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Atrocity Crimes Litigation: Year-In-Review (2010) Conference Abridged Transcript

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

January 31, 2011

Northwestern University School of Law

DAVID SCHEFFER, MODERATOR

PROFESSOR AT THE NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Welcome everyone, to the Fourth Annual Atrocity Crimes Litigation Year-in-Review (2010) Conference here at Northwestern University School of Law in Chicago.

This was an extremely dynamic year in the war crimes tribunals. We're examining the practice and jurisprudence of five separate tribunals: the International Criminal Court in The Hague, the permanent court; the International Criminal Tribunal for the former Yugoslavia, also in The Hague; the International Criminal Tribunal for Rwanda, in Arusha, Tanzania; the Special Court for Sierra Leone, in Freetown, Sierra Leone; and the Extraordinary Chambers in the Courts of Cambodia, in Phnom Penh, Cambodia.

VALERIE OOSTERVELD, ACADEMIC COMMENTATOR

ASSISTANT PROFESSOR AT THE UNIVERSITY OF WESTERN ONTARIO

To begin with the International Criminal Court, I think one of the most significant moments to me, at any rate, was the clarification of the standard of proof at the warrant issuance stage in the *Al Bashir* case, which is the Darfur case before the International Criminal Court. That resulted in the first genocide charges being able to be brought before the International Criminal Court.

In the ICTY, I think that the continued development of crimes against humanity in the *Popović* judgment was quite significant, although there was an interesting dissent by Judge Prost on the issue of persecution in that case. But in the *Popović* case, what I thought to be very important was the continued reinforcement that genocide occurred in Srebrenica.

For the Cambodia Tribunal, the most significant thing was the issuance of the *Duch* judgment, and that was not only significant for the Cambodian Tribunal, but I think also for Cambodians themselves. The judgment was muddled on the question of cumulative convictions, however, where the judges, in essence, telescoped almost all of the charges into the crimes against humanity of persecution charge, which really worries me.

The ICTR continued to develop very well on issues related to genocide, but I do feel that the *Rukundo* judgment was muddled when the Appeals Chamber reversed a particular charge on sexual violence as forming a part of genocide with respect to a particular witness. I think Judge Pocar made it very clear in his dissent that when one looks at sexual violence in the context of genocide, one has to look at the overall context in which the witness is existing at the time.

And finally in the Special Court for Sierra Leone, we heard in the beginning of the year the cross-examination of Taylor, which was very exciting. Then we ended the year in a very interesting way when Taylor's trial team refused to file its closing brief. What it's going to do in that respect is still up in the air.

DAVID SCHEFFER

I want to jump now to Tom Hannis, who is our prosecuting attorney from the Yugoslav Tribunal in The Hague. What I would like you to do is comment on the *Popović* judgment.

TOM HANNIS

*SENIOR PROSECUTING TRIAL ATTORNEY IN THE OFFICE OF THE
PROSECUTOR FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE
FORMER YUGOSLAVIA*

Well, for one thing, it gives the Prosecution team a lot of confidence. The practical matter, though, is how do we do that? In

our Rules of Evidence and Procedure we have a provision that you could use adjudicated facts from other cases, but the record so far on the use of adjudicated facts is spotty.

In the *Lukić* and *Lukić* case, the Prosecution was relying on certain adjudicated facts so they wouldn't have to call certain witnesses or produce certain exhibits, because there had been a finding made concerning an accused in some of the killings that the Prosecution was relying on.

The law developed out of the case, and the Trial Chambers found that, well, yes, that's an adjudicated fact, but the Defense can challenge it by cross-examination of Prosecution witnesses or calling witnesses of their own to undo the fact.

What happens then was not made clear.

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

DAVID SCHEFFER

I want to move, if I could, to the case that you're working on right now, Mr. Dixon, which is the *Haradinaj* case out of Kosovo. There was an extremely dramatic development in this case on July 21, 2010, in the Yugoslav Tribunal. The Trial Chamber had actually acquitted three members of the Kosovo Liberation Army at that point, and yet the Appeals Chamber took that up and reversed and remanded it to the Trial Chamber.

Mr. Dixon, if you could just bring us up to date on what happened at the Appeals Chamber on July 21st. What can you tell us about the Defense strategy for retrial?

RODNEY DIXON

*DEFENSE COUNSEL BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL COURT,
AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*

The Appeals Chamber didn't overrule the entire acquittal, although there were over 40 counts, but it overturned the acquittal with respect to one detention facility, which comes down to six counts. The Appeals Chamber said there should be a retrial in order

to hear two witnesses whom they found the Trial Chamber hadn't provided enough of an opportunity to come forward and testify.

