 110 states are a party to this statute. We did examine, maybe for the record, we did examine crimes that have been committed in Iraq, for those who are nationals of state parties, because that is how far we can go. Iraq is not a state party, so we cannot investigate non-nationals who are committing crimes. And they’re in the U.S. Neither can we investigate Iraq, nor can we investigate the U.S.

But, we can collect information, with the intention of investigating the likes of the U.K., which we have done and it is on our website if you look at it, which we have done against Germany and other nationals who were part of this conflict. This is the role of the ICC. This is what we had to do. And if those countries, if those states declare that we are going to do this investigation and this prosecution, the Statute states that they have to have that opportunity. So, I think we should not mix ICC with all the other jurisdictions that ICC will not be able to investigate, not in a hundred years.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

That’s part of the credibility gap, though, that you have to deal with.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

But this is what we’ve signed and ratified. This is the Statute. We don’t have to deal with it. The ICC is created by Statute, by state’s parties signing and ratifying it.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Fatou, when you were on a radio program in Attu in Ghana, and people are posing questions as to why it is, in many national jurisdictions around the world, like the United Kingdom and the U.S.A., that a disproportionate number of black people end up in prison and prosecuted, and it seems to be replicating now at an international level, that technical answer, with all due respect, isn’t going to cut it.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

This is where the likes of you, who know international criminal justice, should take up your responsibility to explain this is how far the ICC can go. This is the powers that have been given to the ICC under the Rome Statute. I think Jamaica is a state party, and the U.K. as well, whichever nationality you choose to take . . .

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

I'm British.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

That's why I said the U.K. as well. So . . .

David Scheffer, Moderator
Northwestern University School of Law

Let me jump in. This has been fascinating, and of course time rolls on. I've been wanting to get to Alain Werner because I want to get back to Cambodia to the path-breaking work that was done in Cambodia on civil party representation, mainly representation of the victims of the crimes. And we know that in Cambodia, 1.7 million individuals died in the late 1970's, but they left a lot of extended families behind.

[End of second tape]

David Scheffer, Moderator
Northwestern University School of Law

. . . crimes. Genocide, which was a very fascinating debate in Cambodia as to whether or not we would ever reach the stage of charging genocide as opposed to crimes against humanity. The crime of enforced disappearances, which was a key equity for the victims. And also, the investigating judges have agreed to investigate forced marriages and forced sexual relations, drawing considerably from the Special Court for Sierra Leone on those particular points. Those were the substantive law issues that I know were deep concerns of the civil parties.

And then there was also their concern about how they were best represented in the courtroom. There was a key decision that will sort of revolutionize the way lawyers represent civil parties in the courtroom, involved in part because of the experience in the Duch, which required rebooting the way victims are represented, especially in such a mass atrocities scenario, especially with the complexity and the vast number of victims that are involved. So Alain, if you could sort of walk us into those issues from a civil party point of view, I think that would be extremely helpful.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Can I have one moment to jump on the previous . . . just one minute? Just because maybe people do not understand that well. Let me tell you just one thing. I started here in 2002-2003 in

Sierra Leone and at that time, the only lawyers in Sierra Leone were mainly junior, junior lawyers because you were likely to get malaria and it was just after the conflict. So I don't think I was selected to go there because I was very good. But I was selected to go there because I was willing to go there.

And I remember at that time that there was a Defense Office just setting. This was the first to have a Defense office. And quite frankly, there were a lot of questions about the quality of the defense lawyers in the first cases. I just want to tell you that because maybe we know that in the field, but it is not obvious. I think today, to have people like Francois Roux or Courtenay Griffith who don't need to [Inaudible] in the international scene because back home, they are the best defense lawyers you can get. To have these defense lawyers today, in the international courts, I think that . . . and I was talking to Francois about this during the break . . . for me that is the biggest achievement in this field.

The Prosecution was always great, and doing a pretty good job, but for me the dramatic, dramatic evolution of the last six, seven, eight, nine years is the quality of the defense lawyers. And today, you have the best of the best defense lawyers, who decide to leave London, or leave Montpellier to come and to practice in the international courts. And quite frankly I know, even though now I'm mostly parties and prosecution, that it is an enormous challenge for us because now on the other side you have people like Francois Roux and you see him in court. And that is extremely, extremely challenging. So I think that is a very good evolution in our field.

Now just to come back to what Mr. Griffith said [Laughter], and I absolutely agree with Fatou on the complementarity side. And in my organization in London, we are working to try to get the Iraqis, to try to get the English, to get the American, to get everyone in international jurisdiction for them to indeed face trial. Now let me tell Mr. Griffith one thing. There is one trial we are not talking about. I think it's not even a trial now, it's a proceeding. And I think it's very important.

In the Hissène Habré case—let me just tell you 20 seconds on the Hissène Habré case, because I think it's absolutely relevant. Hissène Habré was a former dictator and President of Chad in the 80's. According to Human Rights Watch and all the other organizations, he killed over 100,000 people. Now Hissène Habré went with 100% of the money from his country and enlisted in Dakar and 30 years later is living in Dakar with complete immunity. Human Rights Watch did—10 years ago, 15 years ago—Human Rights Watch did massive advocacy; no money from the U.N., no money from anybody, just some victims to say Hissène Habré has to be tried. And today, the African Union give the mandate two years ago to Senegal to try Hissène Habré. Not in Belgium, not anywhere in Europe, not by white people—by African people in Senegal, where Hissène Habré has been living for thirty years. A former Chad President is to be tried—what is happening? Nothing is happening. And we are telling them, “If you don't want the ICC and all the accusation about ‘oh you white people, you are trying . . .’ then do your own business and try Hissène Habré to start with, which will be an absolutely beautiful example.” So I think that has to be seen as well. And hopefully there will be progress in the Hissène Habré case. We should follow that, because I think it will be extraordinary to have Hissène Habré tried in a court of law, a domestic court of law in Dakar, Senegal, by black people. And I think that would send a beautiful message to the international community.

Okay, now [Laughter]. Okay, so how many minutes do I have . . .? [Laughter]

David Scheffer, Moderator

Northwestern University School of Law

Okay, let's try to give you five minutes to talk about the importance of the crimes that have now been confirmed in Trial II, as well as how lawyers are going to represent civil parties now.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist

Special Court for Sierra Leone

Extraordinary Chambers in the Courts of Cambodia

I will. Okay, I will try to advocate on the global front for civil parties, victim's participation, which is not exactly the same thing, but let me tell you—and that is going to the debate—that for me, the importance of the participation of victims, either in the ICC victim participation or in Cambodia civil parties, is encapsulated . . . and I . . . it's a [Inaudible] civil party lawyers . . . his name is Luc Valen and you can find his interview on the Web at the Lubengatrial.org, and I saw that last night, and that is exactly what I would like to say. In one word, Mr. Valen is presenting civil parties in the Lubenga trial. As you know, it was part of the discussion . . .

David Scheffer, Moderator

Northwestern University School of Law

Lubenga, before the international court, as you know, in the Congo.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist

Special Court for Sierra Leone

Extraordinary Chambers in the Courts of Cambodia

There was a discussion, because the victims there were complaining because the Prosecution didn't go after some crimes so they were filing motions. So Mr. Valen was interviewed on this website in this article, very interesting. And he said something, which really struck me, and I think the best argument to fight for civil victims' participation. He said that without the victims in the courtroom, what you have--and that has been happening in the ICTY, has been happening in the Charles Taylor trial—it is seen as a confrontation between the international community and someone—Karadzic, Mladic, Charles Taylor, whoever—someone who claims to be the representative of his people, and he's saying, "Well, you are going after my community, you white or international community, you are going after my community and I represent the community."

The dynamic, when you have the victims in the courtroom, with lawyers in the courtroom, is entirely changing. And for example, he was explaining that in the ICC's Lubanga trial, lawyers are able to tell Lubanga and his lawyers that it's not true that children in this

conflict were conscripted because your community needed them, because we ARE your community. We are the children that were conscripted. And we are inside the courtroom and we are telling you that it was not for the interest of our community. And that's really what I like with this victim participation of civil parties. It's certainly not like one international community against one party who said, "Ho, ho, you are coming against my people." But it's changing the dynamic.

Now there are so many, so many questions about the Duch trial and Cambodia. I mean I could speak for a long time about these issues. Maybe we can talk about it this afternoon. If it has been challenging for Francois, it has been challenging for Francois, I can tell you it has been. And also challenging for civil parties in the Duch trial because you had one judge in particular—Cynthia Cartwright, who was a former attorney general of New Zealand, a very senior jurist, and very well respected—who quite frankly did not understand at all why we were there. She's 100 percent common law, like Courtenay Griffith [Laughter], so the need to have a lawyer in the middle—she did not understand why we were there.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

I still don't [Laughter].

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

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

David Scheffer, Moderator
Northwestern University School of Law

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

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

So maybe we can talk a little bit more this afternoon about the challenge we had—very interesting decision on 9 October 2009—basically started to restrict our rights as civil parties. Very, very interesting. And I think that should be discussed, because that will be the future of any civil party participation. And there was a very strong dissent, which of course I agree with, a very strong dissent with the French judge, who disagreed with the New Zealand judge and her

Cambodian counterpart, who restrict the role of civil parties. So I think we can talk about this decision, this very, very interesting decision.

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

And of course we can talk about genocide—I'm sure you will because it's fascinating. Thirty years ago, without much proof, how do you prove genocidal intent? Everything is going to be about inferring the intent. And the problem is that, like in Yugoslavia, like that fool, like . . . in Cambodia, they went after everybody. They killed everybody. They killed the intellectual, they killed the royalist. They killed everybody. They didn't kill just the Cham or the Vietnamese. They killed everybody. So how do you prove that there was intent to target one group? That is going to be, I would say in the next year or two, a fascinating legal issue.

But let me just tell you one thing that is very interesting. In Cambodia, in Cambodia, when you talk to the people, they don't care what are the legal issues. Me, of course, I am very interested, but they don't care. They tell me, "Of course there was genocide in Cambodia!" And when you talk to the Cambodians, even at the end of the day if the ECCC says no genocide, that isn't going to matter for them. Because I can tell you that the perception there is that there was a genocide. And I think that is interesting because there was a divide between what we as jurists ask about the Genocide Convention, "Oh, what is the convention, what is the genocide convention . . ." But I can assure you when you are in Phnom Penh and you talk to the people, and I'm sure Francois would agree, the people say it's genocide, that's it.

And then on forced marriage (and then I'm done) on forced marriage very interesting issue on forced marriage because indeed, it's the Special Court for Sierra Leone chamber it's the first time in the ARFC and then the RUF sort of set the legal framework for forced marriage. Now what is so interesting in Sierra Leone is that forced marriage was basically one man—and now you have to ask whether he was a fighter—one of Taylor's men who took someone . . .

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

He wasn't there [Laughter].

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

. . . and basically

David Scheffer, Moderator
Northwestern University School of Law

He said he wasn't there [Laughter].

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

His men were there. . . .who took someone, abducted someone, and that person basically became the forced wife of a soldier of a commander. In Cambodia, what is so fascinating is that it was the Government, the Khmer Rouge, who forced both men and women to marry together. And then at night, the first night, there was a spy who was going under the house to listen if they had sex together the first night. So forced marriage, what is so fascinating is that you can say basically that men are victims as well of forced marriage in Cambodia, and not only the women as was the case in Sierra Leone. So to answer your question, I think Cambodia—and I'm very anxious about this second trial and about the way it's going to go—but there are fascinating legal questions. And for us it will be very interesting to see how it plays out.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much Alain. David? And then I want to ask Christine a final question.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Very quickly. From the domestic point of view, when you're talking about civil participation, or civil party participation, what you may not know, and what may not be generally known by anyone here on the panel, is that by law in Bosnia-Herzegovina, as a function of its requirement to implement the European Convention on Human Rights, there is an obligation, on the part of the Prosecution, to develop evidence that will allow injured parties, civilians that were injured during the conflict, to file a claim during the criminal proceedings, prior to the reduction of the case to verdict. And that had not been done until we started doing it about a year and a half ago in the Turdic case, that was a Rule 11 referral case that was sent to us from the ICTY.

Last year, we gave notice to 2500 people who were survivors of those who were killed in the warehouse in executions, and allowed them to come in and be part of the criminal proceedings through the Prosecution. We didn't represent them, but we were required to understand what was necessary to develop during the criminal case so they could make a valid claim.

I only bring this up because I don't think it's well understood that there are some features in the domestic systems that require that this be done. But the second reason I bring this up is

because the best outreach we ever had, and we have now, is the policy that we instituted in the Prosecutor's Office, to give notice to the injured parties that they could come into the proceedings and make a claim. That has gotten them invested in what is going on. Up until that point, even in the Srebrenica cases, we were having very little participation. Very few people would come to the proceedings, for example. Very few. One or two people maybe. At the time of verdict only would we get more than one or two people coming in. Now they're watching these proceedings very intently because they have an interest in the outcome.

David Scheffer, Moderator

Northwestern University School of Law

That's fascinating. I just have time for one more question. I apologize, particularly to adjunct Professor Kaeb who set this all up for us. I hope we get to the video extract in the afternoon from the Cambodian trial. We just don't have time right now, but we will keep it on deck. I just wanted to touch base here with Christine. We're going to change gear here for the final moments. And I'm probably going to surprise you a little bit, Christine. There's one case that came to judgment in your court, the Rwanda Tribunal, but there were several that were similar to yours that came to judgment in the Yugoslav Tribunal. I don't know if Serge wants to comment on them or not. But I'm going to ask you if you want to cover the bases and that is the whole phenomenon of contempt for the Tribunal, which was big time in the Yugoslav Tribunal last year, and you had a big case, the Nshogoza case, where essentially you had a corrupt lawyer to deal with, and . . . Could you walk us through what the challenge was to the Rwanda Tribunal to deal with a contempt of tribunal prosecution, if you wish to. And then you may be familiar with some of the Yugoslav cases, which were fascinating. Just to get us into the issue of the Tribunal disciplining itself and its own staff.

Senior Appeals Counsel Christine Graham, Panelist

International Criminal Tribunal for Rwanda

That indeed is a very interesting question and it's a complex one. It carries a lot of different layers. I think on the whole, the ICTY has been more active in prosecuting contempt than the ICTR has been. But in the Nshogoza case, is a case where it actually proceeded for trial for contempt of court. And it involved a defense investigator. And it arose out of the Kamuhanda trial, where it was established eventually on trial that the judges were quite broad—it involved money exchanging hands, it involved very concrete conduct to pervert the cause of justice. However, at the end of the day, this defense investigatory Nshogoza was convicted on a much more limited factual basis which concerned repeated violations of court orders, which of course is a very serious issue as well in terms of the Tribunal being able to run its cases in a proper fashion.

There were many challenges. Obviously, none of them are new to the criminal justice system, but as the evidence turned out at the end of the day, it was one person's word against another. It boiled down to the word of one witness, whose protected identity is called G.A.A., and the defense investigator Nshogoza, as to what happened between them. The witness, G.A.A., was himself prosecuted for contempt of court and convicted on a guilty plea. So obviously with

this witness we have some credibility issues here, which of course will help explain the limited factual basis on which Nshogoza was convicted at the end of the day.

And I think in many instances this is what happens in a contempt of court case of this nature. On the whole, this . . . and Nshogoza was convicted of contempt of court and sentenced to nine months imprisonment and is currently on appeal and we're waiting judgment any day now. Now I would say we will see how that turns out on appeal. But on the broader issue, most likely in Nshogoza what we see from the Prosecutor's Office is the tip of the iceberg. There are many instances of this kind of behavior and the struggle is, of course, how to address them, both in terms of the Prosecutor's Office and in terms of the Chambers. And there's currently a discussion going on as to what are the limits of contempt proceedings, because the way the statute, or the statute and the rules are set up, is that the trial chambers pretty much set whether contempt proceedings are going to take place or not. So it's not for the Prosecutor—we can't run out by ourselves to make an investigation than make proceedings. It has to go through the Chambers.

So with the completion strategy in play, there may be practical considerations—I'm not saying that it's happening—but there may be practical considerations around, in terms of making the final decision about whether we want to have contempt proceedings at this stage, because there's certainly a lot of evidence out there. Whether we are going to see those cases prosecuted to their full extent or not is unknown.

David Scheffer, Moderator
Northwestern University School of Law

You know, our time is so short. Serge, do you want to throw in three words, or not?

Serge Brammertz
Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Sure, sure. I can say a few things about contempt proceedings. We had a number of them last year at the ICTY. It's also something I discovered as a practitioner only while I was at the ICTY, because the international system is totally different. We had a number of decisions in different areas. I will not go into details, but we had one case, a criminal case, Haradenaj case where there was an acquittal. It was one of the leaders of the Kosovo Liberation Army. And one of the major problems we had during his trial was interference with witnesses, witness protection, which means that—that's also why we appealed in this case. In fact, we were not able to present all of our evidence in court because a number of witnesses had been threatened. As a result, there was one contempt case against two persons: one, a former Kosovo minister for having tried to influence a witness. There have been convictions regarding a first instance changing a few.

We have in the Seselj case, there the accused himself, who was still on trial, has been convicted for contempt. Why? Because he was publishing books and in one of his books he put the names of protected witnesses, which had a conviction as the result. He's still on trial, so we'll see what will be done with the trial, but he has already been convicted of this contempt offense.

Which always poses the problem of resources. Is the OTP the right person? Is he independent enough to do it? Would it be better to have an amicus? Or would it be even better to have the local prosecutor in the region dealing with this case? I know the judges think it takes too much of the Tribunal resources.

In the questions you're asking before we started the Hartman case [Inaudible] which has been prosecuted and convicted, the issue is in appeal, where it was initiated by the trial chamber as such by appointing an amicus to play the role of the prosecution. So, to make this very clear, the prosecution was involved at no stage in deciding about starting the contempt or in the contempt proceedings where, in the public opinion, sometimes the use of the prosecutor [Inaudible] would be directed by the OTP. So there are a number of examples we can continue discussing if you want to later.

David Scheffer, Moderator
Northwestern University School of Law

And the Hartman case is absolutely fascinating given the character of what she published and the context of it, which also included the International Court of Justice, etc. But we have to stop. Those who . . . First of all, I want to thank everyone for the morning session. This has been tremendous. We have a lunch now that many of you are invited to. 5th floor Wieboldt. We need to proceed there now. Nico, let me ask you. Does everyone here have a partner that shows them how to get over there? Okay, good. You guys will be directed there, so just follow who leads you. And we'll see everyone there for lunch and we'll have the keynote address there as well.

[End of third tape]

David Scheffer, Moderator
Northwestern University School of Law

Ladies and gentleman. I am pleased to welcome you to the keynote address of the Atrocity Crimes Year in Review Conference here at Northwestern University School of Law. For those of you who were not with us at the conference discussions this morning, I am Professor David Scheffer and I direct the Center for International Human Rights. Each year, we hold this conference to review the views and practices of the International War Crimes Tribunals, which include the International Criminal Court, the International Tribunals for the Former Yugoslavia, the Rwanda Tribunal, the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, the War Crimes Chamber of the Court of Bosnia-Herzegovina, and the Special Tribunal for Lebanon. And some of the courts, of course, are domestic courts.

I now want to introduce our keynote speaker, Ambassador Christian Wenaweser, who is the permanent representative of Liechtenstein to the United Nations in New York since 2002. I have known Ambassador Wenaweser for many years. In fact, we were in Rome together in the summer of 1998 for the final negotiations of the Rome Statute of the International Criminal Court. If anyone epitomizes the hardworking, reasonable, and calm diplomat, it is Christian Wenaweser. That is why today, he is the President of the Assembly of State's Parties of the

International Criminal Court. That means he is the leader of an organization of 110 nations which have joined the Court. It is a tough responsibility to shoulder, given the economic and legal complexities of the Court's mission. He has just returned from a trip to Uganda where, in May, he will preside over the long-awaited review conference of the Rome Statute of the Court. He will bring a wealth of experience to bear to that task. He chaired the special working group on the crime of aggression for five years and that crime will be on deck at the review conference. He has chaired several important U.N. working groups and committees during the years. Ambassador Wenaweser speaks five languages: German, English, French, Italian, and Spanish. But perhaps his most important qualification is that he studied diplomacy at the Graduate Institute of International Development Studies on the shores of Lake Geneva in the early 1990s. Now I happened to lecture there during those particular years and I always suspected that some day I would witness one of the institute students govern the world. Well, today, he'll stand before you. I give you Ambassador Wenaweser.

