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## Atrocity Crimes Litigation Year-in- Review (2010): Lines of Inquiry

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# **ATROCITY CRIMES LITIGATION: YEAR-IN-REVIEW (2010) CONFERENCE**

## **Lines of Inquiry Abridged Memorandum<sup>1</sup>**

**January 22, 2011**

**David Scheffer**

**To: ECCC International Co-Prosecutor William Smith  
ICTR Registrar Adam Dieng  
ICC Investigation Coordinator Alex Whiting  
SCSL Chief of Prosecutions and Head of Office, OTP, Jim  
Johnson  
ICTY Senior Prosecuting Trial Attorney Tom Hannis  
Defense Counsel Rodney Dixon  
Professor Valerie Oosterveld**

**Cc: Professor M. Cherif Bassiouni**

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<sup>1</sup> This memorandum draws upon research conducted by Northwestern University School of Law students: Ronit Arie, Shilpa Avasare, Chrissy Bishai, Jamie Lynn Crofts, Federico Cuadra del Carmen, Clare Diegel, Tiffany Eng, Jeanne John, Emma Jones, Hannah Jurowicz, Josh Kaiser, Caitlin Kovacs, Lysondra Ludwig, Katherine Moskop, Alexius O'Malley, Valerie Petein, Kelli Rucker, Joshua Steinman, Raia Stoicheva, Raphael Sznajder, Kari Talbott, Christine Terada, Fitsum Tilahun, Kyle Valenti, Kristen Vogel. Professor David Scheffer, the moderator of the conference, is deeply grateful to these students for their research assistance.

I. INTERNATIONAL CRIMINAL COURT (INVESTIGATION  
COORDINATOR ALEX WHITING AND DEFENSE COUNSEL RODNEY DIXON)

*General*

During 2010, criticism continued that only Africans have been indicted by the ICC so far. Double standards and a new form of Western law-driven colonialism of African nations were among the complaints.

**How did the Office of the Prosecutor (OTP) and the judges counter this criticism? What non-African situations are being actively reviewed by the OTP and what progress was made during 2010 in those particular reviews? (e.g., Colombia, Georgia, Palestine, Afghanistan, Honduras, Korea). Does the OTP's review of the massacre in Guinea and violence in Cote D'Ivoire and Nigeria reveal an inescapable reality of having to keep the focus on Africa?**

One of the greatest challenges facing the ICC in 2010 was the continuing need to apprehend indicted fugitives. For example, indicted Sudan President Omar Hassan Ahmad Al Bashir, Ahmad Harun, Ali Kushayb, Joseph Kony and his Lord's Resistance Army (LRA) co-indictees, and Bosco Ntaganda remained at large. Some enjoy the protection of their own government while others enjoy virtual sanctuaries on foreign territory.

**What tools has the OTP employed to seek arrest of these indictees? Is there any reason to be optimistic for 2011?**

The OTP issued a draft paper on the preliminary examinations a few months ago and has been eliciting comments. The paper is interesting on many levels, particularly with its attention to admissibility issues, including gravity requirements.

**What can you tell us about the content of the paper; how is it intended to guide the work of the OTP in examining situations and arriving at decisions on whether to seek investigative authority from the Pre-Trial Chamber, and what experts have been writing in about it?**

Prosecutor Luis Moreno-Ocampo's nine year term in office will expire this year.

**Understanding that you are part of the OTP and thus suitably reserved on such matters, can you still describe to us what is transpiring in terms of selecting his successor? Are there**

**any openly-declared candidates? How might his legacy best be described?**

*Democratic Republic of the Congo*

1. In the *Katanga/Ngudjolo* case, 2010 saw a wide range of decisions by the Trial Chamber and Appeals Chamber decisions on victim participation. The Appeals Chamber, on May 24, 2010, found that for victims' participation in appeals brought under Article 82(1)(d) of the Rome Statute, four cumulative criteria must be met; they also found that such criteria were in fact met. The fourth criterion was that the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.

**How does the OTP view such rulings that embrace a vigorous victim participation in the case?**

2. In the *Lubanga* case, 2010 was nearly as turbulent as 2008 when the issue of potentially exculpatory evidence almost dismissed the case. On July 8, 2010, Trial Chamber I ordered a stay in the proceedings on grounds that the fair trial of the accused is no longer possible due to non-implementation of the Chambers orders by the Prosecution to confidentially disclose to the Defense the names and other necessary identifying information of a particular witness. On July 15, 2010, the Trial Chamber ordered the release of Lubanga. On October 8, 2010, the Appeals Chamber reversed Trial Chamber I's stay; the Trial Chamber had erred by resorting immediately to a stay of proceedings without first imposing sanctions under Article 71 to bring about the Prosecutor's compliance with its orders. The stay of proceedings was the key element underpinning the decision to release Lubanga, so reversing it vitiates the release order. There was no finding that Lubanga was detained for an unreasonable period due to the inexcusable delay of the Prosecutor, and it was considered inappropriate for the Appeals Chamber to enter findings for the Trial Chamber on these points.

**Which priority should prevail—the protection of witnesses or expediting the trial proceedings? How did the *Lubanga* case almost appear to collapse with the ordered release of Lubanga, and why was the OTP, to the extreme displeasure of the Trial Chamber, so rigid in its protection of a key witness's identity? Could this crisis in the case have been averted or handled differently?**

*Darfur, Sudan*

1. Regarding the indicted fugitives Ahmad Harun & Ali Kushayb, Prosecutor Moreno-Ocampo issued a press release on November 6, 2010, highlighting the ICC Judges' decision of May 25, 2010, which informed the U.N. Security Council that Sudan was not respecting UNSC Resolution 1593, as it had refused to arrest Harun and Kushayb. Moreno-Ocampo described in particular Harun's many activities in Darfur through the years and to the present time, including attacks on civilians and managing the crime of extermination in the camps for displaced persons, the same people whose displacement he had orchestrated. "He should be arrested before he commits new crimes in his new position," Moreno-Ocampo said. As recently as January 13, 2011, Harun visited Abyei, apparently with the assistance of the U.N. mission in Sudan, which attracted strong criticism from Amnesty International.

**How is the OTP continuing its investigation of both Harun and Kushayb while they remain at large? Are Harun's activities highly incriminating such that they might lead to an amended indictment in the future? What is the strategy, if any, of the Security Council to secure their surrender to the ICC?**

2. In the case of indicted fugitive President Omar Hassan Ahmad Al Bashir, 2010 proved to be an eventful year on many fronts. First, on January 28, 2010, the Appeals Chamber found that eight victims fulfilled the criteria for participation in an appeal, which is abnormal, but the Appeals Chamber concluded that "in light of the extraordinary circumstances of the present case, which impeded the Victims from approaching the Chamber earlier," their was participation appropriate; the Appeals Chamber allowed them to make substantive submissions to the case. Judge Sang-Hyun Song dissented, stating, "Victims who did not participate in the underlying proceedings have no right to participate in the ensuing appeal."

**How do you assess the Appeals Chamber's decision to permit the eight victims to participate in the appeals proceeding? Is that a role for victims that OTP embraces?**

Second, on February 3, 2010, the Appeals Chamber reversed the Pre-Trial Chamber I's 2009 decision on the scope of the indictment against Al Bashir. The Appeals Chamber found that to require that the existence of genocidal intent be the *only* reasonable conclusion in order to meet the standard of "reasonable grounds to believe" for issuance of an arrest warrant would amount to requiring

the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt. Such a standard of proof is too demanding at the arrest warrant stage, essentially when requiring the Prosecutor to prove its case beyond a reasonable doubt before trial. Instead, the “reasonable grounds” standard at the warrant stage must be distinguished from the “substantial grounds to believe” standard at the confirmation stage and the “beyond reasonable doubt” standard at trial.

**Why did it take so long for the Appeals Chamber to render a relatively simple reversal of the Pre-Trial Chamber on the scope of the indictment and the standard of reasonable grounds to believe?**

Third, on July 12, 2010, Pre-Trial Chamber I delivered its new decision, issuing charges of genocide for the first time in the ICC’s history. The Chamber agreed that its prior ruling implied that there were indeed reasonable grounds to suspect specific genocidal intent, and that this was sufficient under the correct standard of proof for an arrest warrant. There were reasonable grounds to believe that the attacks on victims of the Fur, Masalit, and Zaghawa groups were made based on the ethnic composition of the villages. There also were reasonable grounds to believe that the attacks took place “in the context of a manifest pattern of similar conduct directed against the target group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group.”

The Prosecutor invoked Articles 6(a), 6(b), and 6(c) of the Rome Statute. The Chamber agreed with the Article 6(a) (killing) and 6(b) (seriously bodily or mental harm) prongs of genocide. As for 6(c) (deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction), the Prosecution argued that the methods of destruction used by Al Bashir included the: i) destruction of the group’s means of survival in its homeland; ii) systematic displacement from their homes into inhospitable terrain where some died as a result of thirst, starvation, and disease; iii) usurpation of the land; and iv) denial and hindrance of medical and other humanitarian assistance needed to sustain life in internally displaced person (IDP) camps. The Chamber also noted the fostering of insecurity among the displaced, the occasional contamination of the wells in the attacked towns, and the encouragement of other tribes to resettle in the lands previously inhabited by the Fur, Masalit, and Zaghawa groups. The Chamber found there were reasonable grounds to believe that the subjective

elements of genocide (deliberately inflicting on the target group conditions of life calculated to bring about the group's physical destruction) were fulfilled. The Chamber further decided that there were reasonable grounds to believe that rape was committed within Count 2, namely the Article 6(b) category of serious bodily or mental harm. But there is no mention of rape in the Chamber's decision regarding Count 3, namely the Article 6(c) category of deliberately inflicting conditions of life calculated to bring about physical destruction.

**How important was the Pre-Trial Chamber I's July 12th decision, which expanded the indictment against Al Bashir to include genocide? Was this a "game changer" for the Prosecution's case against Al Bashir and did it lead to significant aftershocks in the region and in Al Bashir's conduct (for better or worse)? Did it open up new avenues of investigation for the OTP against Al Bashir? The PTC's approval of 6(a), 6(b), and 6(c) categories of genocide for the indictment must have encouraged the Prosecutor. However, was he disappointed that the charge of rape as genocide was seemingly not adopted by the PTC for an Article 6(c) charge? Is there an opening for rape as genocide under "torture" regarding Count 3 (Art. 6(c)) as discussed in paragraph 37 of the Second Decision? Has the PTC's second request for cooperation in making the arrest and surrender of Al Bashir for both the first and second warrants—a request submitted to Sudan, all States Parties of the Rome Statute, and all of the U.N. Security Council members—been at all useful to date in at least galvanizing interest in achieving that key objective?**

Fourth, the PTC issued four decisions seeking to enforce the arrest warrants against Al Bashir. These pertained to Al Bashir's visits to Kenya, Chad, and the Central African Republic in the latter half of 2010. None of these countries arrested Al Bashir during his visits and none of the countries submitted requested reports to the ICC.

**What explains the total lack of cooperation by neighboring African states—all States Parties to the ICC—in the arrest of Al Bashir during his many travels in 2010? In its report to the Security Council, the ICC stated, "[M]any challenges remain, but none is more pressing than the execution of the nine outstanding warrants of arrest." Is the ICC facing a crisis of legitimacy, particularly among its own States Parties?**

3. In the case of Bahar Idriss Abu Garda, charged with three war crimes pertaining to the September 29, 2007, attack against the African Union Mission in Sudan—the peacekeeping mission stationed at the Haskanita Military Group Site in Umm Kadada, Darfur—the Pre-Trial Chamber I unanimously declined to confirm the charges on February 8, 2010. The PTC was not satisfied that there was sufficient evidence to establish substantial grounds to believe Abu Garda could be held criminally responsible either as a direct or indirect co-perpetrator for the commission of the crimes charged by the Prosecutor.