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

The Prosecution has made it plain that they want to bring new evidence and have another go at it. I mean, this is very new territory for me. I think it's the same here. You don't appeal acquittals. When a person is acquitted, that's it. And now you're in a situation where they said the particular witnesses should come back to be called, but now the Prosecution wants to bring new evidence, entirely new evidence. So that's the first issue which we're trying to litigate. But there's been no decision finalizing that yet. In fact, we tried to take it to the Appeals Chamber to see whether it will tell us what their order meant. It's going to be a very interesting issue, how the Appeals Chamber unravels that, because previous to this ruling from the ICTR, the Appeals Chamber had to actually explicitly say, "Only these two witnesses."

The other is the whole witness intimidation issue, which has received a lot of press in Kosovo recently. There have been a lot of allegations made, and many of them have, in fact, proven not to be true about witnesses who were killed in this case. And just to clarify, there were none murdered in relation to this trial. It keeps coming up, and I can one hundred percent clarify that point, and I think the Prosecution could do that or should do that as well.

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

As far as defense strategy is concerned, I mean, I don't want to go on too much more now, but we can discuss this further. Our main point, as I've said, and this is public, is that we want to restrict it to the witnesses that are the subject of the appeal. That's the only fair thing to do. And I suppose our subsidiary argument, which has also been made public, is that if the Prosecution is going to provide new evidence, they must at least satisfy the due diligence threshold of new evidence.

DAVID SCHEFFER

I'm going to give a one-minute rebuttal by Mr. Hannis here. Is there anything you would like to say about the *Karadžić* case?

TOM HANNIS

The witness intimidation is a difficult problem, and I agree with Rod. It's surprising to me that we've only come around to adding it to our rules, you know, 15 years into being in business because it's been a problem from the very beginning.

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

The country to which we made the request refused because it made a finding that contempt, which was the only basis we had to try and arrest a witness, was not part of our statute and was not one of the international war crimes, and, therefore, it was not something that they need to allow extradition for. That poses a problem because if the court can't enforce bringing witnesses, then we could be in for a long ride.

DAVID SCHEFFER

And that is a very rebuttable argument. It's open to a lot of discussion because the statutes of the Yugoslav and Rwanda Tribunals are under U.N. Charter Chapter VII authority; states are obligated to cooperate. There's been no statement that the cooperation ends at the edge of the actual crime itself as opposed to the actual proceedings of the court where you have to have witnesses appear and document production from governments as well.

Mr. Smith, let's discuss the *Duch* judgment before the Extraordinary Chambers in the Courts of Cambodia. This, for not only a general audience, but even for a law audience, requires a little bit of explanation as to what happened there. It's been somewhat different from the way we see judgments being handed down in the Yugoslav and Rwanda Tribunals in terms of Duch being convicted of crimes against humanity with a particular methodology employed by the court to arrive at that determination. This issue forms part of

your appeal to the Supreme Court Chamber of the Cambodia Tribunal.

WILLIAM SMITH

*INTERNATIONAL DEPUTY CO-PROSECUTOR OF THE EXTRAORDINARY
CHAMBERS IN THE COURTS OF CAMBODIA*

In relation to the *Duch* judgment of July 26, 2010—and more particularly, in relation to how they recorded the convictions in this judgment—it was slightly out of kilter following the majority view of the Yugoslavia Tribunal. Meaning, when someone has committed a wide range of crimes or a number of crimes that relate to specific offenses—as you heard, imprisonment, enslavement, torture, rape, murder, extermination—and those offenses have also an associated discriminatory intent in those victims being selected for those crimes, they can also be charged in a catchall charge of persecution because each of those specific crimes are fundamental breaches of human rights, which, if committed at a certain level of severity, will support a persecution charge.

So what the Trial Chamber did in this instance was to roll all those charges into a sort of a convenient, packaged way and said, rather than convict him for all the different counts, let's just convict him for persecution because he had that discriminatory intent when he selected those victims for those crimes. These other crimes would be a fundamental breach of a human right, and, therefore, would fall under persecution, and let's just convict him on that.

Particularly in Cambodia, I think there's a problem in doing that in the sense that it really doesn't give a very clear legal historical record about the crimes someone has committed. This judgment is very important for Cambodians in recording a legal history, or as close to the truth as you can get, aside from academic books and so forth. And so for the legacy of the Court, for a deterrent, and to uphold those social values of the particular offenses of imprisonment, rape, torture—even though they occurred 30 years ago—it doesn't protect those social values which should be recognized, in terms of creating deterrents and accountability for those crimes in the country's official institutions.