Christian Wenaweser, Keynote Speaker

*President, Assembly of State Parties at the International Criminal Court
Permanent Representative of Liechtenstein to the United Nations*

Thank you very much, David, for a very generous introduction. Thanks for having me here. It's a great pleasure to be here. I thoroughly enjoyed the part of the morning I was able to follow.

I am going to take you to a slightly different place, but a very strongly related place, and that is the review conference of the International Criminal Court that they are going to have later this year. Unlike the other tribunals that you have heard about and talked about this morning, the ICC is a treaty based institution. And I think Fatou made very clear in her comments this morning that she said, I'm not quoting you, but this is essentially what she said, "You have given us the law, and this is the law we are applying. So if you don't like the law, you're going to have to change it. You're going to have to give us a different law." The ICC does not make its own law; it's us, the States, that do that.

They did that in 1998 in Rome. David of course was head of the delegation of the United States. Now in Rome, what happened was that, for a number of reasons, we decided that seven years after the entry into force of the Rome Statute—that is not after adoption, but after entry into force of the Statute—we would hold a review conference. We would hold a review conference in particular to look at what changes, if any, we needed to make to the Statute in light of experience we gathered, we would have gathered, seven years later.

There is one particular reason that was put into the Statute, and that is actually the prime impression to which I'll come back later on. After Rome, we had a ratification process that I think was safe to say was speedier and more successful than most of us had suspected. So the Statute entered into force July the First, 2002. So about seven years, actually almost eight years after the entry into force of the Rome Statute, we will gather in Kampala to look at the Statute and see what changes, if any, we need to make.

Now when you read the Rome Treaty, when you read the article on 128 on the review conference, the way it is presented there is that it is a conference to look at amendments to the Statute. In the meantime, as is often the case with these things, the review conference has taken on a bit of its own life. And in Kampala, we will not only talk about amendments, but we will talk about what we have phrased, not very elegantly, I'm afraid, the stock taking part. So Kampala has the first part that deals with amendments and the second part that deals with stock taking. And stock taking means addressing the challenges we are facing—the political and legal challenges we are facing—seven years after having an ICC that is operational and talking about these topics.

I will first speak about these amendments and then I will talk about the stock taking part. We had long talks as you can imagine about the scope of amendments we should discuss in Kampala. We made a decision when we last met as State's parties in the Hague in November, that we would in Kampala only take up three amendments to amend the proposals of the Rome Statute. The first one is a proposal made by Belgium that I expect to be very non-controversial and I expect it to require very little discussion time in Kampala. That is to extend the use of certain weapons from international armed conflict as is currently in the Rome Statute to also known international conflicts. In preparation for the conference, that was a non-controversial proposal that I think it's pretty safe to say, will be adopted.

The other two are proposals that actually come from the Statute itself or that were mandated by the Statute. The first is Article 124, which we discussed briefly. Article 124 is a provision which allows the State, when ratifying the Rome Statute, to say, "I do not want to be subject to the jurisdiction of the Court as far as war crimes is concerned for a period of seven years." That was a slightly peculiar provision that was quite controversial in Rome itself, because some states argued, with quite an amount of credibility I think, that this amounts to a reservation to the Treaty, and reservations are, under Article 120 I think, not admissible under the Rome Treaty. That provision is there. It has been used by two states: my France and in Colombia. The conveners will consider whether to leave it there for possible ratifying states or to delete it.

It is a bit difficult to say how this will end up. I'm personally surprised that those who want to . . . [that] the states who want to delete it are not more numerous, that don't put their voice forward more forcefully. There's actually quite a strong view out there that we might as well leave it in the statute because the provision hasn't really done any harm. Some also believe that it may attract some ratifications in the future, which I think we certainly should not overstate the case. I have my personal doubts there.

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

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

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

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

The second reason, of course, is that these people argue that this is an independent judicial institution. Any decision made by the Security Council is inherently a political decision. It's never really a legal decision. So having the Court dependent on the Security Council on a question of such magnitude will undermine the perception that the ICC is an independent judicial institution. And I think that is a serious argument. We have, of course, under the current system, under the Rome Statute, as it is today, we already have a role of the Security Council. The Security Council has the competence to refer a situation to the ICC, which it has done once in the case of Darfur, which as you know is a very controversial decision. And is something which Fatou and myself and many others have to explain over and over again; this is not something that the ICC decided, this is something that the Security Council decided. So that's the first role the Council already has under the Statute. The second role under the famous Article 16 of the Rome Statute is the competence of the Security Council to suspend an ongoing investigation. So the

Security Council can, and it has been discussed, both in the case of Darfur and earlier on also in the case of Uganda, the Security Council can decide that, in the interest of peace (and that can mean a lot of things), in the interest of peace, the prosecution, the investigation must be suspended so the Council can directly intervene in the work of the ICC.

So this is where we are on aggression. The difficulty is clear. It's really about defining under what conditions this court can exercise jurisdiction. There is actually an agreement, which is something I want to emphasize very strongly, there is actually an agreement among states that the first instance to make a determination should be the Security Council. And that is a big compromise in a way, on the part of those who are very skeptical about any role of the Security Council in general, as far as the ICC is concerned. So the question we are dealing with now is simply, "What happens if the Security Council does not make a determination? Can somebody else do it? Can the General Assembly do it? Can in the International Court of Justice do it? Can the Court itself do it? Can the Pre-Trial Chamber do it?" So that is the question.

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

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

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

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

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

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

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

The third issue is the issue of victims. A really novel feature of the ICC is the role of victims, the participation of victims in the proceedings before the ICC, which has turned out actually to be a very big challenge. How, to what extent, to allow the participation of victims in the proceedings before the ICC is not a question that is finally resolved. But it is something that the Rome Statute provides for. It also provides for assistance to victims and restoration to victims. And that was actually one of the most interesting parts in a way of my trip to Uganda was to go to the north of the country, the area affected by the armed conflict, and to not only see projects funded by the Trust for victims, but also to interact directly with the victims in the affected communities. It is, I think, an extremely interesting feature of this Court and I think it poses, it raises a lot of questions that we have not really thought about in detail when we established this system. Because it means, de facto, that the Court is in a way an operational agency in the field, which is really not what a criminal court usually does, or is not the type of activity the court usually engages in.

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

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

are still conflict situations. Or, you know, shortly after conflict, but certainly with a good chance of relapsing into conflict.

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

Now the overall goal — and I am almost done, sorry if that was a bit long—I think a very important thing to say first is that the states parties must agree that the Rome Statute is a good treaty. We do not have a large number of amendments on the table. We had some proposals, especially on the jurisdictional parts. We had proposals to add the crime of terrorism, to add the crime of drug trafficking, to add nuclear weapons to the list of illegal weapons. Not easy proposals, as you can see. But everybody has agreed, and I think that’s important, and the states that put these proposals on the table, after we discussed these suggestions. We understand that this is not consensual. We understand that this is difficult. We understand that this is not in the best interest of the Court right now, so we are happy to talk about this at a later station. I think that is a very important indication that there is a strong consensus that this is a good treaty.

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

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

relate to our political activities? That is the discussion we will need in the future, and I hope Kampala will be a very good point of departure for it.

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

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

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

I was actually at the state house with President Museveni and we discussed the ICC, of course. That was the purpose of my visit. And one of his cabinet members said, “Yeah, but you know, it’s really a problem that the ICC is targeting Africa.” And Museveni looked at him and said, “Well, but what do you want? We have all these problems here. And we cannot take the DRC and move it to Europe just to make it more balanced.” And for me, that was a surprising strong expression of support that he expressed and I think it was a very nice moment, the moment on which I want to finish my comments. Thank you very much.

David Scheffer, Moderator
Northwestern University School of Law

We have about ten minutes for questions, and we [Inaudible]. Just raise your hand. Do we have a roaming mic anywhere, or not? Questions? I’ll ask one of my students. Oh D.J., yes?

D.J., Audience Member

What kind of outcomes do you imagine [Inaudible question]?

Christian Wenaweser, Keynote Speaker

*President, Assembly of State Parties at the International Criminal Court
Permanent Representative of Liechtenstein to the United Nations*

Well, we're not going to do general debates and that kind of thing. We'll have one general debate in the beginning, everyone comes in, hopefully a lot of ministers, and you talk about whatever you want to talk about. And then the stock taking part will be either panels or roundtables. And I think they will result in . . . well, it depends on what the topic is. You know, peace and justice will probably just have a summary of the discussions, and a few other things. I think we may even have a resolution beyond that. But the plan is to have texts adopted there.

David Scheffer, Moderator

Northwestern University School of Law

Rory Gutman.

Rory Gutman, Audience Member

My question is about [Inaudible question].

Christian Wenaweser, Keynote Speaker

*President, Assembly of State Parties at the International Criminal Court
Permanent Representative of Liechtenstein to the United Nations*

On the first part, yes the President of Sudan has made some travels, and I think he made a point of making as many travels as possible right after the indictment was issued. But as I said, he has not traveled to any state party. And there is a difference there. As a state party, you have an obligation to arrest any indictee, including President Bashir. As a non-state party, you don't. Now of course we would also like those states to cooperate with the ICC, but they indeed do not have a legal obligation. So the more important thing right now is that the legal regime of the ICC, as it applies to state's parties is actually working.

On the second question, yes, the U.S. has a new administration. I think it is an administration that is really taking a fresh look at the ICC. I think it is important to also say that you had that . . . there really was an evolution on the position of the previous administration. So that the last two or three years of Bush was very, very different than the first years. You never had a withdrawal of, in a way, these very ideological statements that we had heard, but the practice was really very different. I mean there was a much more pragmatic approach that the U.S. took toward the ICC already toward the end of Bush, the second term of Bush.

Now I don't know at this point where the U.S. is going to go. I think there is a very intense discussion on the way. It was the first time, in The Hague in November, it was the first time that the United States of America participated in a meeting of the Assembly of States

Parties. That was the first time that they showed up. And I think everybody really welcomed that. But you also have to see that there's been an absence of eight years. That's a pretty long gap. And I think the domestic discussion here will probably move very slowly. I'm certainly hoping . . . I see very generally the positive, or more positive position that the U.S. takes. But, you know, it's very difficult to see which direction it's going to go, and especially at what speed. I think, for example, it's very, very unrealistic to expect a ratification of the Rome Treaty by the U.S. Congress any time soon. But that's, you know, my personal assessment.

[Inaudible question]

Right.

[Inaudible question]

Spoken as a real prosecutor. [Laughter] . . . [Inaudible] That's difficult to say. I mean, I actually haven't seen that much of it in what we have done so far. I don't expect that to have a very, very significant impact on it.

[Inaudible question]

Well, we have 110 state's parties, which I think is very good. It's clear that the ratification process, which was at one time really very impressive and surprisingly good, has slowed down. I don't think that's going to change. I think it's going to be much slower. Now there are hopefully signs in different parts of the world. I do not expect those that you have mentioned specifically, I do not expect any of those to ratify any time soon. But, you know, it's interesting to see, for example, a country like El Salvador that has a very, very difficult history, and that now has a new government, is all of a sudden very keenly interested. That does not mean that they are going to ratify tomorrow. But you have these states—states like Guatemala—that say this is actually something we want to do. Given our history, we want to do it.

And there are also more signs that we will get some ratifications in Asia, which would be wonderful I believe, because that's the part of the world where the ICC has its weakest representation.

You know, the ICC was in Rome before Rome. It was a project that was really driven by midsized and smaller states. It was never a project that has been advanced by the big states. You know, people forget now, but when we went into that Conference, we didn't know that people like the U.K. would vote in favor. We didn't know that the French would vote in favor of that Treaty. It's something that we now forget because they ratified pretty soon after we had the treaty. But this has, you know, this has always been promoted by those who need protection.

[Inaudible question]

Well, it's my job to believe in that, yes. [Inaudible] It's really very difficult to say. It is what I want. But, you know, I need to know more than anything else what states want at this point. You have a discussion that, for five years, was taking place at a technical level. You had

legal advisors. You had, you know, all these people that get very excited about this because it's legally, you know, a very fascinating topic. And it was mostly done at that level. To simplify, to be simplistic really, the legal work is done. The political work is not done. So the moment this goes to the political level, a legal advisor does not make . . . so, yeah. That's a different, you know, that's a completely different discussion. Because the, you know, ministers will say, "What's in it for me? Why do I want this? It's nice that you've drafted all these texts, but, you know, what is politically in it?" That is a very different discussion.

[Inaudible question]

Corporations, you said? Hmm. Well the Rome Statute does not make a distinction whether you're a government representative or who or what you are. It just depends on what you do as a perpetrator. There is no plan to incorporate things like corporate crimes or anything like that in the Rome Statute. So I'm not sure if that answers your question, does it?

David Scheffer, Moderator
Northwestern University School of Law

[Inaudible]

Christian Wenaweser, Keynote Speaker
President, Assembly of State Parties at the International Criminal Court
Permanent Representative of Liechtenstein to the United Nations

Ah, I see, I see. That is where we are. That is not a discussion that we are having right now, that corporations as legal entities would be liable, no.

David Scheffer, Moderator
Northwestern University School of Law

[Inaudible] Okay, thank you very much.

Christian Wenaweser, Keynote Speaker
President, Assembly of State Parties at the International Criminal Court
Permanent Representative of Liechtenstein to the United Nations

Thank you, thank you very much. [Applause]

David Scheffer, Moderator
Northwestern University School of Law

Thank you all, and thank you so much. This does give us a little bit of time before we rush into our afternoon session. We are going to start as close to 2 o'clock, maybe 2:05 if possible, back on the eighth floor, the Bluhm Legal Clinic. And on your way there, obviously feel free to walk through the law school. There are facilities on your way there. And I'll see you there.

I do want to thank, by the way, some of our distinguished guests who have joined us today. Senator Shaumburg, the Manilows, who else am I seeing here? I think Mr. Chester is somewhere, I think right here. And some of my colleagues from the law school. I thank all of you for coming. And Rachel Bronson. We will continue this discussion. We need a little break for ten or fifteen minutes, okay? Here we go.

[End of fourth tape]

David Scheffer, Moderator
Northwestern University School of Law

. . . Francois, who had a meeting with the prosecutor William Smith. And once that's ready to go, we'll choose the moment to pop that in. We also did receive—Federal Express came through from Memphis—and delivered the much-awaited video from Judge Erik Mose. However, I don't want to show all of it, because I understand he may have gone on for thirty minutes or so. So I'm afraid we can't quite do that. But what I may do, since I haven't had a chance to see it yet is we'll just show you the first ten minutes or so, because he'll obviously say something in those first ten minutes, and then we'll sort of go on from there. I had wanted to honor him at this session because he is finishing what I calculate to be fifteen years on the bench—I think it's thirteen years on the bench in Arusha and he was regretful not to come, but actually we've benefitted from having Christine here, so anyway, we'll try to get ten minutes of word from the Judge at some point this afternoon. We'll take a break at I'd say about 3:30 and we'll definitely finish at 4:30, because I've got to get this crew over to the Chicago club for our evening event on the Chicago Council on Global Affairs.

Alright. So where do we begin this afternoon? You know, what I'd like to start with is a subject—you know, Serge, if you cannot address it in any way, I'd like to get someone—perhaps Goran, maybe you could take off on it with some discussion. But you know, during the year 2009, in your court, Serge, we have a very interesting effort by Mr. Karadžić, who actually, Goran, you work on his defense team, so I think this is fair game, to question whether or not the Tribunal even had jurisdiction, as I understand it, because of what he claimed was an agreement he made with American Ambassador Richard Holbrooke in 1996, as to whether or not he would be arrested and brought to justice before the Yugoslav Tribunal. It was very controversial during the year. It created a lot of news back in March, April 2009. It resulted in some responding statements by Mr. Holbrooke himself and by aides of his who had accompanied Mr. Holbrooke on journeys into the Balkans. And the Court itself took up the issue, as I recall both at the trial level and at the appeals chamber level as to whether or not there was any sufficiency as to Mr. Karadžić's claim that in fact he had a no arrest agreement, so why is he here in the Hague? Could you walk us through—which of you would like to walk us through the basic facts of the Holbrooke strategy by Mr. Karadžić. Goran, you're probably the person to do that. And how did this come out in the Court's judgment?

Professor Göran Sluiter, Panelist
University of Amsterdam

Well, maybe I'm not the right person because this is one of the points I've always said to Mr. Karadžić this is a no starter. And he . . .

David Scheffer, Moderator
Northwestern University School of Law

Well no we really want to hear from you! [Laughter] Go ahead, Goran.

Professor Göran Sluiter, Panelist
University of Amsterdam

This is . . . He feels very strongly about this personally. But legally, whatever the facts are, I don't know about the facts, but legally, if there was an agreement, if there would be any agreement, between Mr. Karadžić and Mr. Holbrooke, this could not at all bind the Tribunal at the U.N. But he has been focusing on this also because the judges allowed him to do this. So only if the Chamber allows you to do this, and you say this is relevant to me and the Chamber says, "Okay, we agree. You can pursue." And only at the end they had a decision that said, "Well, even if this would be true, it's not binding on us at all." So I have not understood why they could not have said earlier, "Whatever the facts are, this is a no starter." So I am very surprised at how they handled this.

David Scheffer, Moderator
Northwestern University School of Law

So do you want to describe to the audience how the judges finally resolved this issue?

Professor Göran Sluiter, Panelist
University of Amsterdam

Well, like I said, they, as I recall, stayed away from the facts very much and said, "Well, even if there's a possibility that this could be true, there's no way this could be binding on this Tribunal."

If you compare it, for example, to Sierra Leone, there was a much stronger case for immunity. Because we had a government saying, we have a peace agreement, you are going to get immunity and the next day they basically set up a Tribunal and the Tribunal said there's no immunity. Before I get to Courtenay and perhaps Serge, maybe just one sentence from the Appeals Chamber Judgment: "The Appeals Chamber finds that, even if the alleged agreement were proved," i.e., the Holbrooke agreement, the so-called Holbrooke agreement, "it would not limit the jurisdiction of the Tribunal. It would not otherwise be binding on the Tribunal. And it would not trigger the doctrine of abuse of process." Serge? Any comment?

Serge Brammertz
Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Yeah, in fact what Karadzic put forward was not to say that the indictment has to be rejected, because of the Holbrooke agreement because Holbrooke was acting on behalf of the Security Council or on behalf of the Office of the Prosecutor.

Now indeed, the Trial Chamber has somehow looked into the facts without so far as accepting a hearing on the issue because at the end of the day, they said even if it had existed, there would be no legal consequence. But the Trial Chamber looked somewhat at the issue, because they said he was not acting on behalf of the Security Council. There was no element in the file that would suggest that he had any mandate to act on behalf of the Security Council. Of course, there was no element, no indication ever, that he would act on behalf of the Office of the Prosecutor, which was during the same year that the indictment was confirmed. And it was also during this period where the Security Council several times called for the arrest of Karadžić in Security Council resolutions.

So, even looking into the very few effectual elements available, there was no indication that he—Mr. Holbrooke—ever would have been acting on behalf of the Security Council or the OTP. So the Trial Chamber rejected it. And in terms of appeals, the due process question was also addressed, because it was said that no one could have reasonably believed that impunity could have been given from the prosecution of these crimes.