**How did Abu Garda escape prosecution? Did what the PTC determined meet the Rome Statute’s requirement that there be “sufficient evidence to establish substantial grounds” to believe that the crimes occurred and that the person charged committed those crimes? Why, on April 23, 2010, did the PTC reject the Prosecutor’s application to appeal? Is the Prosecutor intending to further investigate Abu Garda?**

*Central African Republic*

The trial of Jean-Pierre Bemba Gombo commenced on November 22, 2010. Bemba was the President and Commander-in-Chief of the Mouvement de Liberation du Congo (MLC). An armed conflict took place in the CAR from October 26, 2002, to March 15, 2003, during which part of the national armed forces of Ange-Felix Patasse, the then President of the CAR, allied with combatants of the MLC, led by Bemba, were confronted by a rebel movement led by Francois Bozize, the former Chief-of-Staff of the Central African armed forces. Bemba is charged with knowing that MLC troops were committing crimes and did not take all necessary and reasonable measures within his power to prevent or repress their commission. There are 759 victims authorized to participate in the proceedings.

**Why is the Bemba trial so important for the Prosecutor? Was it primarily the rape charges that elevated the importance of this case? Are there ongoing investigations relating to other possible suspects?**

*Uganda*

**In light of the failure to arrest any of the indicted fugitives of the three surviving Lord's Resistance Army (LRA) leaders, including Joseph Kony, how would you describe the status of the Uganda cases and any ongoing investigations? What occurred in the Ugandan Government in 2010 either to strengthen or weaken complementarity practice in that country? How have the indictments affected the behavior and conduct of the LRA and its leaders? Is there any particular arrest strategy that the OTP favors, namely, large-scale military operations (akin to what happened one year ago cross-border with the DRC) or "undercover" efforts?**

*Kenya*

A disputed election and subsequent political/ethnic violence in 2007 left more than 1,100 dead, 3,500 injured, and up to 600,000 people forcibly displaced. During 60 days of violence, there were hundreds of rapes, if not more, and over 100,000 properties were destroyed in six of Kenya's eight provinces. The clashes erupted along tribal lines following an announcement that Mwai Kibaki—a Kikuyu—had won a vote that opponents said was rigged. The bloodbath ended when President Kibaki and his rival, Raila Odinga, agreed to share power, with Mr. Odinga becoming prime minister.

The situation in Kenya was brought before the ICC when the OTP received information about crimes committed in Kenya in relation to the post-election violence of 2007-2008. Following an analysis, the Prosecutor took the view that there is a reasonable basis to proceed with an investigation.

On March 31, 2010, the Pre-Trial Chamber granted the Prosecutor's request to commence an investigation on crimes against humanity allegedly committed in Kenya. The majority found that the information available provides a reasonable basis to believe that crimes against humanity have been committed on Kenyan territory. The majority found that all criteria for the exercise of the Court's jurisdiction were satisfied to the requisite standard of proof.

In his dissenting opinion, Judge Hans-Peter Kaul held that the crimes committed in Kenya do not qualify as crimes against humanity under the jurisdictional ambit of the Statute. In particular, Judge Kaul disagreed with the majority on the requirements of a "State or organizational policy" as set out in Article 7(2)(a) of the

Statute. Given the fact that the fundamental rationale of crimes against humanity as codified in Article 7 of the Statute was to protect the international community against the extremely grave threat emanating from such policies, Judge Kaul concluded that it had to be adopted either by a State or at the policy-making level of a State-like organization. Upon analysis of the supporting material, Judge Kaul concluded that there was no reasonable basis to believe that the crimes committed on the territory of the Republic of Kenya in relation to the post-election violence of 2007-2008 were committed in an attack against a civilian population pursuant to or in furtherance of a policy stemming from a State or an organization.

**Describe how the majority and Judge Hans-Peter Kaul disagreed about a critical definitional factor in determining whether crimes against humanity had occurred in Kenya, regarding their respective opinions in the Pre-Trial Chamber on March 31, 2010. The OTP clearly disagrees with Judge Kaul, but what should we conclude about his reading of the available evidence? Isn't it particularly hard, as an investigator, to satisfy the "State or organizational policy" requirement of crimes against humanity?**

On December 15, 2010, Prosecutor Moreno-Ocampo requested that the ICC issue summonses to appear against six Kenyan citizens to face justice for massive crimes committed during the post-election violence in Kenya. The OTP brought two cases, three defendants each, and requested summons to appear for each.

The Prosecutor concluded that there are reasonable grounds to believe crimes against humanity were committed in two cases. The first case names the following Odinga allies: Henry Kosgey, Minister for Industrialization; William Ruto, suspended Education Minister; and Joshua Arap Sang, radio executive. Moreno-Ocampo alleged that Ruto began plotting attacks on supporters of President Mwai Kibaki a year before the election and worked together with Minister for Industrialization Henry Kosgey and radio broadcaster Joshua Sang to coordinate a campaign of killing and forced deportations in the Rift Valley.

In the second case, the Prosecution names the following Kibaki allies: Uhuru Kenyatta, deputy Prime Minister and Finance Minister; Francis Kirimi Muthaura, Secretary to the Cabinet; and Mohammed Hussein Ali, former Police Chief. Moreno-Ocampo charged Deputy Prime Minister Uhuru Kenyatta—son of Kenyan independence hero and founding president Jomo Kenyatta—

alongside Cabinet Secretary Francis Muthaura and former Police Commissioner Major General Mohammed Hussein Ali with murder, deportation, persecution, rape, and inhumane acts allegedly committed in retaliation against supporters of Prime Minister Raila Odinga.

The accused all proclaimed their innocence.

In December 2010, Kenyan MPs voted overwhelmingly for the country to pull out of the Rome Statute. According to the BBC, if the government backs the MPs it would take at least a year for Kenya to formally withdraw from the ICC, but active cases would not be halted. In January 2011, a special division of the Kenyan High Court emerged as the local option to try the "Ocampo Six," the six persons named in the submissions by the ICC OTP to the Pre-Trial Chamber requesting indictments. Both sides of the Coalition Government agreed to create a local alternative to the ICC. The government recalled Parliament for a vote overhauling the Judiciary and Kenya Police Service. The agreement includes expediting the appointments with the intention of expediting the appointment of a new Chief Justice, Attorney General, Director of Public Prosecutions, and Inspector General of Police; moving quickly to recruit new office holders, including both high court and appellate judges; and establishing the Supreme Court to give the judiciary a new face and the capacity to handle the post-election chaos cases. The hope is that with new faces at the Judiciary and Police force, the U.N. Security Council would ask the ICC to defer the case against the Kenyans. Kenyan officials are lobbying other African leaders for support.

The only constitutional way to try the Ocampo Six is to create a special division of the High Court, as the new Constitution prohibits creation of a local tribunal that works outside the jurisdiction of the Kenya criminal system. In Article 162(1), the Constitution states: "The superior courts are the Supreme Court, the High Court and the courts referred to in clause 2 (which are to be established by Parliament)." This means that a special division of the High Court, as provided for in the International Crimes Act, which defines the crimes against humanity, genocide and war crimes, is the only option. Section 8(2) of the International Crimes Act, states: "A trial authorised by this section to be conducted in Kenya shall be conducted in the High Court."

**There now is a serious complementarity challenge afoot in Kenya. What is the OTP's response to that challenge and**

**what strategy might we see unfold in the weeks ahead? What does this say about the conduct of a State Party during various stages of an investigative and indictment procedure? Kenya appears to have worked its way through this process a bit chaotically and, not surprisingly, with politics as a dominant feature. Might this experience speak to a new start for cooperation agreements where State Parties agree, in advance, to follow established procedures under complementarity and ultimately ICC jurisdictional action so as to avoid the likes of Kenya's belated January initiative?**

II. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (SENIOR PROSECUTING TRIAL ATTORNEY TOM HANNIS AND DEFENSE COUNSEL RODNEY DIXON)

*Vujadin Popović et al. (Srebrenica)*

The Trial Chamber rendered its judgment on June 10, 2010. All seven Bosnian Serb defendants were found guilty and sentenced to imprisonment ranging from five years to life imprisonment. The Trial Chamber found that there was a joint criminal enterprise (JCE) to murder and a JCE to forcibly remove civilians. It also found that some members of the JCE to murder had genocidal intent and thus genocide was committed at Srebrenica. Both JCEs also had the requisite special intent for the crime of persecution. There was a widespread and systematic attack against a civilian population. This attack commenced with the issuance of Directive 7 and had various components, including the strangulation of the enclaves through the restriction of humanitarian supplies, the gradual weakening and disabling of the United Nations Protection Force (UNPROFOR), and a planned military assault on the enclaves, and culminated in the removal of thousands of people from Srebrenica and Zepa. Applying the legal elements of the crimes charged in the indictment to the proven facts, the Trial Chamber found that the following crimes were committed by members of the Bosnian Serb forces in various locations alleged in the indictment: genocide; conspiracy to commit genocide; extermination as a crime against humanity; murder, cruel and inhuman treatment, terrorizing civilians, and forcible transfer, as acts of persecution and a crime against humanity; and forcible transfer as an inhumane act and crime against humanity. The Trial Chamber did not find that the crime of

deportation had been proven. Individual criminal responsibility was found against Popović, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero, and Vinko Pandurevic.

**Remind us what the Prosecution emphasized during its closing arguments in early September 2009 for the on-going Srebrenica joint trial. Given the historical significance of the Srebrenica genocide, how did prior judgments relating to Srebrenica and the trials yet to proceed on Srebrenica (Karadžić and Mladić) influence the Prosecution's strategy? What were the most significant moments in the trial, from the perspective of the Prosecution? How did you argue the case against the defendants on the issue of superior orders, which they must have relied upon heavily for their defense? Why was this case against three senior Bosnian Serb security officers for the genocide at Srebrenica re-opened by the Prosecution after the Defense rested its case on March 12, 2009? Did the four rebuttal witnesses called by the Prosecution from late March to early May 2009 ultimately prove to be significant testimony?**

**Discuss the significance of this Srebrenica judgment, not only for international criminal law but also for the survivors of the genocide and for the legacy of the ICTY. Is this what it was all about? Has this judgment resonated throughout the Balkans?**

*Haradinaj, Idriz Balaj and Lahi Brahimaj (Kosovo)*

On July 21, 2010, the Appeals Chamber ordered a partial retrial on certain acquittals of all three defendants based on the failure of the Trial Chamber to grant the Prosecution an adequate extension to acquire the testimony of two key witnesses. The majority stated that the Trial Chamber “failed to appreciate the gravity of the threat that witness intimidation posed to the trial’s integrity,” which “undermined the fairness of the proceedings as guaranteed by the Statute and Rules and resulted in a miscarriage of justice.” The Appeals Chamber found that the Trial Chamber “seriously erred in failing to take adequate measures to secure the testimony” of key witnesses. While the Appeals Chamber acknowledged that decisions regarding testimony of witnesses are within the Trial Chamber’s discretion, because “serious witness intimidation...formed the context of the trial,” the Trial Chamber’s “error undermined the fairness of the proceedings as guaranteed by the Statute and Rules and resulted in a miscarriage of justice.” The Appeals Chamber also

criticized the Trial Chamber for placing “undue emphasis” on the Trial Chamber’s deadlines for presenting evidence, regardless of the need to ensure the testimony of two key witnesses. This “misplaced priority,” the Appeals Chamber continued, “demonstrates that the Trial Chamber failed to appreciate the gravity of the threat that witness intimidation posed to the trial’s integrity.”

Presiding Judge Robinson’s dissent stated in paragraph 32 that “[t]he Majority Opinion constitutes an overstepping by the Appeals Chamber of its boundaries, and in doing so, confuses the appellate with the trial function. This is a dangerous precedent, which militates against the proper discharge by the Tribunal of its mandate to try persons for serious breaches of international humanitarian law.” His reasons: 1) The Trial Chamber was sensitive to the importance of both witnesses’ testimony for the Prosecution’s case and the general atmosphere of fear and intimidation of witnesses by extending the case three times, and remaining open to the possibility of granting a further extension upon a showing by the Prosecution of a dramatic change in circumstances. 2) The majority opinion amounts to “a substitution of its own discretion for the discretion exercised by the Trial Chamber, and that can only be done where a discernible error on the part of the Trial Chamber can be demonstrated.” No error was demonstrated. 3) By prioritizing the Prosecution’s right to present its case through these witnesses over the right of the accused to an expeditious trial, the majority “wrongly interpreted the relationship between Articles 20 and 21 of the Statute, completely ignoring the fact that the rights enumerated under Article 20 are to be applied “with full respect for the rights of the accused” under Article 21(4).