It's important for Cambodians that justice is accessible, that they understand it, and that when these types of human rights breaches occur even today—of course, not on the scale that occurred

during the Khmer Rouge period—they have an understanding of their rights.

VALERIE OOSTERVELD

I agree completely with the analysis that Bill Smith has given. I thought it was quite surprising that the judges in the Trial Chamber of the Cambodia Tribunal chose the minority view from the ICTY to rely upon in collapsing all of the charges into the persecution charge. It's important to name what happened, the individual types of things that happened. If I could raise one thing that you haven't mentioned, but which is part of your appeal, and that is with regards to the crime against humanity of enslavement.

The court here—and again, I agree with the Prosecution on this—just seemed to get the law wrong from my point of view. Enslavement is the exercise of powers related to ownership, and the judges seemed to say there had to be a forced labor component to enslavement. I'm not sure if you have other thoughts on that, but that was another concern about collapsing all of these charges and misnaming some of the charges.

WILLIAM SMITH

Yeah, I think so. The law needs to be articulated correctly. When you look at the facts of S-21, that was a former high school where people, who were perceived to be enemies of the state or the wrong class or the wrong backgrounds, were brought into S-21; they were tortured and killed. And over the three-and-a-half-year period, there were at least 12,000 people killed; their names were on lists at S-21, and there were many thousands more.

Those people were kept in conditions where they were starved, they were chained, they were unable to go to bathrooms, and they would hear the torture of others. We're talking children, women, men, elderly, and they would hear the torture of others, they would be tortured themselves, and they would be taken from there and then taken to an execution site.

The average time that people were there was a couple of months. Talking about the exercise of control when you discussed the idea of enslavement, Duch and his staff controlled every aspect of their living. Prisoners were unable to do anything.

And for some strange reason, the Trial Chamber, and this is the subject of appeal, said that enslavement must have a forced labor component. The slavery conventions and the jurisprudence coming from the tribunals don't require that. It's not an essential element, but it's a significant indicator of that fact. It just really didn't represent the way that the people were treated. They were enslaved in every meaning of the word.

And particularly as we go into the second case, very much the theory of the case is that the population of Cambodia was enslaved in detention camps, in communes, forced to work, and they had very little freedom at all. Families were broken up, meals were controlled. Everything was completely controlled. So it's important that that slavery charge reflects the actual war rather than the way the Trial Chamber put it.

DAVID SCHEFFER

If you could give us an overview of the Charles Taylor case, the nature of your allegations and strategies, Mr. Johnson.

JIM JOHNSON

CHIEF OF PROSECUTIONS AND HEAD OF OFFICE OF THE OFFICE OF THE PROSECUTOR FOR THE SPECIAL COURT FOR SIERRA LEONE

As you've indicated, we never claimed that Charles Taylor set foot in Sierra Leone; that has never been part of our case. What we claim is that he—whether in a joint criminal enterprise or through other modes of liability—was responsible for the crimes that took place in Sierra Leone; that indeed through terrorism and other means that are crimes under the statute, he sought to take control of the people and resources of Sierra Leone and to pillage those resources for his own needs.

In a sense, bringing this trial together was really bringing together the trial against the leaders of the Revolutionary United Force, the RUF, and the trial against the leaders of the AFRC, the Armed Forces Revolutionary Council, and proving Charles Taylor's linkage to the crimes that took place in Sierra Leone.

In our case, although our opening statement was in June of 2007, our first witness was not until January of 2008. Our last witness testified a year later, at the end of January 2009. Once some

outstanding motions were decided, we were able to close our case in February of 2009. Charles Taylor was the first witness to take the stand on his own behalf; he began his testimony in the middle of July 2009. The Defense estimated that his testimony, including cross-examination, would last four to six weeks. Four months later when his examination-in-chief ended, the Prosecution's cross-examination began, and I believe we finished in February, if I remember right.

So he was on the stand for seven months, or nearly seven months. Twenty witnesses, twenty additional witnesses, came and testified on his behalf, and the last one finished up in November. Their case closed, I believe it was, on November 12th of last year.

DAVID SCHEFFER

Mr. Whiting, if you could bring us into the *Al Bashir* indictment and its developments in 2010, I think that would be a good place to start.