So basically I agree with Professor Sluiter in this regard, that it was a long discussion to come up with a totally logical outcome. That the question of whether it existed or not is of no legal relevance and has no impact at all on the jurisdiction of the Court.

David Scheffer, Moderator
Northwestern University School of Law

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

So, I have always wondered—I of course was not part of these Holbrooke discussions with Karadžić or anything. Other aides were with him on those aspects. But I've also often wondered if he—to be fair to Karadžić, if we wish to for a moment—whether there was some misunderstanding when someone might have said to him in the room something like, "Well, you understand what NATO's policy is right now with respect to arrests. It's only if you voluntarily approach them and literally give yourself up to them that you would be arrested. And our priority now is that you do not stand for any political office in any manner, shape, or form" in September

1996. That was the goal. Lustrate him. That was the goal for September 1996. So, I've often wondered, you know, what may have been said that may perhaps have led to a misimpression at the time. And then of course may have been extrapolated again and again into something which he thought was a more formal representation, but of course was not. Courtenay?

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

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

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

David Scheffer, Moderator
Northwestern University School of Law

Ah yes, Alain?

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone

Extraordinary Chambers in the Courts of Cambodia

Just one non-controversial point about that.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

You're not going to attack me for once?

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

No, no, no. From my point of view at the time, I don't know if I can legally call it that in Nigeria, but the asylum, for us, was illegal. Because of course once again it was Article One of the Geneva Convention. So, you cannot give asylum to what we thought was a war criminal. And what was very interesting in that case—you were absolutely right—is the tension between the [Inaudible] and the legal argument. We tried this in 2003, and we didn't get him until 2006, so that was three years of attempt by local lawyers in Nigeria to challenge in Nigerian courts the fact that had given, had accepted Taylor in Nigeria. Needless to say that was completely futile and I think we . . . they wasted their time trying to challenge it legally, because in the end, it was a political deal. And nothing legal, I think, would have served that, at least on that front.

David Scheffer, Moderator
Northwestern University School of Law

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

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

I mean, what I think is clear is that what Joseph Kony has been doing over the years is to use time and to use money — money that he receives through assistance from peace talks — to be armed, to recruit more people, and then to attack again. He uses this time that is supposedly meant for peace talks to take place to rearm and then attack again. From last year, I think, or from 2008, I think we have seen the incident you were talking about. There was for the first time in a long time a very serious attempt to get Joseph Kony in late 2008. And of course there were

the negotiations that took place — Vincent Otti was leading it, for the first time was being very open—and very [Inaudible] to the international community. But what has happened? Otti has been killed. Not only is Joseph Kony attacking innocent civilians, but also those in his army. We've seen him attacking them and killing them because they were serious about the peace talks. So I think what Joseph Kony is doing — he should be seen for that. He's using time and money to regroup, rearm, and attack again. There is no serious attempt, really, on his part that peace talks should take place.

David Scheffer, Moderator
Northwestern University School of Law

And I have to hit you with the same question I've been hit with two or three days in life, which is: if we were to, if you were to withdraw the indictment, as he has requested, would the peace process take off? Now I think I know what your answer's going to be, but give us the hardcore answer to that question.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

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

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

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

David Scheffer, Moderator
Northwestern University School of Law

Thank you. This is what I'm going to do. I'm going to jump to Christine, then David, and then we're going to show a little bit of Francois in action in the courtroom. Christine? Let's stay with arrests for a moment. Christine, you had two blockbuster arrests in August 2009, one indicted fugitive from the Democratic Republic of Congo, and one from Uganda. And yet—and

I'd like you to say a little bit about that. Was that a good night in Arusha? Did you have a good drink that night? Or was it just finally sort of an exhausted sigh?

But at large remains Mr. Kabuga. And there has been some tension between the Tribunal and Kenya with respect to Mr. Kabuga, who is a top indicted fugitive of the Rwanda Tribunal. Can you give us your arrest scenario from the Rwanda Tribunal with regard to first, you got two of them in, but you still have a very significant one — and that whole relationship with Kenya?

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

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

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

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

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

David Scheffer, Moderator
Northwestern University School of Law

And then finally Kenya.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

[Laughter] Yeah. Well Kabuga of course is a difficult situation. It's been going on for a very long time and it's a bit of a cat and mouse play. You could almost say, in that we, as the reports are coming, are excited. He's in Kenya, he's out of Kenya, you know. So there's certainly a level of frustration.

David Scheffer, Moderator
Northwestern University School of Law

You have a tracking unit still, I presume, yeah?

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

We have a tracking unit and that tracking unit is particularly engaged in relation to Kabuga. In Paranya and Demana, we saw the three main fugitives at large. And Kenya—it's next door to Kenya, so we're neighboring countries and still we have been unable, together with the other African national communities to arrest. So Kabuga is going to be something that continues to haunt us. Clearly, if there is no arrest before the close of the Tribunal's mandate, he cannot go scott free because of that. There has to be some judicial mechanism in place to make sure that Kabuga is tried wherever that may be.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much, Christine. Now David, or, Fatou? I know you worked at the Rwanda Tribunal, so Kabuga may still be a burden on your shoulders.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

[Laughter] Actually, Kabuga is one of the cases I worked on. But I think maybe, I don't know whether this is too sensitive to mention, but I think the fact that Kabuga is being protected, actually, in Kenya, this is also one of the factors contributing to not being able to arrest him. Because have had situations in which, as you mention, he was sighted. And the person who led us to Kabuga was found dead. But even before we got to Kabuga, Kabuga escaped. I remember that incident back in 2004. [Christine makes inaudible comment].

David Scheffer, Moderator
Northwestern University School of Law

And by the way, just enlighten us, just in two sentences: what were his worst crimes that he's alleged to have committed?

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Kabuga was a businessman, a very powerful businessman. And he is known to have supported the purchase of such things as machetes. He was believed to be responsible for importing a lot of the machetes before the genocide into Rwanda, which were eventually used. One of the other names we have for the Rwanda genocide is the machete genocide. You know, this was quite a bit . . . and I also think he had a role in the RTLM. He was a shareholder.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

There are two possible scenarios in terms of the prosecution's case against him. One is about money. One is about inciting the main shareholders in the RTLM. And there are also some more direct instances of his involvement. So . . .

David Scheffer, Moderator
Northwestern University School of Law

We had a question at lunch from Samarra—I don't know if she's still with us—about corporations themselves can be criminal liable in these tribunals, particularly the ICC in that question. But here's a good example of at least looking behind the corporate structure with the corporate officials themselves. And Kabuga was certainly someone who facilitated through his business transactions—alleged facilitated—this genocide.

Now David, I want to hit you now with two questions. One, enlighten us about the arrest in the Balkans now for the War Crimes Chamber. We never hear about this. Do these people just all voluntarily surrender, or is there some police force that actually goes out . . .

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Yes.

David Scheffer, Moderator
Northwestern University School of Law

You know, into the Srebrenica area and finds them somewhere?

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Yes

David Scheffer, Moderator
Northwestern University School of Law

And then secondly, I think I'm correct in saying that your Court does a fair amount of plea agreements. And I'd like to get some insight into the value of those plea agreements, because, well I don't think we see that many plea agreements at the international level, but enlighten me if we do. But where are we in the War Crimes Tribunal both with arrest strategies, which we never hear about here in the West, and plea agreements.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Okay. In Bosnia-Herzegovina, as some of you may know, there is a state protection agency. It's called Sepa, and it's purportedly the state investigative and reporting body. So when we would get an arrest warrant from the court of Bosnia and Herzegovina, the Sepa agents would affect, would essentially take control of the process or the operations for affecting the arrest. We would call on local law enforcement in the cantons of the districts in the federation of the Republic of Herze to assist us in those arrest operations. We have affected a number of arrests, as Serge knows, that have been done with fairly good secrecy, without having the fact of the arrest blown before it happened. I was involved in an arrest operation last year (not personally, obviously), but it was my arrest and it was blown, and I think it was blown by information that was given to the people who were the targets of the arrest. So if you're making arrests in certain areas of Bosnia-Herzegovina, there's a very good chance that that information will get to the people related to that arrest, or who are the targets.

There is no UFOR or NATO or other military involvement in the arrests in the country. You know, that's just not within their mandate; they just don't do that for us. We do share intelligence about where people might be. We alert UFOR, we alert the NATO people whenever it is that we are going to do something because they need to anticipate what may happen on the ground as a reaction. And that isn't always necessarily on the Serb side. We arrested a man named Shefikolej who was part of the 5th core partner, what's called the 505 regime brigade, one of the Mudajeme fighters at the end of the war, who was well-entrenched in a Muslim area in Northwest Bosnian regime. And we had to go in there and take that one, or that accused, and it was a very touchy operation with very strong local opposition where we are actually arresting him and bringing him out. So arrest operations are a really case-by-case situation. Sepa does it for us with local assistance.

You asked about plea agreements. Yes. We began doing pleas, and some plea bargaining about a year, about a year and a half ago. We have followed, as best we could, the example that was set by the ICTY regarding some of the factors they used to decide when and how we should be doing that. We tried to improve on some of the ICTY practices. We hopefully did. We installed a policy which I call the Practice Direction. Practice Direction Number Two, which spells out all the factors a prosecutor needs to consider when someone presents to the prosecutor an offer to plead guilty. We really didn't go out to people and offer pleas. It usually came from the defendant or, in many respects, it was something that was obvious under the circumstances

generally because a plea had happened before, or because the man knew something that he knew we would want to know. And this has become more of a situation where we took over excavation and exhumation at the state level, beginning this last year in January 2009. More people began to come forward who were accused, indicted, and on trial offering up information about where bodies might be and where graves might be.

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

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

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

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

David Scheffer, Moderator

Northwestern University School of Law

Right. I was going to ask you whether you were talking about Ljubicic or Dado.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Dado. Dado is the Korićanske Stijene, the man who . . . the Korićanske Stijene is the place where . . .

David Scheffer, Moderator
Northwestern University School of Law

But the story you just gave us is not Dado.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

In fact, it is. The one who gave us the bodies in Korićanske Stijene is Dado.

David Scheffer, Moderator
Northwestern University School of Law

Is Dado. I'm sort of using his alias. Well that is fascinating because what I was going to do with the audience here is . . . I found it so gruesome the fact with respect to this particular defendant that I remember reading this and saying, "My goodness, only 14 years?" I mean, it just didn't seem . . . But that was the plea agreement . . . And he got you the evidence of the bodies and the plea agreement was fourteen years.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Well, the court sentenced him to fourteen years. And we agreed to it.

David Scheffer, Moderator
Northwestern University School of Law

Yes, you agreed to it. But just the facts of it. Let me just . . . to bring you the reality of what this is all about, I'm going to read just three sentences to you: "He knowingly and willingly participated in a joint criminal enterprise to the civilian and military authorities of the Prijedorian municipality by participating in aiding and escorting a convoy carrying more than 1,200 predominately Muslim and Croat civilians from Prijedor municipality. When the convoy stopped

by the Ugar River, he separated more than 200 able bodied men from the other civilians on the convoy and took them to a location on Mount Vlasic?

Deputy Chief Prosecutor, David Schwendiman, Panelist

Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Vlasic.

David Scheffer, Moderator

Northwestern University School of Law

Vlasic. There they were marched to the road above an abyss and ordered to kneel on the edge above the abyss and shot with pistols and automatic weapons. The bodies of the killed men fell into the abyss. Some of the men who were lined up threw themselves into the abyss to avoid death. The accused and others threw grenades from the top of the precipice and opened fire on the dead bodies and at the wounded men who shrieked with pain from the abyss. This resulted in the death of more than two hundred men.”

Deputy Chief Prosecutor, David Schwendiman, Panelist

Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

David, you're quoting from the indictment, I think?

David Scheffer, Moderator

Northwestern University School of Law

Oh.

Deputy Chief Prosecutor, David Schwendiman, Panelist

Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Yeah.

David Scheffer, Moderator

Northwestern University School of Law

Okay, so things change.

Deputy Chief Prosecutor, David Schwendiman, Panelist

Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

As it turns out, his involvement and his role in that particular incident was much less, much reduced.

David Scheffer, Moderator
Northwestern University School of Law

Okay

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

As far as we know, he did not participate in the shooting and he did not participate in the grenades being thrown into the abyss. He was there. He did escort them on the convoy. And he was there when it was done. That's how he knew where these people had fallen.

David Scheffer, Moderator
Northwestern University School of Law

Right, right. Okay. Well, very interesting. What I would like to do now it to show an extract from the final day of the closing arguments in the Duch trial in Phenom Pen on November 27 I believe it was, of last year. And this is our distinguished defense counsel Francois Roux who was having . . . I believe I selected this extract--you'll forgive me if I forget what extract I have here in front of me—where you have an exchange with the International Co-Prosecutor William Smith and it is about really the sufficiency of the defendant's pleading and what it actually means to the court with respect to what transpired at Toulle Slain prison. Caroline, it is all yours.

[Talking to Caroline] Getting that right for you.

[Talking to audience] This is very interesting. I was in the audience listening to you do this, and I was just scribbling away madly because it wasn't apparent to me immediately that perhaps what you were saying is, "Wait a minute. He has been in detention for ten years. That should now count as his punishment. And he should now be released. This is not an acquittal. This is a release after ten years of detention." And at the end . . . further . . . many minutes later, Judge Cartwright intervenes with the Cambodia Co-Prosecutor to try to get clarity, "Wait a minute, are you asking for an acquittal?" And this is where the confusion obviously erupted because in the translation at least it was the Cambodian Co-Prosecutor who said, "Yes your honor, when I talk about release of my client, I am speaking of acquittal. That is what I equate it to be."

And I'd love to understand, were we actually . . . I mean all the criticism afterwards, you know, flowed through, and I even wrote some of it saying, you know, what in the world is going on here? But, what was going on there?

Head of Defence Office, François Roux, Panelist

Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

First of all, I was quite absent. But to the question of the Prosecutor. He asked to the court to ask my client what exactly did he mean. He can't! Never, never, never. I could not understand why he would ask that question. And unfortunately, one of the lawyers for the civil party supports this question. So it was very [Inaudible].

So indeed, as you understood, I precise what I thought was the position of the two lawyers.

David Scheffer, Moderator
Northwestern University School of Law

He's talking about the Cambodian defense counsel here.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Yeah. Just another thing or two. It was changed to understand, to learn the reason. Sorry. The prosecutor who said the difference was not on the same line. When we know a lot, that is very offensive to the prosecutor were in conflict before. So it was just a game, not very game. But it's true that at the end, when Judge Cartwright asked the accused, "What are you requesting?" and she presided very clearly. And also the prisoner: "Are you asking for your release after you served your sentence? Or are you asking for an acquittal?" And the Accused said, "Please ask my Cambodian counsel." And the Cambodian Counselor said that no response. He said that he was not mostly responsible. Said that he only . . . he does not response. So the President . . .

David Scheffer, Moderator
Northwestern University School of Law

The Cambodian President

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

The Cambodian President asked another time. At this time, we were as in the final World Cup of Fötball. [Laughter] You know, no body at this time knew what is going to happen. [Laughter] So, my co-counselors send everything. I asked for the opportunity . . . it was a surprise . . .

David Scheffer, Moderator
Northwestern University School of Law

He asked for what, I'm sorry?

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Acquittal. Acquittal! Yeah! But, I'm not sure exactly, I'm sorry but I'm not sure if this is a problem of the provision, [groan] no, no, because just five minutes before, he asked for release, and he asked, he say I ask for acquittal. So, difficulty of interpretation? Difficulty of comprehension? I don't know. I don't know. [Inaudible comment from the panel] What I say, what I said after that, you know it was very strong case, I say, all the time I say, "Defend has suffered waste. [Inaudible] suffer waste. Defend is to suffer waste." So we suffered a lot in the case. Suffer? Suffer.

Panel

Defense to suffer with.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Now we is suffering. [In French]

David Schw... [Inaudible] A common interpretation.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

But it made me really show the problem of lessons learned to have two defense counsel, two prosecutors, two investigations. That's much more the question. Lessons learned about having two responsible for each . . .

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Exactly.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

For each player and I think this is exactly . . .

David Scheffer, Moderator

Northwestern University School of Law

And if I may [many people talking] Alain, hold on just one minute. Francois, as I recall you said something publicly about that afterwards, the fact that there were two defense co-counsel. Didn't you publicly say something about that?

Head of Defence Office, François Roux, Panelist

Special Tribunal for Lebanon

Formerly, Extraordinary Chambers in the Courts of Cambodia

Yeah, yeah. I say publicly that you know I know that new plane, there are always pilot and co-pilot. And in case of difficulty, it is always the pilot who decides. This is wrong. I know because I was involved in the [Inaudible] for the plane for my country [Laughter]. Yeah? So I know this is the rule. Even if the pilot is wrong, he decided. So this is the same, I think, to have one pilot in the team. And I think the only time where there is two is when it is the same for the prosecutor. A lot of [Inaudible] are in conflict. Okay. So, it's a very difficult lesson of this hybrid. As I said this morning, we need to learn about that.

David Scheffer, Moderator

Northwestern University School of Law

Do you know, in the preparation of the internal rules back in 2007 or so of the Court . . . I happened to be sort of parachuting into Cambodia at that point with respect to that, and the big issue was whether or not there would be an insistence by the Cambodian government that the Cambodian Co-Defense Counsel always lead off, that the Cambodian Co-Prosecutor always lead off. And it's only at the grace of them that the international partner would then enter the discussion. And the compromise, I think, then was that there would be an opening shot by the Cambodian Defense Counsel and the Cambodian Prosecutor but that thereafter, there wouldn't have to be a daily dance of bringing the international partner on board and in the courtroom. But that was seriously proposed at the time because even the Cambodians were saying, "Well, we want to be number one here. You know, we want to be the top dog in this courtroom."

Head of Defence Office, François Roux, Panelist

Special Tribunal for Lebanon

Formerly, Extraordinary Chambers in the Courts of Cambodia

The President of Cambodia?

David Scheffer, Moderator

Northwestern University School of Law

Yeah.

Head of Defence Office, François Roux, Panelist

***Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia***

The President of Cambodia? No, no. I think we need to learn a lot from this hybrid terminal. So.

David Scheffer, Moderator
Northwestern University School of Law

I know Alain, were you trying to intervene at some point, here?

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
***Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia***

Can I say something?

David Scheffer, Moderator
Northwestern University School of Law

Yeah, sure, please go.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
***Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia***

So, just one thing about the discretion of one Cambodian, one international. My big fear is that people are not learning. And as you know, they are as we speak I think in Phenom Penh now changing the rules for civil parties, for case number two. And as we spoke this morning, for case number two there will be 2,000, 3,000 civil parties. It was felt that it should be changed. Well, guess what? What are the changes? Well, the changes are . . . and I saw the confidential rules and I really hope it's not going to happen. That is my big fear, that they want to have, instead of civil party lawyers, they will still have them, but on top of them, guess what? They will have one Cambodian civil party lawyer and one international civil party lawyer, once again! And they even, they even provided in the rules, the draft rules that I have seen, they have provided a conflict mechanism again. So now you have the fourth conflict mechanism after the judges and the drafting judges and the prosecutors. Now you have a conflict mechanism because they learned nothing and now we are going to have a co-civil party lawyer, one national and one international. And I think that will be a very, very problematic issue if they do that. Very problematic issue.

Now can I just say one thing? One more thing about that, which is I think there is something else which is problematic which is I think they should definitely get the best one. Let's say he is Cambodian or he is international, just so there will be one doing the work with the process and get the best one. And let me just say something. There is only one organ in the Court—this is very interesting—one organ in the Court where there is only one head. And it is

international. It is the defense. The defensive is as one head, and then one deputy Cambodian and one deputy international. And I was told that the reason why the defense is the only department with only one head is because the Cambodians didn't give any money to it. They didn't fund it. But guess what? The victims' unit is not funded by the Cambodians. They are funded by the internationals. But the problem is of course you understand, that the victims are so sensitive that the Cambodians say, "No way, we will leave that to the internationals." So that is where we are.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

That is because I say this morning Cambodians don't want this trial now. They don't want. That is a problem. In this country, they don't want [Inaudible].