**Dixon: What is the Defense strategy for the partial re-trial? What are we to understand about the alleged intimidation of the two witnesses and their non-show in the first trial? How do you, as Defense counsel, interpret due process standards in light of the Appeals Chamber’s apparent attempt to enforce them and achieve a fair trial? How do you square the right to an expeditious trial with the complete presentation of evidence, particularly incriminating evidence? How do you interpret Judge Robinson’s dissent and are you arguing those points in the partial re-trial? According to Robinson, did the Appeals Chamber substitute its discretion for the Trial Chamber’s without finding error first? How has the partial re-trial been received in Kosovo? In Serbia?**

**Hannis: Is this a clear cut victory for the Prosecution so far? Were you hoping for a re-trial on additional issues? What will the Trial Chamber undertake to secure the testimony of the two witnesses?**

*Radovan Karadžić*

Following a Trial Chamber decision of November 5, 2009, Karadžić had to accept being joined by a counsel representing his interests in the courtroom. That individual, Richard Harvey, was appointed by the Registrar on November 19, 2009. The Chamber's decision found that Karadžić had "substantially and persistently obstructed the proper and expeditious conduct of his trial," meeting the test for appointment of counsel set out by the Appeals Chamber in the Milošević case. The Chamber ordered the Registrar to appoint a counsel to prepare to represent the interests of Karadžić at trial, and ordered that the trial resume on March 1, 2010. However, the Chamber further stated that Karadžić would continue to represent himself, including by dealing with day-to-day matters and by preparing for trial, but that "should the accused continue to absent himself from the resumed trial proceedings in March, or should he engage in any other conduct that obstructs the proper and expeditious conduct of the trial, he will forfeit his right to self-representation, no longer be entitled to assistance from his assigned Defense team, and the appointed counsel will take over as an assigned counsel to represent him." On March 1 and 2, 2010, Karadžić made his opening statement and the Prosecution started presenting evidence on April 13, 2010. The trial continued through 2010.

**How has Karadžić's self-representation (aided by appointed counsel) worked out during 2010? How has the Prosecution presented its case against him and what kind of witnesses and incriminating documentation are being presented by the Prosecution? Have there been any defense challenges for exculpatory evidence? Has the Karadžić trial been adequately covered by the media, or has the trial gone subterranean? To what extent is Mladić's absence in The Hague detrimental to the prosecution of Karadžić?**

*Vojislav Šešelj*

There were several rulings of interest in the *Šešelj* case. On July 5, 2010, the Registry denied Šešelj's request for the ICTY to fund his trial because he had not provided the necessary documentation. On October 29, however, the Trial Chamber ordered the court to fund 50 percent of what would normally be given to an indigent defendant. In November 2010, the Registry asked the Appeals Chamber to quash the Trial Chamber's decision about funding, arguing that it had essentially usurped the Registry's power.

**Does the OTP have a dog in this fight? Why would the Trial Chamber challenge the Registrar on this issue?**

On February 2010, for the second time, Šešelj was charged with contempt of court for disclosing information about 11 witnesses in one of his books.

**How has this charge of contempt of court progressed through the year? How do you balance the right of an accused to defend himself with the right of witnesses to their security and privacy?**

*Prlić, Stojić, Praljak, Petković, Čorić, and Pusić (ethnic cleansing of Muslims/non-Serbs)*

On September 16, 2010, the Defense filed a motion seeking the disqualification of Judge Prandler on grounds of bias. On October 4, 2010, President Patrick Robinson denied the motion, finding that the Defenses of Prlić and Praljak had failed to substantiate any of their claims and therefore that it is not warranted to appoint a panel to consider the motion. They had not established any actual bias or the appearance of bias on the part of Judge Prandler and had not rebutted the strong presumption of his impartiality.

On December 15, 2010, the Trial Chamber ruled on Stojić's November 30, 2010, Motion for Certification to Appeal the Chamber's denial on November 25, 2010, to reopen his case and admit 66 documents requested by the Stojić Defense in order to refute evidence submitted by the Prosecution. The Chamber denied the motion.

The Trial Chamber will hear the closing arguments for the Prosecution on February 7, 2011, and for the Defense once the Prosecutor has concluded. Final trial briefs were filed on January 4, 2011.

**How did the Prosecution present the evidence of ethnic cleansing and align the defendants with the criminal acts associated with ethnic cleansing? Is this a particularly strong case on persecution (ethnic cleansing)?**

*Momčilo Perišić (Sarajevo and Zagreb, assaults on civilians)*

The Prosecution completed its presentation of evidence on November 12, 2009, and the Defense began its case on February 22, 2010. One of the Defense's major contentions is that the military and political leadership of the Federal Republic of Yugoslavia did not influence the VRS or General Mladić. On March 18, 2010, Milenko Jevdjevic, commander of the signals battalion in the VRS Drina Corps testified on Perišić's behalf. He asserted that after Mladić's attack on Gorazde in April 1994, he received a message from Perišić in which Perišić "kindly asked" Mladić to "stop any further actions of the VRS."

On March 19, 2010, Perišić filed a motion for a temporary provisional release for the duration of the adjournment of the trial from April 2, 2010, until the trial resumed on April 12, 2010. On March 31, 2010, the Trial Chamber denied the Defense's motion. Although the Trial Chamber conceded that Perišić did not pose a potential danger or flight risk, it maintained that a temporary provisional release is not appropriate in the absence of compelling humanitarian reasons for granting it.

**Were there any significant developments in the *Perišić* trial during 2010 and any testimony or evidence that proved particularly revealing about the role of this key individual in the leadership of the VJ? Why is Momčilo Perišić's case so significant regarding how military forces lay siege to cities?**

*Šainović, Ojdanić, Pavković, Lazarević, and Lukić (Kosovo)*

Following the February 26, 2009, Trial Chamber judgment, which found Milan Milutinović not guilty, the other defendants appealed and status conferences were held in May and September 2010. The next is scheduled for January 2011. The decisions handed down in 2010 by the Appeals Chamber covered admission of additional evidence by the Defense, motions for temporary release on compassionate grounds, and Defense motions for extension of time. On September 7, 2010, the Appeals Chamber approved the filing of David Scheffer's *amicus curiae* brief pertaining to the

proper standard for aiding and abetting liability in the case concerning Ojdanić. A reply brief by counsel to Ojdanić was filed.

**What is the OTP's view of the appeals in this case and what can we expect to see unfold in 2011? I question the time lapse between the filing of the appeals briefs and the action of the Appeals Chamber. The briefs were filed in 2009 and the next action is a status conference in January 2011. Perhaps this is a good moment to ask everyone on the panel how to manage the sheer size of the cases before the tribunals in ways that make things more efficient.**

**How do the OTP and Mr. Dixon view the intent/knowledge standard for aiding and abetting liability, which is central to the Ojdanić case?**

*Vlastimir Dordević (Kosovo)*

The Prosecution originally closed its case on October 29, 2009, but reopened it to examine one more witness on May 17, 2010. On May 20, 2010, the Defense rested its case. Closing arguments were heard on July 13 and 14, 2010. Judgment is pending.

**What is the back story about the new witness presented by the Prosecution, and do you consider his/her testimony as proving significant to the forthcoming judgment? How did the Prosecution consider the overall trial record of the *Dordević* case?**

*Ratko Mladić and Goran Hadžić (at large)*

**What was accomplished during 2010 to bring the Prosecution closer to the apprehension of Mladić and Hadžić? Why have their apprehensions proven so difficult? How did Serbia's efforts to seek admission to the European Union progress despite the fact that Mladić remains at large? Does the Prosecutor have a position on Serbia's application to the E.U. and any conditionality related to Mladić in particular that should be associated with it?**

III. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA  
(REGISTRAR ADAMA DIENG AND DEFENSE COUNSEL RODNEY DIXON)

*A. General*

**Mr. Registrar:** You are completing your tenth year as Registrar of the ICTR. Share with us some reflections about that decade of service.

—How has the ICTR evolved during the last decade? What is the most significant difference today in its operations from the day you began serving as Registrar in January 2011?

—During the mid-1990s, the ICTR had great difficulties with charges of inefficiency and even corruption. That tarnished the international reputation of the ICTR at the time. Yet the operation and work product of the ICTR since the late 1990s and through the last decade has been impressive. Explain how that came about and how you cast off the demons of that early period.

—How do you assess the Security Council's recent approval of the International Residual Mechanism for Criminal Tribunals? Explain how this will enable the ICTR to achieve its completion strategy and wrap up its docket of cases, at least to some reasonable extent, and then transition to the Residual Mechanism. Do you foresee any particular difficulties in that process over the coming years?

—You worked with two different prosecutors, Carla del Ponte and Hassan Jallow. I don't expect you to speak "out of school" here, but compare them a bit for us.

—How has your relationship with the Government of Rwanda fared during these years? I know Mr. Dixon is on stage with you here and should address this question too. But it is important to understand what the concerns and mandates of the ICTR have been that have clashed with those of the Rwandan government. This was a mighty problem in the 1990s and it continued through the last decade, particularly on the issues of arrests and delegation of cases to Rwandan courts.

—How difficult has the financial situation for the ICTR been during the last decade? How do you explain to government officials and the public that the costs of the ICTR relative to other national courts and how their budgets are allocated are

**comparatively reasonable, if not a bargain given the dimensions of the crimes committed in Rwanda?**

**—You were instrumental in the creation of the African Court on Human and People’s Rights. Are you confident that regional court can begin to pick up where the ICTR leaves off in its final years of operation? Can the African Court begin to address atrocity crimes and if so, how might it do so in the coming years?**

During 2010, the Tribunal rendered five trial and two appeals judgments, leaving ten pending judgments at the trial level. According to the Completion Strategy Report released on December 6, 2010, the Tribunal’s President, Judge Byron, stated that the Tribunal expects “four trials with respect to 15 accused in the first half of 2011, and the remaining six judgments with respect to seven accused before the end of 2011.” To accomplish this, the Tribunal has requested authorization for three judges’ terms to be extended.

President Byron projected that the Tribunal expects to complete the evidentiary stage in the first quarter of 2011 for its four currently ongoing trials and begin the last new trial in January 2012. President Byron also anticipated “one or more proceedings for contempt of court and the hearings for preservation of evidence in the cases of three fugitives under Rule 71 *bis*.” Ten fugitives remain at large.

President Byron cited problems regarding resettlement of acquitted persons and relocation of convicted persons who have served their sentences. He cautioned: “The issue of the relocation of [released convicts] needs urgent attention, as there will be many persons in this position in the coming years. If this problem is not dealt with in a comprehensive, long-term approach, the interests of justice and the rule of law will not be served.” He called upon the international community to help solve this long-term problem.

Finally, President Byron emphasized that the ICTR’s progress has been severely hampered by staff retention issues and projected that if the problem remains unaddressed, significant additional delays could be expected: “In 2010, the Tribunal lost almost 100 staff members. For the Chambers alone, the number is 19, representing a high percentage of our staffing level.” “If the problem is not solved,” he warned, “we cannot exclude further delays in judgments.”

*B. Dominique Ntawukulilyayo*

On August 2, 2010, the Trial Chamber released its Judgment and Sentence of Ntawukulilyayo, finding him guilty of only one count of genocide and not guilty of complicity in genocide or direct and public incitement of genocide. The Prosecutor decided not to appeal the 25-year sentence.

**How did the Prosecutor fail on so many counts of genocide and why was there “insufficient evidence?” One wonders whether the Prosecutor’s decision not to appeal the 25-year sentence, rather than seek life imprisonment, stems from his loss on the other counts or some larger strategy of sentencing concerning genocide before the ICTR.**

*C. Callixte Kalimanzira (Convicted)*

Callixte Kalimanzira was the former acting Minister of the Interior. On October 20, 2010, the Appeals Chamber ruled on the appeal from the Trial Chamber judgment convicting him of genocide and sentencing him to 30 years imprisonment. Because almost all of Kalimanzira’s convictions were reversed, the Appeals Chamber held that this represented a significant reduction in his culpability, calling for a revision of his sentence. However, it also noted that Kalimanzira’s conviction for aiding and abetting genocide at Kabuye Hill was affirmed, and therefore Kalimanzira remained convicted of an extremely serious crime. The Appeals Chamber reduced his sentence to 25 years imprisonment.