Just a last point as well. I supported from the beginning the presence of victims in the court. But also Alain knows, we have a lot of difficult things about [in French]. How you say *couiance*?

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

[Laughter] I am not helping you.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

For the victims, it was very, very little. So, we need to progress. I am definitely for the presence of the victims in the court. At the beginning from civil law, but what I say, we don't know, at this time, we don't know how to manage that. And for Case 2, we are trying to find the solution. But we don't have the solution. So we need to imagine more. We need to be more inventive. Okay. We didn't find out at this time.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

May I say something very quickly about that?

David Scheffer, Moderator
Northwestern University School of Law

Please.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist

***Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia***

Maybe just one thing. You know, when we went there, there were four teams of civil parties. Now it was nonsense to have four teams because, unlike Case 2 where there may be some Thai one team, some Vietnamese one team, these teams . . . me, when I came there in December and they showed me my client, and I didn't understand why I was in this team and not the other team. The real thing is that it was the political situation of the NGOs [Inaudible] and others who were there before. And each of them wanted their lawyers. And it was local politics because, as you know, if you are high profile and then you get your money from Phnom Penh and big universities and NGOs and this and that. So, but it was very absurd because we were in the courtroom and we were not really sure why we were representing those parties and not the other ones.

But just one thing about that. I think that definitely there were problems about civil parties, absolutely, but first two things. If lawyers for civil parties are not good, maybe we were not good, but that does not mean that civil parties' lawyers should not be there. You just have to change these bad lawyers. In other words, sometimes there were criticisms of the institutions of the civil parties when it was some of the colleagues were quite frankly appalling in court and not good. And that should not be the criticism on the institution of civil parties. You just change . . . if you have a bad prosecutor, you just change the prosecutor. You should not . . . you just get a good prosecutor.

David Scheffer, Moderator
Northwestern University School of Law

Alright, now . . .

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
***Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia***

Just a final thing. And then, we got no money. We had not one single dollar to work with. So how do you want good lawyers? I mean, you're not going to get Courtenay Griffith to come to Phenom Penh with not one single dollar to work, because he's so good at home. That's just who he is. [Laughter]

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

. . . for a pittance. [Laughter]

David Scheffer, Moderator
Northwestern University School of Law

Excellent point. Now,

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

So I'm just saying, you cannot say they are not good lawyers. First, pay your lawyer! If you want civil party lawyers, then in the statute there are rules of procedure. Just give them money. Why we were not paid? If you do not get paid, you cannot have good lawyer.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

You are right, but you are wrong, because you were not paid but you were the best.

David Scheffer, Moderator
Northwestern University School of Law

Well, let me just . . . Goran, I know you want to say something, but let me just throw a question out, and then you speak, and then if someone else wants to answer my question, great. I certainly saw in the courtroom in Cambodia—I was often sitting there, Alain, and watching your colleagues, the four teams representing the victims, and I wondered, “Is this being efficiently managed with respect to what is being argued by the prosecutor against the defendant, what is being argued by the civil party counsel against the defendant, and at what point are civil party counsel teaming up, whether they know it or not, as a sort of adjunct wing of the prosecutor’s office as opposed to focusing on their particular angle to the trial, which is, “We need to establish the basis on which reparations and forgiveness and all the other remedies civilians have and argue for,” even if they don’t have it, they can argue for it . . . It seems to me the civil party counsel would be seen as, “We want remedies. Here is our argument for remedies if he is proven guilty.” The prosecutor comes in and says, “Now it’s my job to prove him guilty, your job to talk about remedies.” And yet, there were many party counsel that clearly sought to establish guilt. And for defense counsel, of course, that’s an added burden in the courtroom for all these lawyers. And I just wanted to put that issue, because it definitely struck me as I was sitting there listening. I know you want to answer, but first, Goran.

Professor Göran Sluiter, Panelist
University of Amsterdam

Yes. Coming back to the previous issue. The problems at the Cambodian tribunal. Of course, there is a tendency now to blame it on the Cambodians. Maybe now they don’t want the tribunal as badly as the internationals want it. But there’s also another side. This is, you know, the most national tribunal of all the other internationalized families. The procedure has to be Cambodian in scope. And there is also the side of the internationals. To what degree have all the internationals at every level really invested in getting to know Cambodian law, in getting to know the domestic system. That’s also one side of this problem. You must acknowledge that it’s the most national tribunal of all the family of the hybrid tribunals. That’s one point.

The other point I wanted to raise we also discussed this morning is victim participation. And I am a victim skeptic, not that I . . . I have great sympathy for victims, but I still think this is an experiment, an experiment in a highly fragile system of international criminal justice. And I think we need to reflect on the burden of trial for victim participation. And we will—of the ICC and of the Cambodian court—we will have to evaluate what this has brought for victims and what this has brought for the quality of the trial. Especially with the ICC, I would like to see after we've had a couple of trials how much more we could have done without victim participation. Because victim participation may seem very sympathetic, but it is also arbitrary. It means in practice that you have limited resources with a limited indictment with for example, you have five big incidents without victim participation you could have done ten. Practically, this means you have to select those five incidents and those victims are lucky that they can be involved in the process. But the other five—those victims are not involved at all and their crimes are not addressed in the courtroom. So I think . . . this is good that this is also an issue for the stocktaking at the review conference. You have to [Inaudible] that this is really something you want to pursue in this manner.

David Scheffer, Moderator
Northwestern University School of Law

I have to imagine, Alain, that you want to respond to my query.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Sure. I have so much to say, but let me try to be brief. You know, there is one fundamental problem, and I think Francois will agree with that. In Geneva, my country, which is pure civil, 100%. If they kill my father, I will go to court and I will take the best lawyer in town to represent my family in court. Now let's say that I have a lot of money. I will get the best lawyer in court to represent the civil party, to represent my interest. Now you said compensation. But first, what my family we want is the truth, is a judgment, which exactly establishes the facts because in our system, it is on that judgment that my family will move based on that sentencing, and then we will get money. If we can.

Now if the prosecution in Geneva for some reason is not that good, or doesn't do very well, then I can tell you that my lawyer, and I bet I will have the best lawyer in town, he will swallow the courtroom. And he will because he, he is basically here to get the truth. And in effect, if you look from the outside, you can say oh well, but this lawyer . . . I don't care if you can say this lawyer is a certain prosecutor. We civil parties want the truth. Now it is a good system most of the time what you have in Belgium, in Switzerland, in France is solid prosecution, which is doing their job, and then the civil parties lawyers are coming and they just focus on the sufferings of my family because we suffered because they killed my father for example, and that's what happens. And that's what it should be. And that's what it should have been in Cambodia. But what happened in Cambodia, and you can ask Francois, we were in court together, is that they called the number one expert, which they relied on, for the prosecution to

prove their case, and the prosecution was not getting the evidence out. And the judges were not asking the questions they should have asked. And Francois is there to tell me that I am wrong. Under this system, the burden was on the judges to get the evidence—they had most of the time to question and get the evidence. And we were in a situation, because I had for years worked for prosecution so I knew how to do that. And when you have Courtenay Griffith in front of you in a courtroom, you learn fast [Laughter]. So I knew how to do that at the Charles Taylor trial. So what you do when the evidence is not out and you know that Francois Roux is coming behind, you get the evidence out. That's what you do. You get the evidence out. And then of course all the money talking hoopla . . . oohhhh . . . there's a [Inaudible] prosecutor, there's a [Inaudible] prosecutor. But civil party you want the truth, the truth to establish the judgment and then you move for compensation. So again I think again, like civil parties, the system could work if everyone is good. And the perfect system I think could somehow work. But the problem again is that again and again sometime you know you have good and sometime whatever. It depends on the quality of the players.

David Scheffer, Moderator
Northwestern University School of Law

Can I? Okay.

Serge Brammertz
Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

I don't have a problem if the civil party wants to, to . . .

[End of fifth tape]

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

. . . A trial, a criminal trial, is the Prosecution against the accused. Because the Prosecutor represents all of society, but never the victims can speak about the sentence, because that is vengeance. So the civil party can help with the truth, but the civil party, in my conception, can never speak about the sentence. That is the role only of society, and the society is represented by the Prosecutor.

David Scheffer, Moderator
Northwestern University School of Law

Three sentences, Alain.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Yes. We lost that battle. I hope it will go through on appeal. We indeed asked to speak on sentencing. Now maybe even some of us will disagree, some of the French with us even disagreed. We were almost alone. Now let me just very quickly, two minutes to tell you the reasoning why.

First, in the rules, they are very clear about the role of civil parties. They tell you when you cannot do things, for example, we civil parties cannot do opening statements. So it's very clear when they take a right from you. Nothing is said on sentencing. So if you look at the rules, legally, I believe, you can have a very strong argument saying that legally, nothing prevents civil parties' lawyers, who are parties in the proceedings, eager parties, to talk about sentencing. That is number one.

Number two, very quickly. The problem, unlike in Belgium, France, in Switzerland . . . this system, you do everything at the same time. In our system, you would have first the trial, then you have guilty/not guilty, and then you move on sentencing. So it's easy to differentiate what you do on guilt and what you do on sentencing. In this trial, you do everything at the same time. When I call my clients in court, as I am allowed to do, my clients are the sons, the daughters, the husbands, the wives, of people who were killed at S21. Nobody knows Duch. Nobody is going to say anything about the guilt. Nobody has anything to say about that. So when I call my clients, they will tell you how much they have suffered for thirty years. They will tell you they have nightmares every day thinking about S21. That goes to sentencing because that goes to aggravating circumstances.

So we were explaining to the Court, well fine, that would be the French system, we understand that. But here, practically, when I call my clients, and I am entitled to do that, everything that they are talking about is sentencing. And because there is nothing in the rules to prevent us from talking about sentencing, we should be able to do so. But, to be frank, even Jean Lavergne, who did the dissenting opinion, he doesn't agree with us. So I sort of think we wouldn't win on that.

David Scheffer, Moderator
Northwestern University School of Law

They got a ruling against them last year. I think it was October, November? I can't remember exactly when it came down . . .

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

We would need to go to the website, it's a very interesting decision.

David Scheffer, Moderator
Northwestern University School of Law

And obviously the civil parties want to have more of a role in examining character witnesses and sentencing, but they were denied that by the courts. So that's where it stands. Now I want to let Courtenay speak, and then I actually want to close up the victim issue, if I may, with a hypothetical to Christine on this. But Courtenay?

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Interestingly, whereas Francois and I appear on the side of the good, [Laughter] I have to disagree with his point of view on the proposition that civil parties can properly have a role in the trial proceedings but not in the sentencing proceedings. In fact, I take quite the opposite view. I think they ought not only to have a role in the trial proceedings, but they should have a very central role in the sentencing phase of the trial. And I say that for this reason: the state is there to bring the charge and to represent the interests of society. And it's incumbent on them to frame an indictment, which reflects societal concerns. They then bear the responsibility of informing the defendant, through the indictment, the nature of the charge he has to meet. Civil parties don't frame an indictment to their concerns. So consequently, you have this tension, whereby, on a point of principle, the civil parties don't have to alert the defendant of the case they will be bringing on their part. So in a sense, they are this amorphous prosecution who can effectively come in and ambush the defendant after the prosecutor has discharged his or her functions. I think that is quite wrong. I think in the trial phase, the defendant should have a clear idea of the case he or she has to meet.

But I take a different view on sentencing. And in part, I take a different view on sentence because in the United Kingdom now we have a system whereby, following pronouncement of guilt, at the sentencing phase, a judge can invite, say the family of a murder victim to provide to the court what is called a victim impact statement, which sets out what the consequences were for their family for the death of their loved one. And I think it's perfectly legitimate at that stage for the sentencing tribunal to have an idea what the impact of the crime has been on the victim. I think that is perfectly legitimate. For me, as someone who sits part time as a judge in the United Kingdom, it would be very valuable for me to know, in order to fashion the appropriate sentence at that stage what impact this has had on the victim. So I think that part is perfectly legitimate. But in so far as an involvement in the trial is concerned, logically I cannot see how that can operate without causing unfairness to the defendant.

David Scheffer, Moderator
Northwestern University School of Law

And David, can you just interject? Hold on one minute. Aren't we talking a little bit about U.S. practice here, what Courtenay just explained?

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Yeah, sure. But it comes at the sentencing . . .

David Scheffer, Moderator
Northwestern University School of Law

At the sentencing phase, yeah.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Part of that's because the rules of evidence don't apply at the sentencing phase. So you can accept evidence that wouldn't have been clearly admissible in the guilt or innocence phase. Which you want to do. You want to encourage that.

David Scheffer, Moderator
Northwestern University School of Law

Francois?

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Sorry, I don't have a problem with the impact. What I don't want is that victim asks for sentence. For me, the victim cannot say one word to say, "You have to condemn him to life sentence."

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

I agree with that.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

But impact? Yes, that's the role of the victim to explain to the court what is my part, what is my infirm, what is my [in French]. Yes, yes, no problem. But at the beginning, when you ask to call the witness for impact, to say you need to condemn him to the life sentence. I cannot accept that.

David Scheffer, Moderator
Northwestern University School of Law

I know that Alain is in pain here. [Laughter] But it's Serge's turn here, then I got a hypothetical for Christine. And then Alain, if we have got a minute, okay? [Laughter]

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Very briefly. At the beginning in discussion with victims we were saying that the tribunals were not for victims' representation. We are pleased to say that one of the developments of the ICC is the degree of victim participation. Now having said that, I think that at the atrocity tribunals the victims are playing a central role, not just because we as prosecutors feel like we're trying to represent their interests, but also because many victims are coming as witnesses in court. So their story is told and they are also participating in the proceeding. So I would not say, in the ad hoc tribunals, that there is no role for the victims, or that there's a more important one, or there's only one with the ICC.

The second element, having worked at the ICC in the beginning, for the first two years, we had this question about: who are the victims? You know, when we were selecting cases in the DRC, I remember the approach we were taking was an investigation team of four persons. You go to a country, which is bigger than Belgium—Belgium's not so big, but still, sometimes we are bigger than France—so you are looking in the DRC at millions of victims. So you have to select a region to start. The situation is in the DRC, but you cannot be everywhere. So you collect information, analysis about where the major crimes have been committed. So the idea was, okay, it was in the Eritrea province where the highest number of crimes had been committed. We saw a number of groups, rebel groups, that were very active. So we were saying, I cannot prosecute 10 rebel groups, so let's choose two or three, so we picked two, which were somehow the most representative. And out of those two groups, you could limit yourself to a few incidents—you were responsible for a hundred incidents, so you went for two or three incidents. So the question was in the early days . . . I understand there has been a lot of way made since then—but we had this question in the early days, "Who are the victims that are allowed to participate in the proceedings? Are these the victims of the situation of the DRC, the victims of the Eritrea province, the victims of the ten rebel groups, the victims of the two groups, or only the victims of the individual incident selected." So there was this learning by doing phase, which was quite, quite important.

So for me, coming from Belgium, it's absolutely logical and normal to have the civil parties participating in the proceedings. It's absolutely normal. I would also agree that they have no role in the sentencing as such, but in helping get the truth and sometimes, I've seen it in the international system, too, I've been more impressed by the civil party lawyer than by the prosecution. I think we have to see it in the different views, the difference between the civil law and the common law approach. I know there is a discussion going on for many, many years. And we all know that the best system is somewhere in between. But where we are speaking about the role for victims and victims' lawyers, we could have the same discussion about what has to be the role of a judge. Where in our system, a judge knows the case in advance, he's preparing, and he's very actively leading the debates. Where in common law countries it's very different, where we have discussion at the Tribunal even today, whether it is better to have a judge who really is a virgin about the case before him and looks only to the facts presented, where as my natural tendency is to say, no, it's really better to have someone who knows the situation, who knows the historical situation, who knows the facts, and who can much better contextualize.

So there are a number of concepts, which are fundamentally different in approaching cases. Coming from my own background, when I saw the cases at the International Tribunals were taking four years, when I see how often the witnesses have to come back, the importance of oral statements compared to written statements. So it's really two different cultures of judicial proceedings coming together trying to find the best possible solution. And I think . . . when we are trying to hire somebody independent of the different cultures of judicial proceedings from which he is coming, I'm always saying, "You must be capable of making 50% space in your brain. You keep the rules you have learned, but please do not think of trying to avoid having this natural tendency to think that what you have done all your life is the only good solution, the best solution. Really try to open your mind and see perhaps the other system is not so bad and perhaps we can learn from both."

The ICC has addressed the solution by having elements from both systems, but we know of course there are too many problems to . . .

David Scheffer, Moderator
Northwestern University School of Law

Let me just say, I'm going to use my command authority here, superior responsibility. We don't have much time left here, so if you want to get a drink, do something to relax, you may do so. But I just don't think we have time for a break. Sorry about that. And that's true for our panel too. If you need to get up for a few minutes, feel free to do so. Because what I want to do is have a few minutes to show Judge Moi's—maybe five or ten minutes to do so

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Is there any coffee?

David Scheffer, Moderator
Northwestern University School of Law

Yes, is the coffee back there? Yes, Nico, there is. Nico . . . why don't we . . . Nico, could you . . . I think they all want coffee.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Could I have an ice cream? [Laughter]

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Black, no sugar.

David Scheffer, Moderator
Northwestern University School of Law

So if that could be done . . . I'm just trying to act as efficiently as you wish. David.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Well, let me add one dynamic when we're talking about victims. We talk about victims, as we did just now, as if they're a homogenous class, number one. Number two, we've forgotten the role that victims' associations play in all of this. What's happened in Bosnia-Herzegovina and Yugoslavia is that victims have become very well organized. They have become pressure points. I've dealt with victims and leaders of victims organizations, and the people from the . . . the women and mothers of Srebrenica that are better than any labor organizer you will ever have anything to do with. They are very sophisticated. And they marshal their position very effectively from a political point of view. It takes great skill, I think, and resistance in some ways to avoid being influenced too much by the victims' associations because I don't think they always represent the best interests of those who have actually been victimized. So don't forget that in situations post-conflict, you get people who are extremely good at manipulating that situation for their own reasons, for political reasons, for capturing the narrative, for example, and making sure that the story of the conflict is told in their way so that they can then further exploit that for their own political reasoning. That's a very difficult problem when it comes to civil party representation because you can't have a lawyer for every victim in the courtroom representing that particular victim's special interests. It's got to be done collectively or we'd go forever. Which leads, sometimes, to these associations being given much more impact, and much more influence, than they should have in the process.

David Scheffer, Moderator
Northwestern University School of Law

Now I've had a hypothetical in my mind for many minutes for Christine, and we need to bring Christine into this because the Rwanda Tribunal, of course, does not have civil party participation as part of its statute or rules. But like Serge says, of course you've had victims as witnesses consistently. I was just going to ask: what if you had the right of civil party participation in the Rwanda Tribunal? We're talking about a genocide of 800,000. And there would have been a lot of victims and victims' associations that would have been on deck with you. What would that have been . . . what's the "what if" of civil party participation in the Rwanda Tribunal?

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Somehow, I thought that was going to be the question. I think that certainly would have changed things if that had been the case. Of course, I take the point that Dave has made here in

the sense that it certainly complicates things on a political level. It's also what we heard from your other speakers that it of course can also complicate things on a practical level. And as a prosecutor it can be . . . well it's attractive to go into the courtroom and feel that you represent the victims. You have 800 people behind you, but you are calling the shots. You are the pilot. You don't have to deal with any of that other stuff. That is certainly an attractive notion that can facilitate the process.