*Standard of specificity for indictments:* The Trial Chamber found that vagueness in an indictment was “cured” by the summary of a witness’s anticipated testimony, the witness’s prior statement, and the Prosecution’s opening statement.

**The Appeals Chamber found this was an error in law. What are the standards for indictments?**

*Standard of de novo review by the Appeals Chamber of the evidence:* The Trial Chamber found Kalimanzira guilty of direct and public incitement to genocide based in part on a speech he gave. The Appeals Chamber found that the Trial Chamber had misconstrued the testimony of witnesses, including other legal and factual errors, and granted the Kalimanzira’s appeal on this point. One wonders about the review of evidence/testimony that the Appeals Chamber did not hear directly.

**What standard do they use to correctly construe that testimony, to the point where they will overturn the Trial Chamber's interpretation?**

*The role of hearsay in international criminal courts:* The Appeals Chamber found that the Trial Chamber's lack of explanation for accepting hearsay was an error of law, which made a witness's identification of Kalimanzira at the Gisagara Marketplace not established beyond a reasonable doubt.

**What is the role of hearsay in the courts, particularly considering the time lapse between the events and the trial? And if a court does not have the exclusionary rules regarding hearsay that U.S. courts have, then what standard do they use to assign weight, and is it really an error of law not to explain the Trial Chamber's reasoning in accepting hearsay evidence?**

*D. Emmanuel Rukundo*

On October 20, 2010, the Appeals Chamber ruled, reducing Rukundo's sentence from 25 to 23 years imprisonment. The Appeals Chamber reversed Rukundo's conviction of committing genocide by causing serious mental harm to a young female Tutsi woman by sexually assaulting her. The Trial Chamber based its inference of genocidal intent on a totality of the circumstances. The Appeals Chamber reversed on the ground that the inference drawn from the circumstantial evidence must be the only reasonable inference available, and that here it was not. Judge Pocar dissented, citing ICTY jurisprudence that even a purely sexual intent does not preclude intent to harm, and that the rape/assault does not need to be part of a systematic rape/sexual assault, but rather that the attack be systematic.

**Where does this leave the inclusion of rape as a basis for genocide? Does this judgment undo some of the gains made by the ICTY? How does the Appeals Judgment square with the finding of rape as genocide in the confirmation of charges of genocide against President Al Bashir in the Darfur situation before the ICC?**

*E. Butare (Nyiramasuhuko et al.)*

*Right to an amicus curiae report on witness testimony:* The Trial Chamber ordered the Registrar to appoint an independent amicus curiae to investigate the alleged false testimony of the

witnesses and related allegations of contempt. In March 2009, the Chamber directed the Registrar to appoint a new amicus curiae to conduct a thorough investigation and to present a report to the Chamber. The Defense requested a copy and was denied. The Defense argued that the credibility of the witnesses and information relating to the guilt of the accused are in the report, and to that end, they should have access to this information to be able to fairly defend their client(s).

**Why wouldn't the Trial Chamber release the report? Is the Trial Chamber going too far into the civil law model and hamstringing the Defense's ability to do its job? If the concern is retaliation of some sort by the accused, then what about implementing some variant of the solution used in the Guantanamo cases, where the accused is often not allowed to have access to classified information that the defense lawyers can access and use?**

*F. Yussuf Munyakazi*

On July 5, 2010, the Trial Chamber found Munyakazi guilty of genocide and extermination as a crime against humanity, but he was found not guilty of complicity in genocide as the Chamber found that the Prosecution did not prove beyond a reasonable doubt that Munyakazi participated in a joint criminal enterprise, as alleged in the indictment. He was sentenced to 25 years imprisonment. Earlier, on March 17, 2010, the Trial Chamber granted the Defense motion for a site visit and directed the Registry to make all necessary arrangements to make the visits from May 30 to June 2, 2010. However, on May 7, 2010, the Chamber deemed that a material change in circumstances occurred and, having reviewed new evidence, determined that they can assess the evidence without a site visit, thus cancelling it.

**What was the importance of a site visit for the Defense so late in the proceedings? Why are site visits important to the Defense, Prosecution, or judges? Has the ICTR often arranged for site visits and has it been shown they help judges in arriving at judgment?**

*G. The Arrest of Defense Counsel Peter Erlinder*

Peter Erlinder is the lead counsel for Ntabakuze's defense. On May 28, 2010, he was arrested by Rwandan authorities on

charges of “genocide denial.” Ntabakuze filed a motion for an injunction against the Rwandan government regarding the arrest, alleging that the “Prosecutor of Rwanda” made it clear that the charges are directly connected statements Erlinder made outside Rwanda, including in the course of Ntabakuze’s defense. At the time of his arrest, Erlinder was in Rwanda on behalf of opposition politician Victoire Ingabire, chairperson of the United Democratic Forces political party, who had been seeking to run against President Kagame. Ntabakuze argued that these charges “constitute intimidation and serious interference with a legal process” and directly impact his rights to a fair and expeditious trial. The Appeals Chamber ordered the Registrar to obtain information regarding the exact nature and basis of charges brought against Erlinder. There was no response from Rwanda. On July 7, 2010, the Appeals Chamber issued a further order requesting that the Rwandan government provide it with such information within ten days of the order. On July 15, 2010, the Registrar filed submissions indicating that Rwanda had indicated that Erlinder had not been formally charged and that he had been detained as a suspect pending ongoing investigations. He was subsequently released on bail on health grounds. On October 10, 2010, the Appeals Chamber granted Ntabakuze’s motion for injunctions in part and issued a request for Rwanda to “desist from proceeding against Erlinder in relation to words spoken or written in the course of his representation of Ntabakuze before the Tribunal.” The ICTR issued Erlinder functional immunity with respect to statements made in his role as counsel. However, the Appeals Chamber rejected the argument that this immunity extends to statements made outside his ICTR role.

Only one month before he was arrested in Rwanda, Erlinder had filed a wrongful death lawsuit in the western district court of Oklahoma against President Kagame for the alleged assassination of the Rwandan President Juvenal Habyarimana and his Burundian counterpart Cyprien Ntaryamira in 1994. The case was filed on behalf of their widows. On May 22, 2010, six days before his arrest, he vowed to “increasingly take the offensive” in reshaping the history of what had happened in Rwanda.

Numerous ICTR defense lawyers threatened to boycott proceedings before the ICTR in protest of Erlinder’s arrest.

**What is the current status of Erlinder regarding both the ICTR and the Rwandan government? Are Defense counsel before the ICTR at heightened risk these days in light of the**

**Rwandan government's policies? What should be the proper scope of functional immunity for Defense counsel? What kind of impact has this matter had on defense work before the ICTR? Was the ICTR too cautious in its response to the situation with Erlinder?**

*H. Murder of Jwani Mwaikusa, Defense counsel for Yusef Munyakazi*

On July 24, 2010, Jwani Mwaikusa, defense attorney at the ICTR and law professor at the University of Dar es Salam, was murdered outside his home in Tanzania. Munyakazi had been convicted for genocide and crimes against humanity on June 30, 2010. He had planned to appeal the decision and his 25-year sentence. Earlier in the year, Mwaikusa had blocked a motion by the Rwandan government to transfer the trial of Munyakazi and three other defendants from the ICTR in Tanzania to Rwanda. He successfully argued that Rwanda lacked an independent judiciary and that the defendants would not receive a fair trial there.

**Is there any update on this murder case and its implications for the ICTR and defense counsel in general?**

*I. ICTR Complaint to U.N. Security Council regarding lack of Kenyan Cooperation*

On June 18, 2010, Prosecutor Hassan Jallow told the U.N. Security Council that Kenya has failed to cooperate with the ICTR in capturing Felicien Kabuga, an indicted fugitive accused of financing the 1994 genocide. "Despite the copious evidence of Kabuga's entry, residence, activities and occasional reported sightings of him in that country, Kenya has neither arrested him nor provided the information requested by the prosecutor to assist in the tracking and arrest of this fugitive," he said. Kabuga is the most wanted of 11 genocide suspects sought by the ICTR and still at large. The United States has placed a \$5 million bounty on his head.

**Why is Kenya not cooperating with the ICTR regarding the capture of Kabuga? What other difficulties is the ICTR experiencing regarding efforts to track and apprehend other indicted fugitives?**

IV. SPECIAL COURT FOR SIERRA LEONE (CHIEF OF PROSECUTIONS  
AND HEAD OF OFFICE, OFFICE OF THE PROSECUTOR, JIM JOHNSON)

**Charles Taylor Trial (*Prosecutor v. Charles Taylor*)**

*General Questions*

Charles Taylor was under direct examination for 13 weeks in 2009 (and under cross examination for 11 weeks at the beginning of 2010). It has been said that both the Court and the Prosecution were too lenient during the direct examination in allowing Taylor to answer questions in long narratives, effectively recounting his life beginning with his childhood. Taylor was allowed to discuss issues that were not directly related to the questions asked, such as his role in the Doe coup in 1980 and his escape from a Massachusetts jail in 1985. On occasion, some of Taylor's arguably irrelevant answers were even factually incorrect.

**Considering the claim that this may have been a Defense strategy to overwhelm judges with information, what was the Prosecution's strategy in dealing with a volume of irrelevant and potentially incorrect information in cross-examination? How did you draw the line between correcting all the information and therefore adding to the volume of information to sift through, and challenging Taylor's credibility as a witness?**

1. "Fresh Evidence" Part 1: The Legal Issue Decided in 2009

In November 2009, the Trial Chamber decided that the Prosecution could introduce "fresh evidence," which, in this Court, refers to documents that the Prosecution wanted to use during cross-examination of Defense witnesses and that were not admitted during the Prosecution's case-in-chief. The decision concluded that fresh evidence could be used to discredit Mr. Taylor's testimony. The Prosecution potentially could submit fresh evidence pointing to the guilt of the Accused, but it had to be admitted under exceptional circumstances and in the interests of justice, as determined on a case-by-case basis.

The legal issue is how (and whether) to distinguish between evidence used for impeachment purposes and evidence used to prove guilt. The Prosecution argued that allowing the admission of fresh evidence after the close of the Prosecution's case was normal

practice; the Defense argued that doing so undermined Mr. Taylor's legal rights.

While allowing the use of fresh evidence, the Court agreed with the Defense that the Accused is in a different position than other witnesses, and that the court had to be particularly cautious in distinguishing between fresh evidence that is intended solely for the purpose of impeaching the Accused's credibility and fresh evidence that is probative of the guilt of the accused. The Court mainly focused on the distinction between impeachment and proof of guilt, while the Prosecution stressed a different distinction between merely presenting fresh evidence in cross-examination and later admitting it as evidence.

The Prosecution's argument depended on a decision in the Armed Forces Revolutionary Council (AFRC) case (Trial Chamber II allowed the Prosecution to use fresh evidence to impeach the credibility of a witness, and later admitted the document into the evidentiary record even though the document also went to prove the guilt of the Accused) and on a recent Appeals decision in the ICTY *Prlić* case, which allowed fresh evidence to be introduced during cross-examination and also allowed that evidence to be admitted later as probative of guilt of the Accused in exceptional circumstances and in the interests of justice. The Defense argued that the Accused in a trial, acting as a witness (as Taylor was in this instance in his own trial), is in a different position from other witnesses who testify, particularly in relation to specific rights protected under Article 17 of the SCSL Statute, which provides for the "Rights of the accused" and includes having adequate time and facilities for preparation of his defense, to communicate with counsel, and to be informed promptly and in detail of the nature and cause of the charge against him.

All documents the Prosecution planned to use had to be given to the Defense by December 11, 2009. Documents only used for the purposes of impeachment did not require prior disclosure to the Defense. On the other hand, documents that could be probative of Taylor's guilt had to be disclosed to the Defense prior to use in examination. Moreover, such probative fresh evidence would not be allowed unless for use in cross-examination in the interest of justice and unless its use did not violate Taylor's fair trial rights.

To determine whether exceptional circumstances may allow the Prosecution to use documents as fresh evidence, the Court considered (a) when and how the Prosecution obtained the

documents, (b) when the Prosecution disclosed the documents to the Defense, and (c) why they were offered only after the Prosecution closed its case.

During Taylor's cross-examination, the Defense objected to the admission of many documents presented by the Prosecution. Examples included a three paragraph excerpt from the Sierra Leone Truth and Reconciliation Report (one paragraph was allowed while two were not), an article by *Africa Confidential* magazine allegedly showing African leaders' condemnation of Taylor (one sentence in the third paragraph that was not probative of guilt was allowed), and the IRIN West Africa Update 339 (allowed because nothing in the two paragraphs went to guilt).

In early February 2010, the Court denied all of the Prosecution's applications for leave to appeal the January 2010 oral decisions disallowing use of documents in cross-examination.

**On one hand, it can be argued that the Court's decision effectively required the Prosecution to meet a higher burden than that required at other tribunals, and before this same Trial Chamber in the AFRC case; what are your reactions to this? On the other hand, it seems that the Prosecution was pushing the boundaries of the evidentiary rules by arguing the value of certain evidence. On what basis do you feel that this argument was justified? Is it common practice in civil law countries to introduce evidence of culpability during a cross-examination? What happens if the only way that the Prosecution can introduce something related to guilt is through cross-examination of a witness, supposing that they have no other witness that could lay the foundation for that evidence? How does the fact that it is Charles Taylor's cross-examination at stake here come into play? Should the evidentiary rules change depending on who is being cross-examined?**

2. "Fresh Evidence" Part 2: Naomi Campbell, Mia Farrow, Carole White  
Media Frenzy

From January 2008 to February 2009, the Prosecution called 91 witnesses, formally closing its case in February 2009. In late June 2010, the Trial Chamber granted the Prosecution's request to re-open their case and call three additional witnesses (Naomi Campbell, Mia Farrow, and Carole White) to testify in August 2010.

In June, the Defense portrayed one witness as a high-ranked Revolutionary United Front (RUF) member and close confidante to Foday Sankoh, asserting the witness's familiarity with RUF efforts and goals and his awareness of any support for the RUF coming from Taylor. The Witness consistently denied being aware of any connection between Taylor and the RUF. This Witness's testimony opened the door for the Prosecution to request to re-open its case so as to call Campbell, White, and Farrow.

The Prosecution had earlier attempted to introduce a document in which actress Mia Farrow alleges that Taylor gave supermodel Naomi Campbell a blood diamond at a dinner in South Africa in 1997. At the time, the judges rejected the use of this document, deciding that such "fresh evidence" was neither in the interest of justice and was a violation of Taylor's fair trial rights. This purported allegation was first mentioned very early on during the Prosecution's cross-examination in January 2010.

In May, the Prosecution moved to re-open its case and hear testimony from Campbell, White, and Farrow. The Prosecution argued that the three witnesses were necessary to prove a central issue: that Taylor possessed rough diamonds which he maintained to buy arms. The Prosecution argued that jurisprudence from other international criminal courts allows for the Prosecution to re-open their case under certain limited circumstances: when the Prosecution proves that the evidence, despite due diligence, could not have been identified and presented in the case-in-chief. In the alternative, the Prosecution requested that the evidence be presented in rebuttal under Rule 85(A), where rebuttal evidence is allowed at the Court's discretion, but must relate to a significant issue arising directly out of Defense evidence, which could not reasonably have been anticipated. According to Trial Chamber II in the *AFRC* case, the Prosecution must establish that the evidence arose extemporaneously during the Defense case-in-chief that was unforeseeable, and that the evidence has significant probative value to the determination of an issue central to the determination of the guilt or innocence of the accused.

The Defense argued that the Court would not find the anticipated evidence relevant to the charges against Taylor, that the Prosecution failed to meet the legal standards required to re-open its case or to provide evidence in rebuttal, and that allowing the Prosecution to re-open its case now at such an advanced stage in trial would prejudice the administration of justice. The Defense

acknowledged that international jurisprudence did indeed recognize a party's right to be granted leave to reopen its case but only in "exceptional circumstances," which the Defense argued the Prosecution failed to establish in this case. The Defense also argued that subpoenaing Campbell would mainly generate media capital for the proceedings and not evidentiary capital necessary to try the case fairly.

In reply, the Prosecution argued that the SCSL Appellate jurisprudence provides that the Prosecution must only show a "reasonable basis" that the evidence is "likely to be" or that "there is at least a good chance" it is of material assistance to the Prosecution.

The Court found the Prosecution's request to re-open the case as falling within the Court's discretion, in that the probative value of the proposed fresh evidence was not substantially outweighed by the need to ensure a fair trial. The Trial Chamber was persuaded that the Prosecution not only showed that it could not have obtained and presented the fresh evidence during its case-in-chief, with reasonable diligence, but that it also acted with such to obtain the evidence, attempting to contact Campbell numerous times. The Trial Chamber also found that the proposed fresh evidence was highly probative and material to the indictment. The Defense could not be taken by surprise because Farrows' declaration was disclosed to the Defense in December 2009, and the Defense would have the opportunity to test the evidence on cross-examination and to make further investigations.

The testimony of supermodel Naomi Campbell gathered intense media scrutiny. Campbell testified that she had received dirty stones that she did not know were diamonds or that they were from Taylor until White and Farrow suggested that they were. Campbell also agreed that White was a woman with a powerful motive to lie about Campbell. During re-examination, the Prosecution asked Campbell why she had previously declined to make public comments about the alleged gift. When Campbell responded that she had been afraid for her family, the Prosecution then asked whether Campbell's fear of the Accused also led her to deliver testimony that was not entirely true. The Defense objected, arguing that the Prosecution could not impeach its own witness, and the Judge agreed. In response, the Prosecution attempted to classify Campbell as a witness of the Court, and not a Prosecution witness because the Prosecution had not had any contact with Campbell prior to her court

appearance, but the Judge disagreed, as Campbell had been subpoenaed at the Prosecution's request.

Farrow's account differed substantially from Campbell's with respect to the number and size of diamonds received and from Campbell's knowledge about from whom they came. In cross-examination, the Defense highlighted Farrow's inability to recall details, as well as her lack of personal knowledge of the events at issue. Farrow acknowledged that she was not present when Campbell received the diamonds. Moreover, her testimony alleging that Campbell reported having one huge diamond was contradictory to other statements. Defense concluded by attempted to portray Farrow as biased against Taylor. Also, the Judges had their own questions for her, including a question of whether Farrow got the idea of a "huge diamond" from having seen the movie "Blood Diamond." Farrow responded that the movie had not influenced her.

White's testimony also differed considerably from Campbell's. White claimed that during dinner, Campbell told her that Taylor was going to give her diamonds. White testified that she was present when Campbell received the diamonds from two men. The Defense attempted to discredit her testimony by demonstrating that she was biased against Campbell, using Facebook pages, pictures, and commentary that suggested a "blood diamond" party held at her office on the night of Campbell's testimony.

**This testimony, if credible, could be used to discredit Taylor's assertion that he did not possess blood diamonds, *and* contributes to the proof of his culpability (in the assertion that he did possess blood diamonds and used them to buy arms). Does this mean that the distinction between the two types of evidence from the court's perspective is really only a theoretical distinction? What are the practical applications of the Court's November decision on fresh evidence? What do you think the Court should do when evidence satisfies both criteria?**

**Considering the timing and the fame-quotient of the three additional witnesses, what are your reactions to the claim that this was a clever ploy by the Prosecution to refocus the Court's attention and the world's eye on its case, while disrupting the flow of the Defense's case? What was the actual value of the testimony to the Prosecution's case, considering the public acrimony between the women and the discrepancies in the testimony offered? In light of the facts that Campbell was at a fundraiser at Taylor's house, and the fame of the women and**

**Taylor in 1997, how is it that the Prosecution only learned of the evidence related to the gift of diamonds during the Defense's case-in-chief? What is your reaction to the claim that the Prosecution had its chance to make its case with the other 91 witnesses? What are the positive and negative aspects of media involvement in the Taylor case?**

3. "Fresh Evidence" Part III: Sesay's Custodial Statements and Testimony

Defense likely hoped that Sesay's testimony would corroborate Taylor's claims that he was not the commander of the RUF and therefore not responsible for the crimes committed by the RUF. Sesay's testimony seemed to corroborate testimony of prior Defense witnesses who claimed that Taylor withdrew his support of the RUF in 1992, that the RUF respected civilians and did not recruit children, obtained its weapons primarily from the United Liberation Movement for Democracy in Liberia, and was controlled exclusively by Foday Sankoh.

The Prosecution sought to use Sesay's custodial statement interview to impeach his testimony, but the Trial Chamber unanimously denied the application for this use of fresh evidence as it included information that could prove Taylor's guilt in violation of Taylor's fair trial rights and not in the interests of justice. When the Prosecution sought leave to appeal this decision, it was also denied. Again, in order to be granted leave to seek interlocutory appeal of a Trial Chamber decision, the moving party must show irreparable prejudice and exceptional circumstances. Moreover, the Prosecution again applied for disclosure of all witness statements in this period, arguing that the statements differed significantly from his in-court testimony. The Defense and Prosecution reiterated their arguments from previous applications and objections. Moreover, consistent with earlier decisions, the Trial Chamber dismissed this application for disclosure. Nevertheless, the Prosecution relied heavily on the summaries during cross examination, particularly of DCT-008, and the Judges allowed the summaries into evidence as sought by the Prosecution.

**How damaging was the Trial Chamber's denial of the Prosecution's application for such use of fresh evidence, and was the denial of appeal reasonable?**

#### 4. Disclosure of Witness Statements

The first nine defense witnesses testified between February and April 2010. The first six focused on Taylor's time in Libya, the use of child soldiers, and how the RUF acquired guns and ammunition, and much of their testimony was in closed session. The primary legal issue during this period involved the Prosecution's requests for access to Defense witness statements and witness summaries.

The Prosecution argued that the summaries provided by the Defense for three witnesses were inadequate for the Prosecution to prepare its cross examination of the witnesses, and that some witness testimonies in court were inconsistent with the Defense summaries. The Defense argued that the presumption of Rule 73*ter* was that the Prosecution would receive summaries of a witness's statement, not the complete statements, and that Prosecution had to prove by prima facie evidence that it would suffer undue or irreparable prejudice should it not receive a witness statement for the Court to order such disclosure. The Defense also argued that the jurisprudence of the SCSL, ICTR, and ICTY supported its contention that Defense witness summaries did not have to be as detailed as Prosecution witness summaries given to the Defense.

The Court agreed with the principle laid down by the ICTY Appeals Judgment in *Prosecutor v. Tadić*, where the Chamber decided that there was no blanket right for the Prosecution to see the witness statement of a Defense witness. The Prosecution could only apply for a disclosure, while the Chamber retained the discretion to make case-by-case decisions.

The Court only granted one disclosure of a witness statement for DCT-179, basing the decision on being in the interest of justice due to the apparent contradiction between the information provided in DCT-179's witness summaries and his evidence-in-chief regarding a period relevant to the indictment. In other requests for disclosure, the Court mostly allowed the Prosecution additional time to prepare their cross-examination.