However, I have been very intrigued with this debate and something struck me with what Alain said before is that it changes the dynamics of the courtroom. And we have been in the situation often, for instance when we did the Military I trial, we were not allowed to use the word "genocide" in the courtroom for the first two years. As a diplomatic compromise because they didn't want to agitate the defense because they took the position that it was a judicial decision to be made, the prosecutors cannot use it until the Chamber has found that there was genocide. Despite that fact that the Security Council had come out with numerous reports that there was genocide. Human Rights Watch had said that there was genocide. But that was a compromise that was struck in the courtroom and we felt that, "Okay, let's not challenge this." Of course then the Karemera judicial notice decision came out from the Appeals Chamber a couple years into the trial saying, yes of course, a court is free to take judicial notice of the fact that there was genocide. The question in the criminal trial is that of the accused's participation in that genocide. Then of course we use genocide all the time. I think, however, if we're going to look at this from a practical level, had we had victim participations, and this is just an example, had we had victim participation in the courtroom, certainly I don't think there would have been a compromise as to whether we would continue to use genocide or not, because even a criminal trial has to accord with reality on some level. And it was clear to the entire international community, and the participants in the courtroom, that there was genocide. We were just pretending that there wasn't.

So I think the dynamics for sure would have changed. I think also the [Inaudible] aspect would have been more prominent, and that is the issue of restoration. There is actually a provision for that in the ICTR statute, or is it in the rules, I can't recall. And that should tell you as a fact that I as a prosecutor don't know which provision we deal with because we haven't used it. And had there been victim participation on a different level—not just through us as the prosecutor, but if they had their own representation—I'm sure that issue would have been litigated. And I note of course what Serge is saying, the fact that the victim participates in the process. For instance, in the trials in which I've formed part of the prosecution team, many of the witnesses have been victims. But they come as witnesses. They have no representation. They are confined. They are put in a witness box. They're told to take an oath. Then they're totally at the mercy of the lawyers from the prosecution and the defense and the rulings of the court.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

And they don't get to say all they want.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

No, they don't get to say all they want. We limit in our preparation and say we're going to talk about this, this, this. I know that you lost your husband, your three babies. All of your family was killed. We don't have time to talk about that. We're going to talk about this, because this is what matters to us. And this is, you know, dealing with victims on that level on a day-to-day basis as a prosecutor—it's heartbreaking.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

The biggest complaint you get.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Yeah, totally. So yes, [Inaudible] that was a good question.

David Scheffer, Moderator
Northwestern University School of Law

Thank you, Christine. Goran, we'll take a final comment from you, then I want to ask the audience if they have a question or two and then I've been told the judge is a twelve-minute clip. If we start him at ten to four, then we'll finish at 4:02 and we'll have 28 minutes left. So, Goran.

Professor Göran Sluiter, Panelist
University of Amsterdam

Yes, two points. Still very briefly on victims and what their interests really are. To have those persons held accountable for crimes, having the victims on trial is already extremely significant. If we can do that as good as we can on a large scale, I think that would be extremely important. And then maybe later on we can see if we can experiment with further forms of participation, compensation. But suppose we would have all of those experiments once at the same time at the Yugoslav Tribunal, how would the Milosevic trial, how would the Karadzic trial look like? I think the Tribunal could have done far less with widespread victim participation, compensation. Another point, coming back to what Serge said about the procedure. There's a lot of inter-tribunal competition: who's the best, who's been the best in procedure. I'm still a very big fan of the ICTY as the golden oldie . . .

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Can you include us in that?

Professor Göran Sluiter, Panelist
University of Amsterdam

I'm sorry, the ICTR too. . . . very successful. And because they have made a pronounced choice: one system, the adversarial system. I think the experience we now see at the ICC and the Cambodian court is to invest in the pre-trial phase, make that stronger, with the view and the objective to have a better and smoother trial phase. But what I see now is to have two slow proceedings: a slow pre-trial proceeding and a slow trial proceeding. So you have not the best of both worlds, but the worst of both worlds. That is a risk when you start combining things, as the famous scholar Domascus said when combining elements of different proceedings. And I think . . . you cannot have a French system, because at trial, you need publicity, you need to have those witnesses at trial. If you go to France or the Netherlands, you cannot follow a trial. Dutch courtroom, you cannot follow a trial because you do not have the case file. So you need an adversarial system, you need a trial like in the U.S. So that's also very important. We need the U.S. on board with the ICC because the system at the ICC is now too dominated by the French speaking and the Spanish speaking.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Just a small point, maybe two, first regarding this hybrid system and not having an efficient proceeding at the pre-trial and the trial phase. I will disagree with you on that. I think what we are faced with or what the ICC is faced with is a document, a statute that blends the two systems, more or less, you know, and is being tried, or which is being tried for the first time. But I think that the Lubanga case, for example, is setting the pace. I think we are having difficulties, or we have had difficulties in the Lubanga case because maybe for most of it, we were doing it for the first time. But if you see, for example, what is happening now with the other cases, they are mostly taking the position that was already taken in the Lubanga case, and therefore making it more efficient than what we had in the Lubanga case. So I think it would take a case for example to be done at the ICC for other cases to either learn from that or say we are not going to do it this way. We have to go another way. So, yeah.

With respect to victim participation, And I think we've had this debate before. I know your position about victim participation. I feel that . . . with respect to, again, I'm going to call it the Lubanga case, if you see where we are today, with respect to victim participation, seeing the decisions that have been made by the Trial Chamber, by the Appeals Chamber, I think that we have really . . . I can almost say that we are out of the woods when it comes to victim participation at the ICC level. I feel that initially, and Serge has talked about the realities we have to grapple with, [Inaudible] participation, who is a victim, how do we address their concerns, when can they participate—all these things we have to grapple with. But we have done it. I think we have done it. We have done it in the Lubanga case. The appeal chamber has come in and set out all the modalities one needs to have for victims to participate at that level. It will have to take a case for us to go through it, to apply the law, to apply the rules, to apply the regulations, to be able to know where to go from here.

David Scheffer, Moderator
Northwestern University School of Law

Fatou, if I . . . well, Alain you wanted one minute, is that right? You do? Alright one and a half. Goran, why don't you respond, then Alain, then let's watch the judge.

Professor Göran Sluiter, Panelist
University of Amsterdam

Um, yes. Well I think we have a difference because you accept the statute as it is. I don't accept it as it is. I mean, we have heard the Ambassador speak like it's a wonderful document. I don't think it's a wonderful document. I think it needs improvement on many points. Maybe with the document you have maybe the best result you can get. But I don't think there . . . that's such a good document.

Now coming to your position on . . . well, let me . . . you go first.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Can I take 30 seconds for me? [Laughter] It's exactly the same . . . take it, take it, take it.

Professor Göran Sluiter, Panelist
University of Amsterdam

When you are finished, we will come back to me.

David Scheffer, Moderator
Northwestern University School of Law

Go ahead, Alain.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Just very quickly about what Secretary Brammertz said. I think it was absolutely indispensable of him to say because that is the thrust of everything between defense and commoner. . . I can tell you coming from the Charles Taylor trial, which is basically a fantastic fight between Courtenay Griffith and Brenda Hollis, and the judges are listening and counting the punches, of course there is no room for civil parties because it is a fight against ego, too, and the judges are just listening. And in Cambodia, that was my point that judges need to be in charge. Our argument is that it's not unequal, because the judges are in charge. So it's not a fight between two equal parties.

And just one more thing, Francois. Yes, there were a lot of other prosecutor beasts, if you will, but you were able to do something that you could not, or your clients were able to do something that you could not have done at common law, in the Charles Taylor trial and that is

Duch was talking all the time. Every time we had a witness, they were asking Duch before and after what he thought. Charles Taylor, I was one year in the courtroom prosecution. He didn't speak once! So, we could talk about the court inequality but in the civil system, Duch spoke all the time and my clients were coming to me after the hearing and saying, "Duch is winning his trial. He talks all the time!" And I was trying to tell them, well, it's not because he talks all the time that he is winning his trial. But that was the assumption.

And just finally, I will be finished. Just one thing on the fact that it's true to say in the ICTY and Special Prosecutor for the ICTR that yes, we call the victims to be witnesses, but that's the reason why I was tired of the five years in special court. Because . . . and that's why I went to the ICC to work with the victims because in Sierra Leone in the RUF case, double amputees who were on the streets of Freetown begging—and when you are a double amputee in Sierra Leone, the only thing you can do is send your kids to go and beg—we call them one day as witnesses, because it's crime based, we call them in the courtroom. Then the insiders, the number 5, the one you know very well, 5, 6, 7, 8 in the RUF, they are still with us. They are still in a protective program somewhere. We looked after them. We spent years with them and everything. So that's the difference. Yes, you have the victims you [Inaudible] crime based who are up one day and that's it. But the real one you care about the insiders. [Inaudible question from panel]

No, but what I am saying is that in a civil law system, the victims are not just the people you call one day to testify, but they are in court with them, following what is happening, so there is more at stake. That is what I am saying.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Please recognize that they exist.

Serge Brammertz
Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

You need them. The prosecution is also on behalf of the victim. The problem here is that the prosecution could not be on behalf of the victims. Of course the prosecution is at the ICTY, and also at the ICTR. The prosecution speaks on behalf of the victims. The victims are needed for evidence. If you could do more, that would be wonderful. As I always said, you would do more for maybe a very small number of victims and not for a large community. And would it be fair to distinguish between those victims, who have the luck that their crimes are . . . the last community? This is a matter of charity. This is charity . . .

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

But just because they can't do everything doesn't mean they shouldn't do something.

David Scheffer, Moderator

Northwestern University School of Law

Okay Courtenay, final, final word here. [Laughter] [Inaudible argument between Christine and Francois continues]

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

[Inaudible exclamation] The Charles Taylor trial is adversarial litigation at its most extreme. [Laughter] There has been very little room for agreement between the parties. And it is something which I regret. And I regret it for this reason: I've spent thirty years working in an adversarial system, but an adversarial system with a difference. Because, as a barrister in the United Kingdom, I'm a member of a very small profession. It is possible, on an informal basis, pre-trial, to resolve many issues and narrow down what the trial is actually about before you actually step into court. One of my regrets is that in the international arena, we have not yet developed the kind of collegial experience between prosecution and defense, which facilitates that informal mode of discussion, and that informal mode of resolving what this trial is actually about.

David Scheffer, Moderator
Northwestern University School of Law

And this is something that Francois raised in opposing arguments in Cambodia.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Exactly.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

We haven't established that and we need to. One of the consequences, just to give you a practical example from the Charles Taylor trial, and this is an issue which Alain will attest to, has caused a lot of acrimony between the prosecution and the defense. When I came on board in July of 2007, in my first appearance before the Tribunal, I said, "Look, the issue here is not whether the atrocities were committed in Sierra Leone. We accept that there were. The issue is what is Charles Taylor's connection to them. So consequently, we don't need to call any of the crime-based witnesses." And without even looking, I can see Alain smirking behind me. [Laughter]

But nonetheless. Nonetheless, the prosecution proceeded to call in excess of fifty crime-based witnesses. Now in the U.K., what would have happened is this: I would have sat down with the prosecution counsel, months . . . in the weeks or months before the trial, and I would have said to him, "What do you want from each of these witnesses?" And we would have come up with perhaps a fifty-page document of typed admissions, saying, for example, "Witness X had

his arm amputated in Freetown on the 7th of January, 1999.” And that would then go into court as an admitted fact between the parties. And there was a mechanism within the procedural rules of the court to allow us to do that. But it didn’t happen. And I think there ought to be some requirement, prior to any trial in the international tribunals, for the parties to get together informally, before the trial starts, and flesh out what the real issues are. And if those issues cannot be resolved in an informal way, then they should involve the judge or judges so they can direct, as far as this area of evidence is concerned, I suggest it should be admitted under Rule 92 or whatever applicable rule is available.

But I think the fundamental problem with this is that I don’t think we have developed that level of trust between the prosecution and defense in the international tribunal, which allows us to resolve these kind of issues. And I think it is imperative that we go about establishing that kind of collegial atmosphere, because it would lead to much greater efficiency in these courts.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

You do have it at the ICC.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Informal discussions?

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Well . . . okay, apart for the statement of agreed facts, in the Lubanga case for instance, Judge Futo, the Judge, the Judges, encouraged the defense and the witness and the prosecution to sit and talk about certain issues.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

[Inaudible] who come from the same countries.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Yes. Now you see this . . . this effort . . .

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

What I am talking about, what I am talking about, I am the [Inaudible] at a murder trial. The prosecution will come to me with a fifty-page statement from a witness and say, “With what

part of this statement do you take issue? Can I lean on the rest of this?” So I say, “Of course, you can lean on all of this. But when it comes to the issue of identification, do not lean. Alright?” And that way, we can get through it really quickly.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

But if your client instructs you not to do that?

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Well, most of the time, if your client, like Mr. Taylor, is sensible, you can get his agreement.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor’s Office of Bosnia and Herzegovina

As long as you’ve got prosecution . . . as long as you’ve got defense counsel that don’t share the same nationalist issues as the clients that they defend. Because what often happens in the domestic side in Bosnia is that you get defense counsel who share some of the same political ideologies as the person they’re defending. And they will not budge on anything reasonable when it comes to agreeing on anything. So you fight on every issue. And fight on issues that aren’t even issues.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

But I do think our judges in the Special Court could have taken a much more proactive role in determining what the issues are.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor’s Office of Bosnia and Herzegovina

In fact, that’s the key, Courtenay, is the judge taking control and forcing it. So that after a few times, that becomes organic and you start doing it because you know you’re going to have to.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

I totally agree there.

David Scheffer, Moderator
Northwestern University School of Law

Okay, Alain, Serge, judge.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Poor judge! [Laughter]

David Scheffer, Moderator
Northwestern University School of Law

Poor judge. Okay.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

[laughing] He is not taking control.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

I think something, which is interesting, I am Swiss, so everything is in Swiss, which is my first language. But I have discovered, throughout the years, that maybe, Courtenay Griffith, things would have been different if, on the other side, they would have been from London. Quite frankly, I have even seen in one office some cultural differences even among people who speak English. But our prosecutor Stephen Rapp, had a very American way of . . . I think that, well, I have seen sometimes in my office that maybe, I don't know maybe, working throughout the years, maybe this thing moving forward, maybe it will be easier. I don't know.

David Scheffer, Moderator
Northwestern University School of Law

Serge?

Serge Brammertz
Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Two things, very briefly. First, I was also quite surprised when I entered the international arena how the interaction was taking place between the different parties. Where, from a national level, I am quite used to being extremely collegial with judges, with defense lawyers, or with other professionals, I was quite surprised that, very often, the way people acted in court was much more aggressive. When I am speaking with American colleagues, especially in an

American office, they say, you know for an American system, it's much more natural, because it's about winning and losing and about fighting. So it's, it's . . . without being unprofessional, people are somehow used to being more aggressive, which was always very surprising to me, because as a civil prosecutor, we always consider ourselves as being the first judge of a case, willing only to look at a case from both sides, and willing only to move forward if you are really convinced that you have a strong case, and accepting whatever outcome as the judicial truth—the conviction and the acquittal being judicial outcome—without considering winning and losing. So I agree with you; we need a better culture at the international level.

But you mentioned something relating to agreeing somehow on the facts. What we are doing now with so-called adjudicated facts, if we have another Srebrenica trial, to see what facts we can use, what we can agree on. But there, we have not yet touched this issue. But somehow, it's what role do we have to play as a prosecutor or judges or defense counsel at the international level compared to the national level. Where at the national level, for example, you have a criminal gang responsible for, say, fifty crimes. You can quite easily take in your indictment five percent of the crimes committed. You can agree on a number of the facts because expectations by the public opinion are not really to have a long trial. And as a prosecutor, when you get a conviction, it's very, very important. So you move forward.

At the international level, I think there is part of the international justice process that is to have this trial and to show what happened in public. So having agreement on all facts and having no crime-based witnesses in the courtroom, I don't think it represents really the role I see international justice to be performing. So we have on the one hand . . . and it's a very tricky issue because we all have to read our indictments. And at the international level where we have to have this compromise of representing the magnitude of crimes committed and on the other hand, having a manageable trial where you . . . it's very frustrating by the way because you are taking out many potent crimes which, at the national level, would have the highest priority to the prosecution. At the same time, if you already reduce the scope of your case, you have to, to a certain extent, present crime-based witnesses in court to really tell the story of what happened without going too far and without exaggerating, of course. But it's a difficult issue.

David Scheffer, Moderator
Northwestern University School of Law

Okay. Did I miss someone here? Yes.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Just one thing to explain the prosecutor's role. My office in Estelle is trying to make some training for the lawyers. And also, to follow the efficiency of their work. Absolutely not. Absolutely not. Just to say that. Because one of the progress of Estelle is because we learn by . . .

David Scheffer, Moderator
Northwestern University School of Law

I think that's an absolutely critical point, if you didn't catch it in the back there, that Francois is actually in a unique position now to kind of test run some of these ideas of how do you find some degree of consultation between defense counsel and prosecutor prior to the trial. Goran, why don't you speak, then Caroline can run the judge here.

Professor Göran Sluiter, Panelist
University of Amsterdam

I will not be long. It would not be polite to have the judge wait.

David Scheffer, Moderator
Northwestern University School of Law

Yeah.

Professor Göran Sluiter, Panelist
University of Amsterdam

But my memory has come back with respect to what my neighbor has said. And also it's getting a little bit better with the jet lag now. But the efficiency of the ICC, this will be a big issue for the review conference. I know that many states are disappointed in the output. There has . . . not a single trial has been finished. And there is almost—more than—eight years established.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

When did they start the trial?

Professor Göran Sluiter, Panelist
University of Amsterdam

Too late?

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

When did you have a body before the ICC?

Professor Göran Sluiter, Panelist
University of Amsterdam

I will explain why they started too late. [Laughter] Because the confirmation hearing that we have, which was supposed to save time, is the monster. It takes very long. It produces hundreds of pages with detailed treatment of German criminal law and to basically say that it

doesn't really bind the trial chamber. So we have to do everything all over again. Whereas at the ICTY, we have the confirmation of the indictment, which is a very large and short proceeding, which is twelve pages and then we can start immediately. So, I think there are many things that can be improved, especially in this confirmation hearing. This has to be much shorter.

David Scheffer, Moderator

Northwestern University School of Law

Okay. Caroline, do you know how to get it started? Now I will use my authority again, if this does not grab our attention after a few minutes, we will change the channel, okay? We have paid much attention to at all, except occasionally, the Special Tribunal for Lebanon. And I want to deal with this because it's such a uniquely crafted institution. And it is so politically, well, it has great challenges politically. And I wanted to see if I could elicit at least one comment from Serge, because you had your experience previously with the Lebanon investigations. Is there anything you could say about . . . are we on the right track with having a special tribunal for Lebanon, and trying to move forward as I know the prosecutor now is. I understand I think he is in Lebanon at this time and trying to move the process forward. In 2009, we did have four Lebanese generals released from custody, who had been held under suspicion, but who were released from Lebanese custody. We don't have any indictments out yet. You were there at the beginning of all the investigations. Now you've moved on. Is there anything you can reflect upon and say, "Yep, this is where we should be with this Tribunal." Or is there any alternative manner in which this should be evolving?

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

This is quite difficult for me to answer, as you can imagine. By the way, for the time being the President and Vice-President are in Lebanon meeting with the responsible.

David Scheffer, Moderator

Northwestern University School of Law

And is the prosecutor down there too?

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Yes, yes. The prosecutor was there some time ago. But anyway, there are people there on a regular basis.

David Scheffer, Moderator

Northwestern University School of Law

Yeah.

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

So I have not followed for more than two years the investigation and the establishment of the Tribunal, so I am really not an expert to give an opinion on it. What I can say is that it was obvious in the international community that when the decision to establish the Tribunal was taken, the investigation was still ongoing. I don't think that one can blame the Tribunal today for the fact that there is no trial yet because the investigation is still ongoing. When the other tribunals were created, although sometimes helping the international investigation commissions, they had to start the investigation again, or certain parts of the investigation. So it was clearly a political decision, a logical decision, to move on and to create this Tribunal. I have of course followed the investigation and the release of the four generals, which was not a surprising outcome for me since I know what elements were in the file in relation to their alleged responsibility and what was the evolution of the investigation in relation, in relation to those facts. But to say where the investigation is today, what is the timeline for the indictments, and whether this can be considered normal or not, it's quite difficult for me. We all know that justice, that international justice for sure is not an exact science so it's totally impossible to predict this. I am aware of the fact that there is not a lot of communication on the issue. For the two years I was there, I was also extremely careful in what to communicate and what not to communicate. One of the very challenging issues was that you are in the middle of a very sensitive, confidential investigation in Lebanon. The time I was working there, several Lebanese and other officials we were working with were killed by roadside bombs during the time we were conducting the investigation. At the same time, every three months, we were to present a report to the Security Council about the evaluation of the proceedings, which was somehow a contradiction itself to have a confidential investigation in a very volatile security environment about extremely sensitive potential targets. And at the same time, you had to report publically about it. So it was a very difficult phase. I also understand that the prosecutors were very careful about communication. The only thing I can say is that we have to wait, wait and see. And the best we have is the representatives of the OTP.

David Scheffer, Moderator
Northwestern University School of Law

Well Francois is obviously head of the defense office and you're diving into this now. Are you optimistic about the course of work for the Tribunal over the next year?

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

I am always. If not, we cannot, we cannot work in international criminal justice if we are not optimistic. As I myself said, the prosecutor is very discrete, prudent . . .

David Scheffer, Moderator
Northwestern University School of Law

I'm sorry . . .

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

The prosecutor is very discrete, discrete

David Scheffer, Moderator
Northwestern University School of Law

Discrete. I'm sorry.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

. . . discrete about the investigation. But when he went in Lebanon I think two months ago, he said publically to the victims that he was optimistic. I am not afraid . . . you know, I was involved in the Moussaoui case in the United States and we wait five years, five years of investigations.

David Scheffer, Moderator
Northwestern University School of Law

The Moussaoui case, yeah.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

So, it's not a walk . . . it's not a public crime. The networks, I can imagine the networks are very difficult. So I am not afraid. Things in particular are very serious work. And I like that. I like to have in front of me a very competent and serious prosecutor. What I say at this time, what I know as a prosecutor is working, not only on the investigation, but also on the legal topics. Which is a possibility, which forms the [Inaudible]: what is a terrorist? What is the definition of a terrorist attack? And what I request is to have now the same thing that he has. So the just. If he can focus on that, to support not only the idea of an official defense, but that we can have a really balanced trial with the means of the prosecutor. You can just say that there are seventy investigators. Seventy. And there are thirty people who work on legal issues now. Thirty people. For the same work, we are six. So actually, my own concern is whether I am happy because it is very, very good progress to build the defense office. But now it is to give to this defense office the means that the prosecutor has, if we want to have balance.

David Scheffer, Moderator
Northwestern University School of Law

And you're referring to, particularly to our law students, the issue of equality of arms for the defense counsel.

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Yeah. What I can say about that after one year, I was named that one year ago. We went many times into Lebanon. My office works very well with your bars, Beirut Bar and Tripoli Bar. We make very good training for lawyers in Lebanon. And also, we start building the list of the counsel, because now, to be counsel in this Tribunal, you need to be interviewed by the panel with three lawyers. And I am one of them. And we interview the competence and skills of the lawyers before we move forward. And that, as I said, we can control the efficiency of the work and we also have a duty to continue the training for the other areas.

David Scheffer, Moderator
Northwestern University School of Law

Very good. Thank you. Fatou, then I want to ask the audience for some questions. Yes.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Actually, it's just a short question. I will just ask the question. Do you see equality of arms as having the same number of people in this office and also in your office or to be provided with people who can actually . . . with resources, if I can put it that way, who can efficiently carry out your work?

Head of Defence Office, François Roux, Panelist
Special Tribunal for Lebanon
Formerly, Extraordinary Chambers in the Courts of Cambodia

Now clearly you are right. I don't want to have exactly the same, no. Just what I ask is to make my work normative. Actually, really, we are not enough. I cannot, for instance, I cannot actually recruit Lebanese lawyers for my office. It's not normal. It's not normal, no. So just I don't want to exactly balance the number, but I would like . . . we would be a strong office in front of the prosecutor. Can you imagine seventeen investigators? I cannot provide my [Inaudible] with seventeen investigators. So, it's quite difficult.

David Scheffer, Moderator
Northwestern University School of Law

Okay, we had Courtenay, yes.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

You appreciate that the Special Court for Sierra Leone sub-office in the Hague is now relocated to your building. [Francois laughs] So no doubt we'll be bumping into each other on a regular basis. But a point I want to make on equality of arms, David, is this: I was quite shocked when I arrived in the international tribunals at the disparity of resources between the prosecution and the defense. I accept that given the much greater role that the prosecution has to play within a criminal trial that you're not talking about exact equality of resources. That's not realistic. But the fact is, for a case the size of Charles Taylor, the initial legal team consisted of two lawyers and a couple of legal assistants, which was totally inadequate. And it left me with the abiding impression that many of these tribunals are established to convict. And consequently, there doesn't appear to be . . . I'm glad I've provoked some interest [Laughter] this late in the afternoon. I see everyone coming to life.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Coming at you.

David Scheffer, Moderator
Northwestern University School of Law

No jet lag anymore.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

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

David Scheffer, Moderator
Northwestern University School of Law

He is referring to a dispute that arose in the Special Court for Sierra Leone as to whether the defense was being properly resourced. That I think occurred about a year and a half ago or so. Um, Christine?

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Yes. Just a brief comment that I think requires some balance. [Courtenay laughs] And obviously, the prosecution bears the burden of proving the case beyond a reasonable doubt, but it's not particularly controversial in that context to require the prosecution to have more access to investigative resources pre-trial. I think we all can accept that, I think if you look to the ICTR as an example, at least at the time I practiced in that jurisdiction, and certainly in the Military I trial, there were a lot of prosecutorial resources before the trial started. Once we went to trial, we had very well equipped defense counsel. Each of the four accused had two counsel, two defense investigators, two legal assistants, and a couple of interns. So as a core team of prosecutors, we had additional resources from time to time. Fatou was one of them. But particular there were four people that were part of it from beginning to end. And it's pretty daunting in a courtroom where you stand up and face four accused on the other side, all of whom are very well represented and are being very loud and vocal in the courtroom as well. So in terms of appearances, clearly in that situation, in that multi-issue trial, that there was any level of inequality of arms. So it's an often-voiced complaint on the part of the defense, but, you know, I'm getting a little tired of it. [Laughter]

David Scheffer, Moderator
Northwestern University School of Law

The War Crimes Chamber has a Defense Office. Did they seek to achieve equality of arms, or what happened?

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

On the local end, a lot of people in the major cases were people that had defended in the Hague at the ICTY and have come back to Sarajevo or [Inaudible], so they're quite confident. But the level of confidence in Bosnia-Herzegovina is not especially good. It's getting better, but it's not especially good. I will say that one of the other prosecutors—you know, prosecutors sort of band together—but I think part of the way that you enforce equality of arms is you get the Court to properly enforce discovery issues so that the prosecution, who is developing evidence, should be delivering over that material which it's bound to deliver over, saving the defense some considerable time in investigation. So, but that's not a very popular opinion as far as this Court is concerned.

David Scheffer, Moderator
Northwestern University School of Law

Okay, thank you David. I've been terrible at looking . . . there are so many questions. The audience must have some questions. Yes, Steve Sawyer.

(End of sixth tape)

David Scheffer, Moderator
Northwestern University School of Law

Fatou? I think it's your corner.

Deputy Chief Prosecutor, David Schwendiman, Panelist
Formerly, Special Department for War Crimes in the Prosecutor's Office of Bosnia and Herzegovina

Yeah Fatou, it's all yours. [Laughter] I think it's time for a coffee break for the rest . . .
[Laughter]

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Well, as you may rightly know, in January 2009, the Palestinian government made a declaration under Article 13 accepting the jurisdiction of the ICC. And since then, we have had a series of meetings, including a small committee that has been put up, consisting of some members of the Arab League, as well as some NGOs who have met with both the prosecutor and myself. We had a meeting—a two, three day meeting—you know, and they came to present their case as to why the ICC should intervene and take the case. Obviously, as you appreciate, there are a lot of issues that have to be considered. At the moment, that's what we are doing. The Palestinians themselves are putting up a strong case in which they are not even going in the direction whether Palestine is a state or not a state and all those legal issues, which if you look at Article 13, it says when the state accepts the jurisdiction of the ICC, the ICC can intervene. So even without saying that, they are saying that naturally they have a criminal jurisdiction themselves, which they are able to try if, you know, the crimes are committed on their territory they can try, or at least investigate some of those concerns when it involves Israel's citizens and at some point in time, they will transfer it to Israel or try it themselves.

And they are saying that as long as they have that criminal jurisdiction, they are able to transfer that jurisdiction to the ICC for the ICC to be able to act. This is one of the strong arguments that they are making. What we are doing now is as I said, of course, I think for any intervention to take place, in the context of the Palestinian/Gaza situation, it has to be based on very solid legal footing. We are not rushing. We are considering it carefully. We are not ruling out that we will not take the case. Of course that is not a consideration. We are just assuring that all the legal basis under the Rome Statute are fully satisfied if ICC is to take that case. So that is where we are.

David Scheffer, Moderator
Northwestern University School of Law

Okay, one more question and then I'm afraid I've got to get these folks downtown. Yes sir, from Notre Dame. [Inaudible question] Can I, can I, is there a short question at this point? I just . . . we have to move along. [Inaudible response] Okay, can we get to the question, because we just don't have the time. [Inaudible from audience member] Let me ask, Christine, what's your sense on the ground in Kigali? Actually, you're in Arusha, I know, but you must be back and forth all the time.

Senior Appeals Counsel Christine Graham, Panelist
International Criminal Tribunal for Rwanda

Yes. I think this is a very difficult question, one question that every criminal justice system struggles with in terms of what is the impact of criminal trials when it comes to deterrence. The whole idea of course is to fight impunity and the idea that you can commit crimes and you will not be answerable to them. One, it is better off in the sense that there is no genocide going on right now. That is a good thing. However, that had stopped already before the Tribunal came into place because RPF took over the country. So, I don't want to sound too cynical when it comes to these issues . . . this issue. I think it's very difficult to measure to what extent we have impact, to what extent we have improved deterrence. I don't think that should be the focus of what we do. Whether the deterrence hasn't . . . whether we haven't deterred that many crimes or not, I mean, political leaders still tend to commit violations against their own population. We still had to do something. Because, even though there was no impact, are we just going to sit with our hands folded and say, well, it doesn't matter what we are going to do, so let us just do nothing. I don't think that's the solution either. I don't have a good answer for you. I can't see that we can measure it in any way. I still see that there are enough arguments to continue doing what we're doing.

David Scheffer, Moderator
Northwestern University School of Law

Okay. Alain, you wanted to answer that, and then Courtenay.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Just very quickly. And to come back to one argument that was made this afternoon by Professor Sluiter about the Special Court. Millions and millions of dollars were spent, while Sierra Leone is very poor. We could have built schools then, which is legitimate. I was there for four years . . .

David Scheffer, Moderator
Northwestern University School of Law

I think it was Courtenay who made that comment. Yeah.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

Oh, sorry. But just one point about that. I think for Western Africa, impunity is such a disease and the prosecution we've been doing in Western Africa with the Special Court where the first one—and Fatou is coming from that part of the world—the first one ever in Western

Africa and I remember the three years I was there, before Charles Taylor was finally arrested, everyone was telling me in Freetown, “You will never get Charles Taylor because he’s such a big man.” And there was this big idea that if you are big, not small, but if you are big, you will never, never be arrested. And when we got Charles Taylor for the months he was in Freetown, everyone was telling me, “ Well, he will get out, we are sure. He will get out.”

There was such this idea. To change ...

Professor Göran Sluiter, Panelist
University of Amsterdam

Still presumed innocent, I mean.

Senior Counsel for International Justice Program of Aegis Trust, Alain Werner, Panelist
Special Court for Sierra Leone
Extraordinary Chambers in the Courts of Cambodia

No, no. He will get out of jail, somehow, he made his way out. So just to say I think that that has been changing with the prosecution in Sierra Leone. And I think that that, from my view, is fundamental.

David Scheffer, Moderator
Northwestern University School of Law

Alright Courtenay, you may have, more or less, the last word.

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

Very well. I totally agree with your sentiments. Don’t mistake the position that I suggested this morning in any way that I am advocating impunity for African dictators or despots. Not at all. I am well aware of the history that runs from Mikasa to Mbutu to Amin. I know that history. And I would like to see those people put on trial. So my point is not that African leaders should be above the law. That’s not my point at all. My point is that for this idea of international criminal justice to have any global reach in this age of globalization, it has to have equality before the law as its core. It has to be seen as applying equally to everybody, whether you be American, European, African, Asian, whatever. That is the point I am making. That’s why I posed it in terms of a credibility gap. I am not suggesting they should not be put on trial. I am suggesting that it is important for people like Fatou to ensure that the message has got across that we’re at a starting point here, that it’s a process of evolution. And we should be using this as a building block. We are merely at the point of laying a foundation. And we’ve still got a ways to go to establish this as a universal principle. That’s my position.

Now, in terms of the impact of the Special Court for Sierra Leone on West Africa. On one hand, I can understand Alain’s position. It will come as no surprise to you that, like so many issues today, I am going to differ from him. Because my abiding image on arrival at the Special

Court for Sierra Leone in Freetown is to see a fortress. It's surrounded by a high wall topped with barbed wire, with [Inaudible] posted on each corner, reminiscent of a prisoner of war camp. These are manned by Mongolian soldiers, armed to the teeth. Once one gets through the security gate, there is a tank waiting at the bottom of the hill, which once a week the Mongolian soldiers start up. And there's this great roar with the cannon out front, as this tank is driven up the hill and back down again, as if the people of Sierra Leone are going to storm this bastion of international criminal law and free the prisoners. So what we have in reality is this oasis in the middle of Sierra Leone, the only place in the whole capital where there is continuous electricity, running water, toilets that flush, broadband, amidst this sea of deprivation and poverty. And remember: this is a court set up by treaty between the United Nations and the Sierra Leonean government. And one of the terms of that treaty was that Sierra Leonean law would play some part in the proceedings. It never has done so, and never will.

And so consequently, I am very skeptical about the claim of the legacy of this court. There should have been a much greater involvement of the local community in the whole process. There shouldn't have been this separation, this physical separation between the court and the people. There should have been much greater trust, much greater sharing, much greater interaction if this supposed legacy was supposedly left behind. That is my feeling.

David Scheffer, Moderator
Northwestern University School of Law

Any other closing words?

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

I just wanted to say something on the point that you raised. Okay, ICC is not the first international court that has tried someone for using child soldiers. I think it was the Special Court of Sierra Leone. But we are the court that has brought a trial solely based on these charges without adding any others. We are the first.

Okay, I . . . as Christine said, it is difficult to measure the impact this has had on the ground. But, I can see a few positive things that has happened since then. And one of them was the conference that was held in France. You know, it generated a lot of discussion at the international level about the child soldier. Also recently, you see that I think it was in Naples, they have released over 3,000 child soldiers, just last month, I think. The SRSC for Children in Armed Conflict was talking about it. And also, even in the Congo—I'm not saying that the practice has been eradicated completely—but I think they are much more aware of the practice and there have been attempts to rehabilitate some of the child soldiers and get them to integrate back into their communities. So perhaps it's not a big impact. But perhaps I think it has had some impact on local communities and even on an international level. Because what we see also is many armies came back to the ICC and looked at the statute to see how they could use it to sensitize their own armies or even to amend their laws to make sure that they do not commit this kind of crime. So what big measure? I don't know, but I think it has had some impact.

David Scheffer, Moderator
Northwestern University School of Law

Thank you very much. I think we do have to bring it to a close because we do have an evening event at the Chicago Club that starts at six o'clock, although we're supposed to be there drinking at five-thirty. [Laughter] And saying hello to the Chicago community that will be there to see us. So I have to move them on and I hope some of you are coming downtown as well to the Chicago Club, which is at Michigan and East Van Buren, for that event. I want to thank our guests. You have worked very hard today. You are entitled to all drinks and meals tonight and a very relaxing evening and a late night, you know. Really, sleep all day tomorrow if you need to. But really, I want to thank everyone at Northwestern who has helped us. All of the students who have worked both substantively and logistically on this conference. I am indebted to you somehow. I don't quite know what I will do about that, but I am extremely grateful, very grateful. And thanks to our team that filmed it. Thanks to Caroline for the video portion of this. And to Brenda Givens—this couldn't have happened without her. And our final thanks has to go—I hope he's around—to Nico Martinez, there he is right there. This is the guy who made it happen right there. [Applause] And I am very thankful for my colleagues like Bridget Arimond and Steven Sawyer and others who were here today, Bernadine Dohrn, and Sandra Babcock. Alright, we will bring this to a close now and we will continue talking with some more correspondence at the Chicago Club at six o'clock. Thanks a lot. [Applause]

(End of seventh tape)

CHICAGO CLUB PROGRAM

Leah King
Director of Leadership and Programs at the Chicago Council

Thank you. My name is Leah King. I am director of leadership and programs here at the Council. Just wanted to bring a couple upcoming programs to your attention. On Monday, on February 8th, we have an excellent discussion on our global nuclear future. It's co-sponsored with the American Academy of Arts and Sciences. And we have some fascinating people coming in for that. They'll examine the linkage between nuclear power and nuclear weapons. On February 17th, for those of you interested in law, we have Professor Robert Mnookin coming in from Harvard to discuss negotiating, how to negotiate with an adverse adversary and when to refuse. And we have just one announcement. Anyone who is planning on coming to the Princess Rema program, on Saudi Arabia, that program has been changed to April. The Robert Blake program has also been changed. So I would encourage you to look at your emails that came from the Council today because unfortunately, we had a very dynamic 24 hours of programs changing. And on behalf of the Council, I'd like to thank everyone for coming here this evening. I'd like to thank our co-sponsors: the John D. and Catherine T. MacArthur Foundation, the Center for International Human Rights at Northwestern University School of Law, and the Medill School of Journalism National Security Initiative at Northwestern University. Now I'm going to turn the

microphone over to Ambassador David Scheffer who will run tonight's panel. Please join me in welcoming him. Thanks. [Applause]

David Scheffer, Moderator
Northwestern University School of Law

Thank you. Well thank you, Neve. This is a great pleasure to be here and welcome to all of you. I'm David Scheffer. I'm professor at Northwestern University School of Law and Director of the Center for International Human Rights there. We've just completed, during daylight hours, a conference at the law school with three of the panelists here, to my immediate left, who are jurists, as well as many who are sitting in the audience now and joining us on basically what has happened in the year 2009 in the jurisprudence of the war crimes tribunals. So they're coming off of that long discussion and now we're going to open it up to a side of atrocity crimes, frankly, the public sees more of, which is what do journalists bring to the table. What do they report on and report to us about? And how does what the public sees from the work product of journalists, how does that have an impact on what prosecutors and defense counsel and others who are within the bowels of these war crimes tribunals and trying to actually pursue cases, what kind of impact does that have on their work? It's a fascinating interchange of interests. There's been litigation about it that concerns freedom of expression of journalists, protection of sources, etc. So we're going to get into as much of that as we can tonight.