**What was the impact on the trial of the Court's denial of the Prosecution's effort to gain greater access to the Defense witness summaries?**

## 5. Prosecution Allegations and Strategies

### *i) Summary of Prosecution Allegations*

The Prosecution sought to undermine Taylor's credibility as a witness and focused primarily on Taylor's claim that he was appointed by the Economic Community of West African States (ECOWAS) Committee of Five (a group of regional leaders attempting to negotiate peace in Sierra Leone) to be the "point president for peace" for the conflict of Sierra Leone. The Prosecution attempted to point out flaws and inconsistencies in his testimony, including the following, which Taylor denied:

- a. That Taylor had lied about his involvement in the 1985 coup to overthrow the then Liberian president Samuel Doe;
- b. That Taylor lied about knowing rebel leader Foday Sankoh in Libya during the 1980s;
- c. That Taylor's testimony regarding his decision to step down from the Liberian presidency was not based upon the Greystone attack, but rather from pressures by other West African leaders;
- d. That he supplied arms and ammunition to rebels in return for diamonds;
- e. That he helped rebels plan certain operations during which atrocities such as rape, murder, and amputation were committed;
- f. That he had knowledge of rebel commander Sam Bockarie's public calls to kill Sierra Leoneans in Freetown if Foday Sankoh was not released from jail;
- g. That he participated in the operation of the attack in Freetown;
- h. That he sent fighters to destabilize the Ivory Coast;
- i. That he ordered the execution of Sam Bockarie because he knew that Bockarie had been indicted by the SCSL and he did not want Bockarie in the hands of the Court;
- j. That he systematically used child soldiers for combat;
- k. That he stashed away huge amounts of Liberian government money in foreign bank accounts;
- l. That the NPFL did not have standards to mitigate widespread abuses;
- m. That amputations occurred in Liberia as they did in Sierra Leone; and

n. That he was responsible for the execution of several Liberian politicians, including Jackson Doe, Gabriel Kpolleh, Moses Duopoe, and Samuel Dokie.

*ii) Prosecution Strategy Highlights*

a. Questioning Taylor to demonstrate that he did not have complete control over the whereabouts of the documents of his personal presidential archives on which the Defense heavily relied during direct-examination. By questioning Taylor on the possibility that other individuals may have had access to the documents, the Prosecution attempted to show that the content of the documents could have been compromised.

b. Questioning Taylor to suggest that he had tried to benefit the RUF through his peace negotiations where the conclusion of the Lome Agreement would transform the RUF into a political party, affording the RUF all the rights of a party, including the right to assembly and amnesty covering crimes committed by the RUF.

c. Linking atrocities in Liberia by the NPFL soldiers to those in Sierra Leone by the RUF to demonstrate that Taylor was involved with the RUF.

d. Questioning Taylor on specific knowledge of alleged NPFL crimes, including alleged crimes of his own family members.

e. Questioning Taylor on his specific knowledge of the use of child soldiers, police brutality, and mistreatment of journalists, introducing media and articles including some from the BBC and Amnesty International that reported on the topics.

## 6. Miscellaneous Legal Issues

### *i) Defense Request for Disclosure of Exculpatory Information on Witness Payments*

The Defense requested disclosure of exculpatory information about some \$30,000 paid by the Prosecution to Defense Witness DCT-097 under Rule 68, arguing that this information tended to prove that Taylor was not connected with RUF diamond trading. According to the Defense, the Witness claimed that a Global Witness employee had interviewed him in 2001 regarding his involvement with the diamond trade and the RUF during the Sierra Leone conflict. Purportedly, the Prosecution gave the Witness an allowance during the period he was interviewed by the Prosecution; the Witness claimed that the Prosecution stopped giving him the money when they told him that he was not giving the Prosecution what it needed. The Trial Chamber granted this motion in part, ruling that the Prosecution must disclose information relating to payments made to DCT-097, but that the Prosecution was not obligated to disclose the alleged statement made by the Witness to the Global Witness. The Court noted that Rule 68(B) does not limit disclosure of exculpatory materials relating only to Prosecution witnesses, but is broader. The Court concluded that the Defense failed to make a prima facie case showing that the Global Witness statement existed, or that the alleged statement met the other elements of the test for mandated disclosure. Adopting the view of the ICTR in *Karemera*, the Court found that because the Prosecution did not contest the contents of the money transfers and because the funds were transferred by Prosecution employees, the Prosecution should have disclosed information about the transfers to the Defense.

In a separate issue relating to witness payments and a subsequent charge of abuse of process made by the Defense against the Prosecution, the Trial Chamber ordered Prosecutors to disclose exculpatory evidence in their possession that suggests that Charles Taylor did not order the execution of Johnny Paul Koroma, the former leader of Sierra Leon's military junta, the AFRC. The factual issue of Koroma's death is still at issue as the Defense argued that Koroma, who worked with the RUF rebels to bring down the government, may be alive.

The Court's order granted the Defense's September 24, 2010, motion for disclosure, in which the Defense alleged that the witness

involved was previously a potential Prosecution witness who had received payments to cooperate with investigators and who later became a Defense witness. The Defense argued that the benefits given to the witnesses were meant to induce them to give false testimony against Taylor. The witness himself admitted to defense lawyers that he was making up the story to get money from the Prosecution. The witness was allegedly a subordinate who carried out the murder of Koroma, on order by Taylor as an individual who had knowledge of his dealings with Sierra Leonean rebel forces.

The Trial Chamber ordered the Prosecution to disclose materials regarding an investigation by the Prosecution into the alleged death of Koroma, including DNA tests on corpses, records of disbursements made to Defense witness DCT-032, and an original duplicate copy of indemnity against the Prosecution before the Special Court. However, the Trial Chamber had at the time declined to draw adverse inferences from the Prosecution's failure to comply with Rule 68(B), holding that since the potentially exculpatory material had not yet been disclosed, such a request was premature. After the exculpatory material was disclosed by the Prosecution, the Defense moved again for the Trial Chamber to draw an adverse inference from the disclosed material against the Prosecution allegations and evidence that Taylor was responsible in any way for the alleged death of Koroma in Liberia.

The Trial Chamber dismissed this motion to draw adverse inferences against the Prosecution's allegations and evidence that the Accused was responsible in any way for the alleged death of Koroma in light of the Prosecution's failure to comply with Rule 68(B). The Court reasoned that the Defense failed to demonstrate that any material prejudice flowed from the Prosecution's failure to comply with the Rule, that the failure to comply was not done in bad faith, and that the adverse inference sought is not available on the material relied upon, which does not go so far as to establish that the evidence of the Prosecution witnesses relating to Koroma's death could not be believed.

However, the Court granted the Defense's motion for leave to appeal this dismissal, finding that the Defense met the conjunctive conditions of exceptional circumstances and irreparable prejudice that cannot be easily remedied in final appeal as prescribed by Rule 73(b), which governs the test for granting an interlocutory appeal. A decision on the appeal has yet to be made.

**The issue of the Prosecution's payment to witnesses seemed to come up a couple of times in this case, both in 2009 and 2010. While the issue in 2010 did not seem to be particularly controversial per se, has it become a theme in the Court's jurisprudence?**

*ii) Defense Motion for Investigation of Prosecution for Abuse of Process/Contempt of Court*

In September 2010, the Defense first alleged abuse of process for the manner in which the Prosecution had conducted its investigations, and moved for relief in the form of an independent investigation into the OTP and its investigators under Rule 77. The Defense cited an SCSL Appeals Chamber holding that the standard for an independent investigation into contempt is not of a *prima facie* case, which is the standard for committal for trial, but instead a different and lower standard of "reason to believe" that an offense may have been committed, a pre-condition for ordering an independent investigation. The Defense alleged that the Prosecutor was responsible for assaulting potential witnesses or suspects, exerting undue pressure by threats, harassment, and intimidation, and offering or providing improper payments, benefits, or other incentives. The Defense sought investigation into the conduct of the Prosecution in relation to witnesses and potential witnesses in this case as well as for payments and benefits offered and/or paid by the Prosecution to witnesses. The Prosecution denied all allegations and sought to dismiss the motion on two counts: first, that it was filed untimely, and second, that it failed to establish that there is any credible reason to believe that any member of the Prosecution had been involved in conduct that would constitute "contempt of court," arguing for a narrow construction of Rule 77. The Defense replied by suggesting that the Special Court and ICTY Rules were distinguished on grounds that ICTY Rules were limited to three categories of witnesses whereas the Special Court deliberately included a fourth category not provided for in the ICTY Rules, namely, "potential witnesses." The Court eventually orally dismissed this motion in October 2010, and gave its reasoning in a December 2010 decision.

Rule 77 sets out the law and procedure for dealing with contempt of the Special Court. The Appeals Chamber has stated that the standard of proof in determining whether an independent investigation should be ordered into a matter of contempt is not that

of a *prima facie* case, the standard for committal for trial, but a different and lower standard of “reason to believe” that the offense may have been committed. Notwithstanding the lower standard of proof, an allegation of contempt must still be credible enough to provide a Judge or Trial Chamber with “reason to believe” that a person may be in contempt. The Trial Chamber found against the Defense on the timing for bringing the alleged misconduct to the attention of the Trial Chamber, and under the ambit of Rule 77. Specifically, the Defense’s application amounted to a request for an audit of the Prosecution’s operations since the inception of the Special Court in 2002, which is a remedy too general and which does not fall within the ambit of Rule 77. Instead, Rule 77 is concerned about the conduct of individuals who have allegedly committed contempt and must be targeted at an individual engaging in specific conduct that the moving party must identify in greater detail and in accordance with the “reason to believe” standard. The Trial Chamber found no reason to believe that members of the Prosecution willfully interfered with the administration of justice or otherwise engaged in contemptuous conduct as identified in Rule 77 and so dismissed the Defense’s motion.

However, the Court also granted the Defense’s motion for leave to appeal the previously denied motion for the investigation into contempt, finding that the Defense met the conjunctive conditions of exceptional circumstances and irreparable prejudice that cannot be easily remedied in final appeal as prescribed by Rule 73(b), which governs the test for granting an interlocutory appeal. A decision on an appeal has yet to be made.

**Any comment on this direct assault by the Defense on the conduct of the Prosecution?**

V. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (INTERNATIONAL DEPUTY CO-PROSECUTOR WILLIAM SMITH)

*TRIAL 001*

On July 26, 2010, the Trial Chamber issued its judgment in the case of Kaing Guek Eav *Alias* Duch (Case No. 001). On August 16, 2010, the Co-Prosecutors filed an appeal against the judgment of the trial chamber convicting Duch of grave breaches of the Geneva Conventions and crimes against humanity. On August 24, 2010, Co-

Lawyers for Duch filed an appeal of the Trial Chamber's July 26, 2010, judgment, asking the Supreme Court Chamber to set aside the Trial Court judgment and acquit Duch.

### **Main Legal Issues from the Judgment**

#### **1. Cumulative Convictions – Crimes Against Humanity**

This is the first of three grounds for the Prosecution's appeal. Because Duch's actions formed the basis for multiple convictions for crimes against humanity and war crimes, the Chamber had to consider the effect of the cumulative convictions. In doing so, the Chamber applied the *Celebici* test from the ICTY. This test turns on whether the statutory provisions of multiple criminal convictions have *materially* distinct elements from each other. After applying this test, the Chamber found that extermination was found to encompass murder and the one instance of rape was included in torture. The Chamber also found that persecution on political grounds encompassed extermination, enslavement, imprisonment, torture, and other humane acts.

In their Notice of Appeal, the Co-Prosecutors argued that the Chamber erred in subsuming all of these crimes against humanity in that of persecution on political grounds, and therefore erred in not convicting Duch cumulatively for all of the crimes against humanity. In subsuming the crimes, the Chamber based its judgment on the *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, paragraphs 10 and 12 (noting that where persecution requires the materially distinct elements of a discriminatory act and a discriminatory intent, it is therefore more specific than murder or other inhumane acts as a crime against humanity, and further noting that convictions for imprisonment and persecution are impermissibly cumulative. Where persecution takes the form of imprisonment, the former subsumes the latter (citations omitted)). This is despite the fact that it seems that the majority of the judges in that Chamber entered cumulative convictions for persecution and other crimes against humanity.

The Prosecution's appeal further alleges that the Trial Court erred by characterizing the crime against humanity of rape as torture and not convicting Duch of the two distinct crimes (crime against humanity of rape and crime against humanity of torture) separately. The Chamber found Duch criminally liable for torture. However, the

Chamber noted that in 1975, “torture” required the involvement of a State official, and therefore this requirement was applied in Duch’s case. Torture occurred in the interrogation techniques used in S-21 and S-24, the rape of a detainee, and “other inhumane acts” inflicted on detainees. The Chamber noted that rape is a separate offense from torture both under Article 5 of the ECCC Law and international criminal law. However, the Chamber found that in this case, the act committed met the legal elements of both rape and torture.