My duty to begin with is certainly to introduce our distinguished panelists. To my immediate left is Fatou Bensouda. And she is the deputy prosecutor for the International Criminal Court, which sits in the Hague. And before joining the ICC, she worked as a legal advisor and trial attorney for the International Criminal Tribunal for Rwanda in Arusha. And prior to that, she had a very distinguished career in the halls of justice of her native country, Gambia. To her left is Serge Brammertz, who is the prosecutor for the International Criminal Tribunal for the former Yugoslavia. And before that, he was the chief investigator for the investigation into the assassination of former Lebanese Prime Minister Hariri, which was sort of the predicate for the establishment of the Special Tribunal for Lebanon, which now exists. And prior to taking that position, he was actually Fatou's predecessor at the International Criminal Court as deputy prosecutor. And prior to that, a long and distinguished career in the courts of Belgium. And to his left, Courtenay Griffiths. He is the lead defense counsel for the former Prime Minister of Libya, Charles Taylor in the trial that is now ongoing before the Special Court for Sierra Leone of Charles Taylor in connection with the atrocities that occurred in Sierra Leone in the 1990's. He also has worked on defense cases with respect to the International Criminal Court and other criminal tribunals. And he has a very distinguished career in the Major Crown Courts in England. He hails from Jamaica, but is a British citizen and a Q.C. barrister and one of the best there is in Britain.

To his left, we now turn to the journalism side of our event tonight. And Roy Gutman is the foreign editor at McClatchy Newspapers based in Washington. He was previously a correspondent for Newsday. I think that's when I first met you, Roy. And is a director of the Crimes of War project, which works with the Medill National Security Initiative at Northwestern University. He won the Pulitzer Prize for his coverage of the 1993 war in Bosnia-Herzegovina and his book, *A Witness to Genocide*. And he has recently written a book about Afghanistan, *The*

Story we Missed, I think, or something generally of that title. You can correct me. But it was the story that journalists missed in Afghanistan after 9/11. To his left is Christine Spolar, who is a senior editor at the Huffington Post investigative fund. She's worked at the Chicago Tribune, CBS, 60 Minutes 2, the Miami Herald, and the Washington Post, where she served on the investigative team and served as a correspondent in Los Angeles and a foreign correspondent in Warsaw. But she also . . . I mean, just her experience in the field where atrocities have occurred is remarkable and similar, really, to Roy's in terms of being at Srebrenica right afterwards, and working in Serbia, and with respect to some of the trials taking place in the Hague. So Christine has really been in the field, very directly exposed, and of course reporting on all of this. And immediately to her left is actually my colleague for the evening, Tim McNulty who formerly had a long distinguished career with the Chicago Tribune and is now a lecturer at the Medill School at Northwestern University and heads up the Medill National Security Journalism initiative and Tim is going to be pitching a lot of the questions to our panelist tonight before we open it up to the audience. Tim, do you have anything in particular you'd like to begin with?

Tim McNulty, Moderator

Co-director, National Security Journalism Initiative at Northwestern's Medill School of Journalism

Since Roy just came back from Afghanistan, we thought perhaps he could give us a suggestion of the story that he is writing or have written or intend to write.

Roy Gutman

Journalist, McClatchy Newspapers

Ah, yes. Thanks to you and to David. And I have to congratulate you, David, for putting this conference together that already occurred, because it's got . . . it had such amazing participation of prosecutors and people connected with tribunals that, you know, twenty years ago you couldn't have held a conference. Even ten years ago, you might have had a hard time. And it really shows how far the practice of criminal law has come. And this is really making sure that states observe the laws of war as have been handed down over generations and were certainly codified in the Geneva Conventions. Being a journalist, I sort of see my professional obligation as asking the question no one was expecting to ask and to try to raise the issue that seems to be is paramount and maybe is the one that didn't come up in the conference today.

I spent the last month in Afghanistan, but I've written a lot of stories about it previously. And it seems to me that of all the places that have international tribunals, the most important example of impunity, that is to say people who have committed crimes, massive crimes, atrocities that are not being punished—the biggest example of that is Afghanistan. There is no tribunal for Afghanistan. There is actually no process under way right now. I spoke with the head of the human rights commission there and was shocked to hear that she has to duck the issue in public. She's very worried about her own safety. The government is not pursuing war crimes issues. And the U.S. government is not pushing for some kind of judicial process that will deal with them.

And I just . . . for those that do not know the history, Afghanistan is a place where in just one particular location, just outside Mazar-i-Sharif in the north, you can go to a place where there are mass graves. And there might be three or four layers of mass graves that actually occurred, were created there. [In] 1997, when the Taliban was trying to capture the north and they got trapped by local population and one war lord, if you want, captured all the Taliban and loaded them in to big container trucks, took them out to this place called Dasht-i-Leili and buried them. Many were shot there. Many suffocated in the trucks. [In] 1998, the Taliban recapture Mazar-i-Sharif, or captured it, rather, and ordered the extermination, the killing, of non-Pashtus in Hazar, maybe several thousand. No one knows exactly how many. In 19 . . . in the year 2001, Mazar-i-Sharif and Serburgone and Dasht-i-Leili specific burial grounds came to light again. General Dostum, who by the way was recently promoted to become head of the Army, organized the . . . after the U.S. alliance helped capture thousands of Taliban in Kunduz, they were loaded into container trucks and General Dostum saw to it that they were either suffocated or killed. They too were buried in mass graves. And finally in 19 . . . in 2008, we did a story in McClatchy, and later the New York Times did one as well, that General Dostum had ordered the exhumation of the people that he had buried just seven years earlier. And we don't even know where the remains were moved to, but we do know that the mass graves are no longer there.

And so you have to ask yourself the question: why does this matter? And maybe in some sense this helps introduce the panel today. Well, it's interesting. Because we don't really know what happened with any of those mass killings and mass burials, we don't know how many, we don't know their names, we don't know their hometowns of origin, and all of the family who lost people there don't quite know what happened to their conscripted soldiers or anything that happened that led to the dragnet of these mass murders. There's no record on the history of what happened or what the sequence was or who did what to whom exactly. And this is not without relevance. In fact, what the panel of jurists are doing in their separate tribunals is really trying to recreate the history, really establish the truth of what happened in each of the different places that they're focusing on so that there is a common history, so that history does not have to be redone, relived. And I'll quote from a former Taliban official I met in Kabul, named Vahid Musdah, because I asked him what is the significance of the burial of all these Taliban, for example, at Dasht-i-Leili. And he said, "That massacre, that massacre is the foundation for all the fighting that is now going on. So that's not a minor consequence. Then I talked to a top official in the International Security Force and I asked him if he agreed with the judgment from that former Taliban official. And he said, "As a matter of fact, that mass burial at Dasht-i-Leili was used by the Taliban, and is being used today, to recruit new fighters." He said the government in Afghanistan has to do something about it. And as for General Dostum, he said, "How can we have an individual like this in that position? What kind of message are you sending?"

So that's . . . those are facts. They're on the ground. There's no tribunal. The United States, which has a very important role there, and NATO, which has a hugely important role there together, are not pushing for tribunals. If we're going to have a political solution there, and I don't know how you could have a solution other than a political solution at the end of the day, I have to ask the question how you can have it when the other side, in fact nearly everybody, has had people buried in Dasht-i-Leili. And it seems to me this is one of the reasons that international justice really has a role to play here in the future. But that's why I would have to leave it to the

other jurists here to figure out how you get international justice to a place like Afghanistan where there is no justice. Thank you.

David Scheffer, Moderator
Northwestern University School of Law

Why don't I take that as a jumping off point, Roy, thank you very much. We actually have someone who can begin to answer that question for us and that's Fatou Bensouda, the Deputy Prosecutor at the International Criminal Court because Afghanistan is a state party to the International Criminal Court. And as I understand it, it is a situation that remains under review at the prosecutor's office at the ICC. That does not mean that a formal investigation has begun. But Fatou, perhaps you could tell us: how could the ICC begin to address the kind of questions that Roy has raised about accountability in Afghanistan. And obviously temporal jurisdiction is a big issue because many these crimes were before your court was created, therefore no jurisdiction. But walk us into how jurists use the kind of information that Roy publishes and Christine publishes in the review phase within your chambers.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Thank you, David, and good evening. As I said earlier this morning, I am very happy to have the opportunity to be here this evening. Coming to the topic at hand, Afghanistan is a state party to the Rome Statute. It has signed and ratified the Rome Statute, which means the ICC can have jurisdiction on the territory over crimes committed in Afghanistan. As David has said, of course there are the time limitations, or temporal limitations, of when we can investigate crimes that have happened. And this will be from 2002, when the court was actually established, that we can look at the crimes that have been committed in Afghanistan. There are stages the ICC has to go through to open investigations, if we get to that level. And first of all is to collect information, whether it is from individuals sitting at the court or whether it is from open source and this is where the work of the journalists become very important for what we are doing. And after collecting this information, we analyze the information with a view as to whether the crimes that fall within the jurisdiction of the ICC have been committed on the territory of Afghanistan. These are determinations that have to be made by the ICC before we can go another step. As David has said, it is under review, and currently, apart from gathering the information, we have also requested to visit Afghanistan. Investigators have requested to visit Afghanistan. I must unfortunately report that we still do not have a response from the Afghan government accepting this request that we have. Not to say that they won't do it, but at least we have not yet had this request accepted. But in the mean time, we are definitely looking at crimes, we are looking at open source material, we are looking at people who are giving us information. We are as much as possible avoiding Article 53 situations, which is where we would have to receive the consent of the individual before we could do anything with that kind of evidence in court. But we are gathering information and we are reviewing it at the ICC.

David Scheffer, Moderator
Northwestern University School of Law

Thank you. Tim?

Tim McNulty, Moderator

Co-director, National Security Journalism Initiative at Northwestern's Medill School of Journalism

As you, excuse me, as you gather information, for open sources, from journalists, that is something that is in the nature of what journalists do. It is also time sensitive as the journalist works. But when it comes to the tribunals, and this is a question to take to the journalists as well as the jurists, how do you feel about the role of journalists once a tribunal is under way.

David Scheffer, Moderator

Northwestern University School of Law

Serge, do you want to take that first? Once the tribunal is under way and taking in cases, the media reports come out before. Do journalists have a role from that point onwards?

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Sure. I would say the role is different depending on the stage you are [at]. Of course, journalists are on the crime scenes, in the regions where crimes are committed, much earlier than the investigators or the international justice components. So it is obvious, in terms of what Fatou already said, that studying a situation, studying the crimes that have been committed, the first organizations on the crime scene are humanitarian organizations and journalists. So very often, in the early stages, collecting information is extremely important.

Once the tribunal completes its investigation and starts the trial phase, we have indeed a situations where journalists are asked as witnesses. Or almost crime-based witnesses. Or overview witnesses or expert witnesses. There are different categories of witnesses we are calling in our cases. Or to explain the overall conflict, the overall situation, which is happening very often. We call those expert witnesses or those overview witnesses with giving general information about the conflict. Of course you have journalists sometimes being asked to testify about very specific crimes committed. And this is one of the issues we will discuss today. What are the limitations? How far can a journalist go without putting to danger his own security or how far can he go without having a negative impact on the function he is to perform.

Tim McNulty, Moderator

Co-director, National Security Journalism Initiative at Northwestern's Medill School of Journalism

Can I interrupt just to ask: would you testify, Chris, Roy? Would you testify at a tribunal?

Christine Spolar

Senior Editor, Huffington Post Investigative Fund

I would not. And this is based on the reporting I've done in my time. I covered Srebrenica. And when I . . . to prepare for this, I went back and read what I had written all that time ago. And I'm not sure it would happen today, but the Washington Post, who I was working for then, we realized at the time how important it was to get every detail and every fact out about that. And there was no doubt that we thought some crime had happened when thousands of men disappeared. I would see no reason to testify on that because the paper printed everything I knew on that. And, you know, I was up for thirty hours trying to piece this thing together in order to beat the New York Times on it. And I was . . . we were . . . you know, it was a different technological time. We were faxing things. We were getting the wires from the wall and trying to get our copy over. No, I would see no reason for me personally in the things that I have covered. And since then, I've done a lot of intelligence reporting and military reporting in the States. And it's so important to me to be able to tell someone, "You give me this document. I won't tell how I got this document." And I've dealt with classified documents. And that kind of burden to my sources to make sure that they're safe and that I can keep doing what I do—it's paramount to me.

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

I think in those cases, common practice at the tribunals is, whenever possible, to use those kind of information for lead purposes, to have the information, then to find other evidence to corroborate it. Crime based witnesses, or other evidence. So it's obvious that I think in those cases where journalists have been asked to testify very often it was when no other evidence was possible. And we can speak about the jurisprudence of the ICTY in 2002. And I fully understand the parallel you are making. You mentioned the intelligence services. I would not exactly put them in the same category, but it's obvious at a national level and an international level that if you want to use documents from an intelligence service in judicial proceedings, it's a very difficult and delicate issue because those information have been collected for different purposes, for state security, for national security issues and not for trial purposes. And it's always a question of protecting sources, in this case is similar to what journalists are doing.

We had a similar discussion sometimes with volunteers from the Red Cross, for example, who are also in the field, who are providing help, medical assistance, to victims very early in the conflict. And where it is also extremely difficult for these persons to testify and we fully understand the argument. Because once, if they become fully witnesses and you have the next conflict, those people who were providing humanitarian assistance would not be let into the country and you would create other problems. So it's quite an important and delicate phase during . . . for sure during the time when the crimes are going on and afterwards. But you are asking what role the journalists are playing at different stages. So you have, during the period where crimes are committed, and after the trial is going on. But even today, sixteen years after the creation of the tribunal. But we consider our interaction with journalists still of major important.

Take an example. Our main priority for our office is the arrest of General Radic. Now there is at the political end some pressure to say, let's turn the page. This is fifteen years, it is not important. Let's move forward. European enlargement, European integration, that's the main topic. And by having witnesses in court telling again and again the story. By having journalists

reporting about the importance of the crimes, reporting about the victims in Sarajevo, Srebrenica, and others, it's their daily reality, they are every day confronted with those crimes that have been committed. But by reminding the public opinion about the importance of those crimes that have been committed, you impact directly on the political level—politicians always being interested in public opinion—and today we need more than ever the support of the world governments to make sure there are enough political incentives, if not to say pressure, to make sure that the remaining fugitives are arrested.

Christine Spolar

Senior Editor, Huffington Post Investigative Fund

Right. But I think that the better endeavor that a journalist would be doing is if they or their paper continue to go back to that region, as I was lucky enough to do. I covered that war for the Washington Post out of Warsaw, I was the bureau chief. Years later, I was working for the Chicago Tribune, who still had an interest in that region. Then is your duty to go back and find those same people again, which it is, and keep reporting how their lives have been in limbo. They're in a frozen time period here because they still don't know. I think that is a better service than . . . I'm still very worried about testifying not just for me . . . When I worked for the Washington Post, certain entities in that region would say, "Oh, well you work for the government. You're a spy." You know, there's always confusion about the name Washington Post. But I'm more concerned also not just about me, but the next journalist after me. You know, what is your bond when following the story and not cooperating and not being a part of the arm of justice?

David Scheffer, Moderator

Northwestern University School of Law

Let me jump in, if I may, with Courtenay Griffiths, but before I do so, Courtenay, because I think you may get on to this so I want to set up the audience properly for you. There's actually been some litigation on this before the International Criminal Tribunal for the Former Yugoslavia and before the Special Court for Sierra Leone. The Yugoslav tribunal in 2002 determined, after basically upholding a journalist privilege not to disclose a source, then they established the test for, well, when do you cross the line where you really must reveal your source? They created, well, they articulated a two-prong test. That that requirement to disclose the source to the tribunal would occur where the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. And second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere. So that's conjunctive. Both of those have to exist. That was the Yugoslav tribunal. That was the Jonathan Randall case of the Was . . . for the Washington Post in 2002, where he was not going to disclose the identity of an informant that assisted with an article that he wrote for the Washington Post. And that went through a lot of litigation at the tribunal. At the Special Court for Sierra Leone, just last year, March 6, 2009, there was a ruling against the defense, which wanted a journalist to reveal a source. And the Court upheld the journalistic privilege. I leave it there. Courtenay, do you want to take it from there?

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

Yes, I do. Because I was the person who was cross-examining that journalist Hassan Bility, a Liberian national now residing in the United States. But before I come to an account of what happened with Hassan Bility, I will return to the question you posed, Roy, which is why no tribunal for Afghanistan. And I can ask three questions.

First of all, where such a tribunal to be established, what would it be limited to? For example, would it have jurisdiction over an Afghan at Abu Ghrab, if such a situation were to arise. Such that, if allied troops currently in Afghanistan were to repeat that despicable behavior, would such a tribunal have jurisdiction over such crimes? And if not, one could understand why NATO might not want to have such a tribunal have jurisdiction over its troops, if not, how would such a tribunal gain legitimacy, if such a tribunal's jurisdiction were limited only to the natives and not to the troops present there who might have committed such offenses? And bearing all of that in mind, is it surprising to you that NATO really doesn't have much interest in setting up such a tribunal? We'll leave that there for later consideration. [Laughter]

Roy Gutman

Journalist, McClatchy Newspapers

I can't even get a word in edgewise.

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

Not just yet.

David Scheffer, Moderator

Northwestern University School of Law

Right after Courtenay, Roy, but . . .

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

In any event, last year January, the prosecution in the Charles Taylor case called a witness in, one Hassan Bility, a Liberian journalist who was, allegedly of course, detained and tortured on Taylor's orders. Now during the course of his cross-examination by me, he informed us for the first time that with the assistance of ECOMOG, that is the Economic Community of West African States that had sent troops to try to stabilize the situation in Sierra Leone, he had been transported clandestinely from Liberia into Sierra Leone in order to report on events in that neighboring country. Now that was of interest to the defense for this reason: we had evidence that ECOMOGC was involved in arming one of the factions in the Sierra Leonean conflict. So from our point of view, what were they doing injecting this Liberian journalist into that situation? So I wanted to ask Mr. Bility some questions about this. He objected on the basis that so to do would involve him disclosing his sources. Now our argument was, this has nothing to do

with disclosing your sources. First of all, what we want to know is the identity of those who facilitated your entry into Sierra Leone. It's not as if you obtained information from these individuals. They merely facilitated your clandestine entry into the country. So that shouldn't be covered. Secondly, we argued that in a situation such as this, journalistic privilege should be trumped by the need to provide evidence that directly goes to the guilt or the innocence of the accused. And in our view, that overriding consideration should trump any journalistic privilege.

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

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

Roy Gutman

Journalist, McClatchy Newspapers

Can I just say that I am familiar with the cases that have come before The Hague Tribunal, having been asked at least four or five times myself to testify based on my reporting on the Balkan Wars. And the practice of U.S. news organizations on the whole is rather different than the practice of European news organizations, in that it is almost universal that U.S. news organizations do not want their reporters to testify for the very reason that, as Christine ably pointed out earlier, that you can't actually go back to the scene as a neutral, detached person easily. And in the case you're just mentioning, the reporter could not work with ECOMOG in the future very easily, or with the people who helped him in this particular case, and go back to them for more information, if he were to testify about who they were and what they did on behalf of your client in this particular case.

Now the reasons . . . I've laid out the reasons that Americans are reluctant to testify. But it's interesting. One of my British colleagues, or our British colleagues, Ed Bulleomi, is one of a

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

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

David Scheffer, Moderator
Northwestern University School of Law

Tim?

Tim McNulty, Moderator
Co-director, National Security Journalism Initiative at Northwestern's Medill School of Journalism

One of the books I have my students read is called The First Casualty. And it's part of a quote from the Senator from California in the 1920's or the teens, and the first sentence is: "The casualty of war is truth." And that is indeed what we journalists find all the time, is that we look at something and find that in the press of time, we've either gotten it correct to what the person has told us. But then months later, either through an investigation of the police or others that we find that was simply not true, that we rely on falsehood or lies. And I wonder if you could give examples? How do you deal with situations when you have a difference of opinion? When you say, this person had something that was very fresh at the time, but here this person is testifying against or opposite of what he said earlier? Does that come up in the tribunal for any of the jurists?

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Of course, any information that you would obtain in an article from a journalist, you always have to verify and corroborate to find other elements. As was already said, the purpose of writing an article or collecting information is not to collect evidence to be used in court, but to leave the threshold of reasonable doubt for the journalists, which of course is of a different nature than at a tribunal.