**Did the Trial Chamber go too far in the way that it subsumed crimes within each other? Should it have instead entered cumulative convictions? What is the practical difference and effect between cumulative and subsumed convictions?**

## 2. Sentencing Issues/Court’s Discretion

In sentencing Duch, the Chamber noted that there is not an international sentencing regime that applied to the ECCC. With one dissenting judge, the majority stated that the sentencing would draw from international and Cambodian sentencing principles. Notably, one of the most prominent principles guiding the sentencing was that its purpose was to punish the accused, not to seek revenge. This is notable because of the outcry from civil parties and people in Cambodia and abroad who think the sentence is too light.

**What was the argument made by the dissenting judge on the sentencing principles?**

In the aftermath of the sentence, many commentators expressed doubt that the sentence was heavy enough to punish Duch and deter future war criminals. Drawing from the Rome Statute and Cambodian 2009 Penal Code, the Chamber announced that it would apply one single sentence for Duch’s multiple convictions. According to Deputy International Co-Prosecutor William Smith, the parole provisions under national law should not apply to Duch because he was convicted by an international tribunal. Furthermore, Smith stated that there is no parole possibility under the ECCC because the ECCC expressly declined to include parole provisions that other international tribunals may have.

**How difficult was it for the Co-Prosecutors to agree on the factors for an appeal regarding the sentence issue? What most influenced the decision to appeal on this issue?**

The Chamber refused to find that duress and following orders were mitigating factors. However, the Chamber did give “limited weight” to the Democratic Kampuchea (DK) government’s coercive

environment under which Duch operated as an officer of the Communist Party of Kampuchea (CPK). The Chamber also found Duch's cooperation with the ECCC a mitigating factor because it aided "national reconciliation," which was one of the goals of establishing the ECCC. Finally, Duch's "propensity for reconciliation" was also given limited weight by the Chamber. Citing Duch's failure to fully admit responsibility for his actions and his last-minute request for acquittal, the Chamber stated that any remorse that may have been a mitigating factor was undermined, diminishing the extent to which it may have been considered (although it apparently did not diminish it completely).

**Why should the Chamber have accorded any mitigating value to the DK government's "coercive environment?" Isn't that a normal phenomenon in atrocity situations? Didn't Duch fatally undermine the mitigating advantage for cooperation when he sought "release" and "acquittal?"**

Duch's sentence was further mitigated by his unlawful detention by the Cambodian Military Court for more than eight years. Drawing reasoning from the ICTR, a majority of the Chamber found that Duch's unlawful detainment entitled him to a reduction of five years from his sentence. Notably, the Chamber stated that "neither the gravity of the crimes . . . nor the constraints under which the Cambodian legal system was operating . . . can justify these breaches of the Accused's rights." The majority sentenced Duch to 35 years. The 35 years was further reduced by the five-year compensation for Duch's unlawful detention and for the time he spent in detention under the ECCC since July 31, 2007, thus reducing the sentence to be served to 19 years.

**Should we understand that there really was no disagreement by anyone—the Prosecution, Defense, Judges—about the need to mitigate Duch's sentence in light of the eight-year detention in the Cambodian Military Court? Does this mean that under no circumstances can the Appeals Chamber seriously consider a life sentence for Duch?**

The Prosecution's appeal alleges that the Trial Court erred in its sentencing discretion by "giving insufficient weight to the gravity of the 'crimes of a particularly shocking and heinous character' committed by Duch, his role and willing participation in those crimes and, other aggravating circumstances; and giving undue weight to the mitigating circumstances." The appeal also alleges that the sentence imposed by the Trial Chamber is arbitrary and

inadequate and that the Trial Chamber “committed an error of law... by failing to consider the relevant international sentencing law and the range of sentences available to it in cases similar to this.”

This is also the second ground for the Defense’s appeal that the Supreme Court acquit Duch, stating that the Court erred in the determination of a single prison sentence of 35 years. The appeal argues that Duch should be designated a witness to the events during the Democratic Kampuchea regime. The appeal argues that the Trial Court violated Rule 87 of the ECCC internal rules by failing to examine the question of its personal jurisdiction, “solely on the grounds that the Defense preliminary objections were raised late.”

**How well does this sentence conform with the sentences meted out to others found guilty of similar crimes in other international criminal courts? Explain how the issue of “gravity” figures so prominently in the Co-Prosecutors’ appeal and in the analysis of many commentators of the Trial Chamber judgment.**

### 3. Error in Defining Enslavement

This is the third ground for the Prosecution’s appeal, which alleges that the Trial Chamber erred in failing to convict Duch of enslavement because it used an erroneous definition of the crime against humanity of enslavement. The Chamber found that no fewer than 12,272 persons died at S-21 and S-24. Due to the massive scale, the Chamber found that the deaths and executions of the detainees amounted to murder and extermination. The Chamber also found that the detainees of S-21 were subjected to enslavement (which was meant in this case to be forced labor. . . “coupled with detention”), imprisonment, torture, other inhumane acts, and persecution on political grounds. With regard to enslavement, the Co-Prosecutors claim in their Notice of Appeal that the Chamber had relied on an incorrect definition of enslavement by making “forced labour an essential element of enslavement.”

### 4. No Procedure to Allow a Guilty Plea

The Trial Chamber noted that unlike other international tribunals, the ECCC does not allow a defendant to plead guilty. As a result, the Chamber heard all issues related to the charges, even if the issues were not in dispute. Further, in only a few short paragraphs,

the Chamber rejected Duch's defenses that he: 1) acted under duress and 2) was only following superior orders of the DK government.

**How should the Court handle a defendant who essentially pleads guilty, when there is no mechanism for a guilty plea in the rules of procedure and evidence?**

5. Lack of Jurisdiction over Cambodia Diminishes the Meaningful Participation of Civil Parties

After convicting Duch of crimes against humanity of persecution and the above-listed war crimes under the Geneva Conventions, the Trial Chamber turned to whether Duch could be held responsible for the injuries of two categories of Civil Parties. The two categories of Civil Parties were survivors of S-21 and S-24, and relatives of detainees of S-21 and S-24. The Chamber found that 66 Civil Parties had established their claim to be immediate victims of S-21 or S-24, or to have proved the existence of immediate victims of S-21 or S-24 and close kinship in relation to them. The death of these victims caused demonstrable injury and this harm was a direct consequence of Duch's actions. The Trial Chamber granted the request of these Civil Parties that their names be included in the judgment. The Chamber rejected nearly all Civil Party reparation claims on the grounds of lacking specificity or as being beyond the scope of available reparations before the ECCC. The Trial Chamber did agree to order the compilation and publication of all statements of apology made by the Accused during the trial, but rejected that statements made by Civil Parties be included.

In rejecting nearly all of the Civil Parties' requests for reparations, the Trial Chamber recognized that, unlike regional human rights' courts such as the European Court of Human Rights, the ECCC does not have jurisdiction to compel the Cambodian government or its national authorities to contribute monies to reparations.

**What will be the effect of the handling of Civil Parties in the *Duch* trial on future ICC cases? What are the lessons to be learned, and what is the ECCC doing right, and wrong, in its dealings with Civil Parties in Trial 002? What's the point of being a Civil Party if all you get is your name published in the judgment, and the tribunal/court (whether it be the ECCC, or the ICC) has no real enforcement authority? Could the Trial Chamber have determined more innovative remedies for the**

**Civil Parties, including some that had been suggested by lawyers for the Civil Parties during the Duch trial?**

6. The ECCC's Personal Jurisdiction over Duch

This is the first ground for the Defense's appeal asking the Supreme Court Chamber to set aside the Trial Court judgment against Duch and acquit him.

The Defense appeal argues that the Trial Court erred in finding that it had *ratione personae* jurisdiction over Duch.

[The appeal alleges that the Trial Chamber] ... failed to demonstrate why it was convinced beyond a reasonable doubt that the Prosecution evidence on which it relied proved that the Accused fell under its personal jurisdiction. In reality, in light of his official functions at the relevant time, the Accused does not fit into the category of persons under the jurisdiction of the ECCC.

The Defense appeal further argues that the Trial Chamber erred by applying international customary law inconsistent with the ECCC law.

[It alleges that t]he Trial Chamber gave preference to common law principles at the detriment of the civil law principles recognized under the civil law system in effect in Cambodia. Such interpretation amounts to a violation of Article 2(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, of Articles 1 and 2(new) of the ECCC law and of the civil law judicial system in effect in Cambodia.

**How can the Defense raise the issue of personal jurisdiction on appeal?**

**Describe how the Trial Chamber addressed this issue long before closing arguments and the July 26, 2010, judgment, and arguably denied the Defense counsel the opportunity to raise**

**it so late in the proceedings and again on appeal. Did Duch's lawyers do themselves any favor with the judges by challenging personal jurisdiction in the manner in which they did?**

*TRIAL 002*

7. Background

On September 15, 2010, the Co-Investigating Judges issued the Closing Order that indicted four Khmer Rouge leaders: Nuon Chea, the party's chief ideologue; Ieng Sary, the foreign minister; Ieng Thirith, the social affairs minister; and Khieu Samphan, the party's head of state.

The indictment charges that between April 17, 1975, and January 6, 1979, defendants, through their acts or omissions, committed (via a joint criminal enterprise), planned, instigated, ordered, or aided and abetted, or are responsible by virtue of superior responsibility, for the following crimes:

- (1) **Crimes Against Humanity:** (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecution on political, racial, and religious grounds; (i) other inhumane acts...(Closing order, p. 370).
- (2) **Genocide**, in killing members of Vietnamese and Cham groups. Defined as, "acts of killing, committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such."
- (3) **Grave Breaches of the Geneva Conventions of 12 August 1949:** (a) willful killing; (b) torture or inhumane treatment; (c) willfully causing great suffering or serious injury to body or health; (d) willfully depriving a prisoner of war or civilian the rights of fair and regular trial; (e) unlawful deportation or unlawful confinement of a civilian.
- (4) **Violations of the 1956 Penal Code of Cambodia:** (a) homicide; (b) torture; and (c) religious persecution.

The Closing Order (p. 276) reads:

The Co-Investigating Judges find there is sufficient evidence that the Charged Persons, Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith committed the crimes listed in this Closing order through their membership in the Joint Criminal Enterprise and their contribution to the common purpose...Further, the Charged Persons not only shared with the other members of the Joint Criminal Enterprise the intent that these crimes be committed as part of the common purpose, they were the driving force behind it.

### **How do you assess the Closing Order?**

#### 8. Continued Detention

The Co-Investigating Judges decided in the Closing Order of September 15, 2010, to continue the detention for all four defendants, despite their advanced age and in some cases, failing health. Their reasoning for each:

- a. Ieng Sary: to ensure his presence at trial, to protect his security, and to preserve public order.
- b. Ieng Thirith: to ensure her presence at trial, preserve public order and avert the risk of Thirith exerting pressure on witnesses or victims.
- c. Khieu Samphan (Hem): to ensure the presence of Hem at trial, protect the security of Hem, preserve public order and avert the risk of Hem exerting pressure on witnesses or victims or destroying evidence if released.
- d. Nuon Chea: in order to ensure the presence of Chea at trial, protect his security, preserve public order and avert the risk of Chea exerting pressure on witnesses or victims or destroying evidence if released.

Nuon Chea applied for provisional release because Cambodian Law does not allow provisional detention to exceed three years. His application was dismissed. The Prosecution argued that

he should not be released in light of “the complexity of the case, the seriousness of the charges and the diligence of the Court to date.” The Co-Investigating Judges disagreed with the Defense’s interpretation of the applicable Cambodian law, and found that the Internal Rules do not limit provisional detention to three years and that it was necessary to maintain Nuon Chea (and the rest of the indicted) in Provisional Detention until they appear before the Trial Chamber, pursuant to Internal Rule 68.

9. Appeals Against the Closing Order/Challenges to ECCC Jurisdiction

Each of the accused filed an appeal in the Pre-Trial Chamber against the Closing Order, claiming that the Co-Investigating Judges erred by charging them with genocide, crimes against humanity, grave breaches of the Geneva Conventions, and with joint criminal enterprises as a mode of liability. They argued that these crimes and joint criminal enterprise were not part of the law applicable in Cambodia during 1975-1979—the relevant period of the court’s jurisdiction. Thus, they assert, the charges violate the principle of legality, which holds that a person can only be charged with crimes that were clearly established as such at the time of the alleged commission.

The argument is premised on the claim that the ECCC is a domestic court that must apply Cambodian law, and that domestic criminal law between 1974 and 1979 did not provide for the criminalization of genocide, crimes against humanity, or war crimes. Further, they argue that joint criminal enterprise was not a mode of liability recognized in Cambodia during the relevant time. Counsel for Ieng Sary also claims that a pardon, given to him in 1996 by the King of Cambodia when he renounced his allegiance to Pol Pot and the Khmer Rouge, bars the claims against him, and that neither command responsibility nor aiding and abetting are appropriate modes of liability before the ECCC because they were not part of established Cambodian law by 1979. (Ieng Thirith Appeal from the Closing Order, page 14).

On January 13, 2011, the Pre-Trial Chamber confirmed and partially amended the indictments against Ieng Sary, Ieng Thirith, Khieu Samphan, and Nuon Chea. The Pre-Trial Chamber ordered the Accused Persons to be sent for trial and to continue to be held in provisional detention until they are brought before the Trial Chamber. The indictments continue to include charges of crimes against humanity, genocide, grave breaches of the 1949 Geneva Conventions and murder, torture and religious persecution as defined by the 1956 Cambodian Penal Code. The Pre-Trial Chamber found that the appeal filed by Khieu Samphan was inadmissible, whereas the appeals filed by Ieng Sary, Ieng Thirith and Nuon Chea were found to be admissible in part. Of the admissible parts, the Pre-Trial Chamber dismissed all the grounds of appeal with two exceptions. First, the Pre-Trial Chamber ordered that the Closing Order be amended with a specification for the requirement of the existence of a link between the underlying acts of crimes against humanity and an armed conflict. Second, the Pre-Trial Chamber also found that rape did not exist as a crime against humanity in its own right in the period 1975-1979, but that rape could be considered as “other inhumane acts” within the legal definition of crimes against humanity. The Closing Order was amended accordingly.

Currently, the trial against the four leaders of the CPK is set to begin in mid-2011. It is feasible that the Trial Chamber could hold its initial hearing within the first quarter of 2011 and set a date for opening the trial within the first half of 2011.

**What are the views of the OTP about the PTC decision of January 13, 2011, regarding the appeal? Why did the PTC require a link between crimes against humanity and an armed conflict? How will the finding on rape as an “other inhumane act” affect the Prosecution?**

10. Civil Party Participation and Reparations in the Wake of Trial 001

The ECCC is the first hybrid court to provide a role for Civil Parties in criminal proceedings (recognizing that the ICC also provides for a role). ECCC Internal Rule 23(1) provides that the purpose of Civil Party action is to (a) participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the Prosecution; and (b) allow victims to seek collective and moral reparations.

The investigating judges received and reviewed 4,128 applications from persons claiming to be victims of crimes

committed by the accused. They admitted 2,123 of the applicants as civil parties—victims recognized by the Court as parties to the proceedings who are allowed to claim collective and moral reparations. They rejected the remaining applications for a variety of reasons, most commonly because the applicant did not establish that his or her injury was related to a specific crime or crime-site included within the scope of the investigation.

In Trial 002, the ECCC is under pressure to find more creative and symbolic solutions to the issue of reparations, should the accused be found guilty. Deputy Prime Minister Sok An said, “People have to have something to take away and be proud of this court; to be proud of the trial...If the reparations after this second case are similar to the first case (*Duch* case), then most victims will not be satisfied. If the reparations are still the same, I think it will not be successful.”

**Considering the result in Trial 001, what meaningful “collective and moral reparations” can this court offer the victims who participate?**

The seventh plenary session of the ECCC took place between February 2 and 9, 2010, and resulted in amended Internal Rules creating two Civil Party Lead Co-Lawyers to coordinate with all Civil Party Lawyers and victims. The amendments were adopted to streamline civil society participation and accommodate the large number of civil parties participating in Trial 002. The Lead Co-Lawyers will be responsible for overall advocacy, strategy, and in-court presentation of the interests of all Civil Parties. The new rule scheme “is intended to balance the rights of all parties, to safeguard the ability of the ECCC to achieve its mandate while maintaining Civil Party participation, and to enhance the quality of Civil Party representation.”

A second set of amendments focused on reparations seeking to “open additional avenues through which reparations can be paid, such as third-party funds, to ensure that victims still receive reparations even if the convicted person is indigent or refuses to comply.”

In August 2010, the Co-Investigating Judges began to release their first decisions on the admissibility of Civil Parties in Trial 002 after a review of 3,988 applications. Due to the large number of victims seeking to participate, the Internal Rules were amended to provide that decisions on the admissibility of such parties must be made during the judicial investigation and, at least, by the Closing

Order. This was accomplished by September 15, 2010, when the Closing Order was issued.

**If Trial 002 is set to begin in early to mid-2011, has this procedure provided the victims with enough opportunity to submit their applications to participate? What appeals process, if any, is there for victims who have submitted their appeal in a timely fashion and been denied?**

#### 11. Political Interference

On September 9, 2010, the Pre-Trial Chamber of the ECCC issued the “Second Decision on Nuon Chea’s And Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses,” dismissing the request by lawyers for Ieng Sary and Nuon Chea for an investigation into alleged political interference by the Cambodian government in the Court. The appeal was dismissed due to the failure to achieve the vote of a super-majority of judges.

##### *i) Procedural History*

Beginning in November 2008, Co-Lawyers for Nuon Chea and Ieng Sary filed several “Requests for Investigative Action” or “Rule 35 Requests,” asking that the Office of Co-Investigating Judges (OCIJ) interview current and former members of the Royal Government of Cambodia in hopes of finding “documents and information relevant to the pending judicial investigation . . . some of which may be exculpatory” in anticipation of Trial 002. The lawyers for Nuon Chea and Ieng Sary filed the requests in response to public allegations of political interference, Hun Sen’s public remarks regarding potential ECCC witnesses, the RCG’s official position with respect to six summoned officials, and other events. In response to the Requests, the OCIJ issued summonses and received no response. The OCIJ refused to use coercive measures to compel appearances of the witnesses and dismissed the requests on January 13, 2010. On March 15 and 16, 2010, Co-Lawyers for Ieng Sary and Nuon Chea issued appeals to the Pre-Trial Chamber in response to the dismissal. On June 8, 2010, the Pre-Trial Chamber issued its response directing the Co-Investigating Judges to “reconsider the Requests in light of the correct interpretation of Internal Rule 35,” but confirmed “the decision by the International Co-Investigating Judge [CIJ] that implementing coercive measures against the six summoned officials would unduly delay the conclusion of the

judicial investigation.” “The Pre-Trial Chamber found that the CIJs had incorrectly interpreted Internal Rule 35 which had led to an error of law.” That is, the CIJs interpreted Rule 35 as having application only “once evidence can be deduced that the CIJs have failed to exercise their power or perform a particular function as a consequence of interference . . .”

In response, the CIJs filed the “Impugned Reconsideration” affirming their original decision. The CIJs reconsidered the request with the “purpose of ascertaining whether there might be any link between statements by members of the Cambodian government and the decision of witnesses not to appear,” and again found that the allegations did not warrant application of Rule 35. Finally, the Co-Lawyers for Nuon Chea filed a response to the Impugned Reconsideration asking that the Pre-Trial Chamber “investigate whether comments made by Kong Sam, Khieu Kanharith, and others in the Royal Government of Cambodia may have impacted the ability or willingness of these witnesses summoned by the International Co-Investigating Judges to participate in interviews” and to take appropriate action, including instructing the OCIJ to carry out the investigative actions requested in the Rule 35 Request.

*ii) September 9, 2010, PTC Decision*

The Pre-Trial Chamber failed to reach a super majority decision on whether or not the Co-Investigating Judges erred in failing to conclude that material placed before them gave rise to a reason to believe that an interference pursuant to Internal Rule 35(1) may have occurred.

Rule 35 provides that the ECCC “may sanction or refer to appropriate authorities, any person who knowingly and willfully interferes with the administration of justice,” including anyone who “threatens, intimidates...or otherwise interferes with a witness.” Rule 35 is “demonstrably” similar to Rule 77 of the ICTY. The Pre-Trial Chamber explicitly adopted that court’s approach to ICTY Rule 77 in its application of ECCC Rule 35 here. Unlike Rule 77 of the ICTY, however, Rule 35 provides that the accused must act with the *mens rea* elements of knowingly and willfully. That is “it must be demonstrated that the accused acted willfully and knowingly and with the knowledge that his conduct was likely to deter or influence a witness or potential witness.”

*iii) Joint Dissenting Opinion of International Judges Catherine Marchi-Uhel and Rowan Downing*

The two international judges on the PTC filed a strong dissent arguing for intervention: “As a result of the repeated failure of the CIJs to act, we are of the view that given the grave nature of the allegations of interference the Pre-Trial Chamber must intervene.” They argued:

In surveying this material [supporting the allegations of possible interference with the administration of justice] we are of the view that no reasonable trier of fact could have failed to consider that the [relevant] facts and their sequence constitute a reason to believe that one or more members of the [Royal Government of Cambodia] may have knowingly and willfully interfered with witnesses who may give evidence before the CIJs... The comment by [government spokesman] Khieu Kanharith [“that [the] government’s position was that [the six government officials] should not give testimony”] satisfies us that there is a reason to believe he, or those he speaks on behalf of, may have knowingly and willfully attempted to threaten or intimidate the Six Officials, or otherwise interfere with the decision of the Six Officials related to the invitation to be interviewed by the International Co-Investigating Judge.

The two international judges argued that the “most suitable course of action would be to conduct further investigations to ascertain whether there are sufficient grounds to instigate proceedings.” The judges based their decision on both the right to a fair trial and the need to uphold the integrity of judicial proceedings.

[Though the international judges’ dissenting opinion did not prevail, it] is a healthy sign that the strong arguments advanced by those judges are being transparently demonstrated even though such arguments did not prevail at this stage of the proceedings. It is always possible that the Trial Chamber or even the Supreme Court Chamber in

Trial 002 will have an opportunity to revisit the issue and be persuaded by the dissenting judges' views. (David Scheffer).

*iv) Majority Opinion of Cambodian Judges Prak Kimsan, Ney Thol, and Huot Vuthy*

The three Cambodian judges argued for dismissal of the appeal: "The statements of the spokesperson, Mr. Khieu Kanharith, cannot obstruct, prevent, or threaten directly or even indirectly the appearance of the six high-ranking officials before this Court." Accordingly, they held that the Second Order by the CIJs reflects a "proper exercise of [the CIJs] discretion."

**Isn't there a back story to this entire saga regarding the six high-ranking officials and their refusal to testify? What is the OTP's view of the significance of these officials and the nature of the testimony that they might have delivered? Are they truly individuals who would provide exculpatory evidence for the four Accused in Trial 002? Or is this shadow-boxing by the Defense to delay, obstruct, and try to de-legitimize Trial 002? How seriously do you view political interference by the Hun Sen government in the work of the ECCC?**

*v) October Statements by Hun Sen stating Case No. 002 would be the last*

In a meeting with United Nations Secretary Ban Ki-moon in October 27, 2010, Cambodian Prime Minister Hun Sen said that he would not allow further prosecutions at the ECCC after Case 002. Hun Sen argued that further investigations would destabilize Cambodia. The International Co-Investigating Judge, Marcel Lemonde, had proceeded with additional investigations while the Cambodia Judge, You Bunleng, did not support them.

**How does the OTP view allegations of political interference by the Hun Sen government in the work of the ECCC? What is the reaction of other international tribunals to the potential interference by Hun Sen in determining whether or not there is a Trial 003, and whether or not his government staff will testify when called upon by the ECCC? If the world stays silent, doesn't this open up the door for other nations/leaders to stand in the way of atrocity crime investigations/trials with impunity? Is this already happening in Rwanda? Didn't Ambassador Rapp a few weeks ago visit Cambodia and not only**

**support the ECCC moving forward with further investigations, but also provide some assurance that the Cambodian government would not interfere?**