But I would say there are many different kinds of journalists and journalism. Dealing with the Balkans or having worked in Lebanon, I would very often be careful in relying on media articles, where it's very much, so, to take a different example, that you would have the media being 50% on the one side and 50% on the other side. So it's not really what I call objective journalism, but really the opposite. So personally, I have not been in a situation where I would have been too far with information obtained by journalists not to be able to correct it afterwards. But that information obtained at an early stage was not confirmed afterwards, this is happening all the time. This can happen to a journalist. This can happen to an investigator. It can happen to a prosecutor. I mean, that is part of our job and the nature of our work.

David Scheffer, Moderator

Northwestern University School of Law

Can I . . . I'm sorry, Tim . . . can I? Courtenay, go ahead.

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

I think your question demonstrates one of the great dangers of relying on the testimony of journalists. Because contemporaneity adds a certain verisimilitude to evidence. And the law places a great deal of evidence . . . I mean weight . . . to that idea of contemporaneity. So that, for example, to use a Latin phrase, *visjusti*, words spoken in a moment of great anguish, are . . . a great deal is put into them by the courts. And yet, as your question illustrates, later events might show that what the law feels to be, to carry great weight, may in fact might be totally erroneous. And that to me seems to be the great danger from a legal standpoint in relying on journalistic sources in the courtroom, because they're not operating, with all due respect, to the same standards one would demand from a police officer or any other investigator.

David Scheffer, Moderator

Northwestern University School of Law

Uh, Fatou? Yeah.

Deputy Prosecutor Fatou Bensouda, Panelist

International Criminal Court

I think that Serge has mentioned this in his earlier intervention, that as prosecutors, as much as possible, we try to look for evidence that is similar to what the journalist is giving us. For example, open source, so that we avoid, as much as possible, calling the journalist later to come and give evidence for us. But also on the other hand, sometimes you find that reporting that is being made contemporaneously with what is going on is sometimes helpful, and is sometimes not so helpful for us. And I just give the example of Bashir, the Sudanese President. There is of course a lot of positive reporting that is going on. But I think the situation that is going on today in Africa and, for example, the stand that has been made by the African Union last year was much the responsibility of some irresponsible reporting, unfortunately that has happened in that case. Irresponsible reporting gave misinformation in that case as to what the ICC is doing and what the ICC stands for. And because there was not much information on the ground about what the ICC is all about, it has had some consequences that we as ICC and as the supporters of ICC had to counter again on the ground. So.

Christine Spolar
Senior Editor, Huffington Post Investigative Fund

I think there are different standards for different reporters, and you better know on which reporter you're relying. Tim and I were talking earlier—Tim was my editor at the time in 2002 when there was a so-called, well, there was a battle of Jenin in the Palestinian territory with the Israeli defense forces coming in—and I have always said in journalism that if I had gone somewhere a day earlier, then it would have been a day too early. I tend to go in to conflicts after I've learned something from other conflicts about how to approach things. And when we went into Jenin, the—and it was very, very important to get into Jenin because there was a massacre in Jenin and on the radio people were saying, "There's 500 dead, the Israeli forces are slaughtering people." And a group of journalists, we all crammed into a car and got into Jenin as soon as we could. And [sniffs] we weren't smelling anything. And Srebrenica—when you went looking for mass graves, you smelled. And I remember that day, we were all—I think it was a Wednesday or a Thursday—and we were all planning to write for Sunday big stories. "Tick tock: the Battle of Jenin." And I turned to my colleagues and I said, I'm writing tonight because it's really important to know what exactly happened here.

And there was evidence and there was chatter, people talking, about the use of human shields. But what we saw, the evidence we saw, which was different than Srebrenica, was an armed battle in the streets. And one force might be bigger than the other, but people weren't carted off and taken as civilians. There was a battle there. I wrote everybody, you know, we all decided that the good story for Sunday wasn't necessary. The story of the moment needed to be out because we knew that the discussion . . . that the story would take a life of its own if we didn't get the word out. But, can I say that some British journalists wrote the next day that it was worse than Chechnya, the things they had seen. There was a huge . . . because the Guardian was reporting the facts—forget the other papers that had said it was a massacre worse than what they had seen in Chechnya—there was a huge problem in the British press over this. The American press was pretty, well, it was fact based, but people who thought they had personal histories and experience in war zones made more evocative statements.

Roy Gutman

Journalist, McClatchy Newspapers

Any one of us who has covered these conflicts where there are atrocities knows that the premium for journalists is to get it right. The difference between a war crime and a regular crime, as I understand it, is that a war crime is carried out on behalf of a state, or is ordered by a state, or the state is going to cover up the person who is actually the criminal. And so when you go in to a conflict, and you hear stories about mass killings, if you don't actually prove it, document it, and you put out a story that's based on hearsay, that's not based on your own investigation, I think you run the risk of . . . you risk your own reputation, and the reputation of your publication or your news organization. You make it very hard to work again in that same location. People are going to question you forever. So I mean I think the experienced journalists at least are going to be very, very cautious just in the way that Christine was.

I recall in Kosovo, when the Serbs overran the town of Arakabatz in the south, that . . . just arriving there after the fighting had ended and hearing from colleagues that they heard from street sweepers and refuse haulers that they had picked up a lot of bodies, like fifty or sixty bodies. And my problem was that I couldn't find those same refuse haulers. And I focused myself on one person who was killed after the fighting ended who happened to be the local Imam or priest in fact. And that story was so meaningful, for me that was so much more meaningful than writing about numbers or about statistics which I couldn't prove.

So it's really the case with war crimes that if journalists are responsible, we will realize that every rumor is a pitfall. Every hearsay statement contains huge risk for us. We have to be careful. You know, we do make mistakes. I recall in Bosnia that Bosnians referred to Serbs, rather to U.N. workers as McKenzie. General McKenzie was at some point the commander of the U.N. forces there. So they just happened to refer . . . it was a slang or a kind of a slang or a kind of off hand name for them. So they would say well the McKenzie, the McKenzie was doing this, McKenzie was doing this. So a whole lore developed in Sarajevo that General McKenzie was out there raping women personally, that he was out there committing all sorts of crimes. And what they really meant was just, it was figurative, it was not literal. And it actually took me weeks to figure that out after getting all sorts of testimony. And I called up McKenzie at one point, I said, "You are being accused of all sorts of things." And he says, "Well I can tell you where I was every day and it was not there."

So my point is, you have these . . . not just these rumors, but you have the inability to check things out. And if you don't check things out, you're really asking for trouble. And if you do, you can usually avoid the pitfalls. But that doesn't mean we [Inaudible].

David Scheffer, Moderator
Northwestern University School of Law

I have a very . . .

Courtenay Griffiths, Panelist
Defense Counsel, Garden Court Chambers

One more thing. It's interesting that you use that very point, the word, the story. You are there to write a story which, between you and your editor, sells newspapers. Your role is there not to gather evidence, to find out what the full picture is. You're looking to write a story.

Christine Spolar

Senior Editor, Huffington Post Investigative Fund

The correct story. The right story. Maybe the best story. If we can . . .

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

Maybe the correct story, but nonetheless, the story that is seen through the lens of your own particular vantage point. And that is always the danger.

Christine Spolar

Senior Editor, Huffington Post Investigative Fund

Oh, but that is more reporting. That day you will be able to tell what you have that day in the best way you can. Then you try to build a body of work in a war zone based on, if you know this, then you have to check out that in the other days, in the following days. You know, I always think that you look at a body of work rather than the idea that you're selling a news . . . that you're writing a story that day to sell a newspaper. That's not why anyone would go into a war zone and keep doing it. You're trying to get to the facts of what is happening. It's not easy doing any of that. So . . .

Roy Gutman

Journalist, McClatchy Newspapers

One of the, one of the corrective factors in journalism is competition. Now it can also be a destructive factor. It can also lead you to write things before you have them together. But basically, if you write a major story and it actually makes a difference, you can be sure that your colleagues are going to come after you. They may try to come after you in both ways. They may try to duplicate it. But if they can't prove it, they've got an even better story. So we all have to watch for that. I mean, Christine's point about getting it right is really central. The story's really got to stand up. Now I'd like to say that her work, and the work of a lot of journalists did stand up in the Balkans. The reason I wrote this book about Afghanistan is—and how we missed the story—is that there were no journalists there in the 1990s. So imagine you have all of this—ten years of war, three different wars—and nobody is there to record what's going on in any one of them. What are the violations, what are the crimes, what are the atrocities, where are the mass graves? You know something? There are eighty mass graves—I didn't mention this earlier—eighty to a hundred mass graves in Afghanistan which have never been exhumed. And you know, so we have all of these . . . where at least in the Balkans, the journalists were there. So, you know, it's a rough draft of history, it's true. But we do have this corrective mechanism that you may not always appreciate as a jurist.

David Scheffer, Moderator
Northwestern University School of Law

And I might say that I'm really not aware of any book quite like Roy's in describing the 1990's with respect to undiscovered crimes, quite frankly, in Afghanistan. We now open this up to the audience for questions. And so that is why we're here, so we invite questions. I think you've got one right behind you there.

Audience Member

My experience is in Cambodia. And there, there was an organization called the Documentation Center of Cambodia that has operated for over ten years developing evidence. And that evidence has been the support of Khmer Rouge tribunal. My question for you: is there a role for a privately or publically funded organization devoted to developing evidence so you don't have to rely on the journalists.

David Scheffer, Moderator
Northwestern University School of Law

Well, you know what comes to my mind is something like the international crisis group, some groups like that that the tribunals draw upon. Well, Human Rights Watch of course and certain NGO—Amnesty International—are recording a lot of data. Do you distinguish that from journalism?

Serge Brammertz
Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

Of course. Absolutely. For sure, from the time I was at the ICC, reports from international NGOs, Human Rights Watch, other international human rights groups, are quite important. But they're also—the purpose of those organizations is not necessarily to collect evidence to be used in court. We had—at the ICC and at the ICTY, many discussions, because sometimes, you have NGOs that are really trying to be assistant investigators, entering zones and, without professional standards, are conducting interviews, which afterwards, if professional investigators are coming in, are not at all confirmed. So once again, it's a delicate issue. I think it's very important that everybody plays his role and fulfills his . . . it's own mandate. Same for the journalists. Same for NGOs. And same for the investigators.

Of course, if you have . . . you speak about documentation centers. The best is for prosecutors to find state archives, military archives where you have the best evidence. So if you can cooperate with institutions that have been able to seize important material, which is relevant for the case, that's very important. But the main message is really that we as professional investigators and prosecutors, have to do this job ourselves based on our own standards. And we can't really ask others to collect evidence on our own behalf.

David Scheffer, Moderator
Northwestern University School of Law

I believe that Fatou wants to add to that.

Deputy Prosecutor Fatou Bensouda, Panelist
International Criminal Court

Pretty much Serge has answered the question. But I also think, just to add one thing, that it touches on the impartiality and independence for our investigations. Which, at the tribunals, at the ICC, is guarded very jealously. Just to cite an example. You'll recall with Darfur, with the investigations, a United Nations Inquiry was set up to look into the conflict in Darfur and to see whether there were crimes, crimes against humanity which have been committed. And they came out with a report. And this report was handed over to the ICC. And I believe the prosecutor made a public declaration that we've seen the report which is very interesting for us, very helpful. But we are going to do our own independent investigations. And the same thing I think is what we have done for Kenya as well. We have received the [Inaudible] report, which I believe is very thorough. But we still—if we have the authorization from the chamber, which we have requested, we will do our own independent investigation.

David Scheffer, Moderator
Northwestern University School of Law

More questions? Here?

Audience Member

I think one of the . . . [tape cuts out]

Christine Spolar
Senior Editor, Huffington Post Investigative Fund

I think it's a very interesting question because journalism has changed so much over the last fifteen years, since I covered Srebrenica, and coming back to the States—I've been living overseas until July of this year. I am very struck by American TV journalism and how emotive it is and how emotional it is about covering crises. It's quite striking when you've been away for a while. When I was with the Washington Post, some at the Tribune, but when I was at the Washington Post, it was, you know—you find a narrative of the story you want to tell. And the Post—we took out a lot of emotion, you know, you weren't allowed to have an opinion, which is how I thought good story writing was. So much has changed with the internet and with blogging. I was thinking earlier—you were talking about journalists. And now the definition has changed about what a journalists is. So now, when you have these reports on the field, how do you know what to trust? And who to trust? It's becoming more and more difficult. So, for me it's about knowing how far the person is going to write the story, and knowing who you can trust with your experiences. When . . . The lack and the drop in foreign correspondents is really troubling, both for the American and the British press. And for other countries also. You're seeing in Poland and Italy the number of correspondents going down. The less you know about the journalists out there, I think the less you trust a story. I know coming back to the States that's how I feel, even

reading the major papers and I don't recognize the names anymore covering intelligence or covering military. I question them more. Which I'm not sure really gets to your question about narrative, but there's a lot of, there's a lot of tentacles to that question, and worries. I have a lot of worries about the narrative.

Roy Gutman

Journalist, McClatchy Newspapers

I was the editor at McClatchy just a year ago when our Jerusalem correspondent finally got in to Gaza. And we also had our Nairobi correspondent there. And we had leads. Al Jazeera had a reporter in there during the entire onslaught by the Israelis. And the rest of the international news media were kept out. And the door was locked.

Quite frankly, when that happens, that gets my dander in a fluff. I always worry if any government, any government anywhere, be it the U.S., the Israelis, the Taliban, I don't care. If they close the doors, that means something bad is going on. So you collect all the data that you can as a reporter on the outside and you see what people on the inside are reporting, your own stringers there. Then you actually have to go in there and report the stories out. As an editor, I told our men, Dian Nissenbaum, that I wanted him—I just wanted him to get the story correct. And I wanted every . . . I didn't want a word that was wrong because this was such a sensitive thing. And sometimes it took him three or four days to report out a story. And in every case, and I think this is still the practice—although I worry about the trend that Christine is mentioning—I would always insist, “Now I want you to go to the Israelis and I want you to get their side of the story. And if necessary, you go back to your Palestinian sources and back to the Israeli sources, back and forth and back and forth until you're convinced that you have the facts right. And at that point, you can write the narrative. At that point, you can write a story that's going to stand up.”

So you know the reporting method, the investigating method in covering war is really unchanged. It's just that fewer people are practicing it, and that really is a very worrisome sign.

Christine Spolar

Senior Editor, Huffington Post Investigative Fund

Well, and it . . . I do think it's unchanged. You have less and less experienced people going out. I felt that when I returned to the Balkans for the Chicago Tribune. The example I give is Kosovo independence, which is not that important as far as a story goes. But people came in late and left early and there were fewer reporters there and there were far fewer people who knew the history of the region. And that does affect how you write. If you don't have the authority, you don't have the history, you just can't explain why this is so important. And it just wasn't paramount for that story, but it does . . . the fact gathering can be different. People don't know why it's important to go back and interview the same person two or three times because their story will change slightly and we have to figure out why.

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

I'm not so sure the question is being addressed. Because as I understood it, the question was asking about emotion. And the issue is, whether journalist or jurist, the importance of being clinical and dispassionate in either reporting or in presenting the prosecution's case. Because you and I know that sympathy corrupts objectivity. And it seems to me that's the essence of the question. And so, to ask a prosecutor, what do you say Serge? [Laughter]

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

The defense sometimes using emotion as well. [Laughter]

Deputy Prosecutor Fatou Bensouda, Panelist

International Criminal Court

As well. Most of the time.

Courtenay Griffiths, Panelist

Defense Counsel, Garden Court Chambers

That's my job.

Serge Brammertz

Prosecutor for the International Criminal Tribunal for the Former Yugoslavia

That's another debate. Of course, as a prosecutor you try to be as technical and effectual as you can. For me, emotions that I see are when a victim or a witness is in court and, without being emotional, their story makes it emotional. For example, we have not mentioned one of the cases we had this year, the Lukic and Lukic case, which was one of those cases where, at the ICTY, two physical perpetrators were convicted. As you know, the majority of our cases are against politicians who were generals for command responsibilities, so mainly their hands are not dirty. Mainly they are commanding troops to commit crimes. Here, the Lukic and Lukic cousins were convicted for committing a number of crimes. The most visible were where, on certain days, on two occasions, they had put more than 70 women and children into a building they had prepared before and put this building on fire after they closed the doors and shot all people who tried to escape. So all people there, women and children, were burned alive. There were only a few survivors. And one of the survivors, she testified recently, and you could still see all the injuries, body parts that had burned during those incidents. She succeeded in escaping to neighboring villages to warn people about those Lukic cousins who were coming with their troops. In doing so, she saved a lot of people. So she was one of the survivors that helped other people to survive. All her sisters, her family members were killed in this incident. If you have a person like this, after so many years, appearing before the judge and having the courage to speak and to tell the story and doing this in a very impressive way, those are what I would consider being the very emotional moments, but not necessarily because of the way it was told, but because of the authenticity of the way it was explained.

Christine Spolar
Senior Editor, Huffington Post Investigative Fund

Can I add something? While we talk about the different journalists, we see they are trained and have different standards. There's also the element of citizen journalists now. I think that the understanding that we have of Iran and what happened after their election, it was far greater because people went to the street with their cameras, and Twittered, and took video. So I want to argue both sides, that people who go out and say that they're journalists and they're writing stories very authoritatively, but perhaps have not done the same standard of work, that's problematic. But I also applaud people going out and saying, "This is my . . . this is where I live. This is my democracy, if it is, and this is my country. And you need to see what's going on. We're bearing witness." So it works both ways. I don't . . . in the definition of journalists, they might not fit, but they are citizen journalists in this broad new world of internet journalism.

David Scheffer, Moderator
Northwestern University School of Law

Let's see if we can get another question on board here. Anyone? Yes, in the middle there.

Audience Member

This question's for Mr. Guttman. You mentioned that there hasn't been a push on the American side for tribunals of any sort. And I was wondering, in your opinion, if that had anything to do with the security situation on the ground there, and especially in terms of the American side? And to your knowledge, if there's any discussion, while maybe not a push, but any discussion of having national tribunals?

Roy Gutman
Journalist, McClatchy Newspapers

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

But anyway, and what we did—I was in Newsweek—before we published a word, we went to the Americans and laid things out at every level we could and asked for their response. Because the U.S. Operations Forces, or U.S. Special Operations Forces were embedded in General Dostum's units. They were there—they came in after 9/11—because they knew what was going on, and it was essential that they knew what was going on. And General Dostum was

very cooperative and he was their man in some ways. And they would not comment on it. In fact, they would not say anything about it. And General Dostum basically got away with it at that point. Now fast-forward to 2008. We sent in a reporter—I worked for McClatchy at that point—and we sent in a reporter who I think took some life risks in going into Dash-ti-Lali, quite frankly, where we had heard, from an NGO called Physicians for Human Rights, where we had heard that the graves had been moved. But we didn't know the details. We didn't know when, we didn't know who exactly had done it. You could assume it was General Dostum. But anyway, this fellow Tom Lassiter actually went out to the graves. He discovered new ones. He brought out a GPS unit with him. You know, he had an exact fix on these graves. And he reportedly, very carefully, that in fact he thought that additional graves had been disturbed. And once again, since it's journalistic practice, at least with the old-fashioned, mainstream organizations, that we went to the authorities. We went to the U.S. military, went to the U.S. Embassy, went to Mr. Karzai's government. General Dostum had actually been asked to leave the country at that point for other, slightly unrelated, reasons, so he was in Turkey. So we actually staked him out in Turkey. Lassiter went there and spent a good ten days trying to get Dostum to talk to him. In any case, no comment. Once again, no comment.

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

Leah King

Director of Leadership and Programs at the Chicago Council

Thank you very much to our panel this evening and thank you, because I know they're all exhausted, they've been at a conference all day, so we'd like to particularly thank them for that. Thank you very much. [Applause]