ALEX WHITING

*INVESTIGATION COORDINATOR IN THE OFFICE OF THE PROSECUTOR OF
THE INTERNATIONAL CRIMINAL COURT*

I think if you look at 2010, the thing that stands out is that it was an extraordinarily productive year for us at the ICC. We have three trials going now, and we had a range of important decisions, confirmation hearings, arrests, and new cases starting. Across the board it's really been an incredibly busy, productive year, and I think the significance of that for the ICC and for all the tribunals is, again, something that David Scheffer mentioned at the beginning; that you know, now I think we can say this field is here to stay, which has always been a question mark as to whether this would continue or fall away and die.

So with respect to the *Al Bashir* case, as Professor Oosterveld said, there were decisions about that case with respect to genocide. And just to kind of bring you up to date a little bit without getting too much into the weeds about what happened when the prosecutor presented the case, the prosecutor asked for war crimes, crimes against humanity, and genocide, and they confirmed the war crimes and crimes against humanity charges. The reasoning of the Pre-trial Chamber in denying the genocide charge was that while the evidence

supported an inference, it was not the only inference that could be drawn from the evidence.

The Prosecution appealed, saying that at the stage of an arrest warrant, that was too high a burden to require of the Prosecution, and that that was a more appropriate analysis to be done at the trial stage than at the arrest stage, and it should be sufficient for the Prosecution to show that the evidence supports the inference even if it's not the only inference that could be supported, even if genocide was committed. In due course, the Appeals Chamber sent it back to the Pre-trial Chamber for reconsideration and approved the genocide charge.

The decision is significant for two reasons: First, it's significant for the *Al Bashir* case itself, which will, without a doubt, have Al Bashir facing these questions in The Hague. Without a doubt, that will happen, at least in my mind.

The broader reasoning here is that a case goes through progressive stages and gets checked by the court at each stage. There are essentially three stages: the arrest warrant stage, the confirmation of the charges, and then the trial. And it's important that the check at the arrest warrant stage was held to an appropriate level—was not allowed to be overly stringent—because the reality is at that stage the Prosecution may not be able because of security considerations—and this sort of ties back to the issue that Rod Dixon and Tom Hannis were talking about with respect to witness security—that the Prosecution may not be able to show its full hand at the arrest warrant stage because witnesses are protected, there's continued insecurity, instability.

So if the test at the arrest warrant stage were too stringent, then the prosecutor would either face the choice of having to show more of his hand or drop the case. So in order to make these cases viable and so they can progress, it was an incredibly important decision that that check be preserved at the arrest warrant stage—of course, there must be a check—but that it not be too stringent.

DAVID SCHEFFER

And just remind us that when the Pre-trial Chamber actually arrived at its decision on July 12, 2010, they broadened the indictment to include the charge of genocide against President Al Bashir, but there was actually an interesting sort of matrix of what they looked at there. Why is President Al Bashir being charged with

genocide? What happened in Darfur that leads the Prosecution to even seek that and now achieve it within the indictment?

ALEX WHITING

Well, the case the Prosecution has put forward at this stage, the theory of the case, is that President Al Bashir was in charge at the top of both the government of Sudan and forces which allied with Janjaweed forces and which attacked various ethnic groups in Darfur with the intent to eliminate those groups. There are various approaches that the forces used under the command of Al Bashir—direct killings of these populations.

But also, in addition, and maybe this more captures what happened, creating conditions that would make it impossible for these populations to continue; displacing them to places where they could not survive, destroying their ability to have a livelihood, destroying any ability to have crops. When they were in these locations that were incredibly unstable, if they tried to go out to get firewood or food, they would get attacked, killed. Rapes were part of these attacks.

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

DAVID SCHEFFER

Let me pursue this just a few steps because this is so important. I know that the prosecutor was hoping that there would be a clear acceptance by the Pre-trial Chamber under what's called Article 6, subparagraph (c) of the Statute that covers genocide, and this is the part that reads, "Deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction," which Mr. Whiting was talking about; that, in fact, rape would be clearly seen as genocide. In other words, that there would be a direct relationship between rape, which takes place outside of these camps, as the women and girls go to get the firewood and water, because if the men do so, they get killed. If the women and girls do so, they don't get killed, they get raped, but at least they survive. Somehow the camp has to get wood and water, so that's the tradeoff essentially.

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

ALEX WHITING

I think that may overstate a little bit the concern of the Prosecution in the case, at least at this stage, bearing in mind that these are the early stages when Al Bashir is brought to The Hague, as he will be, then he will face confirmation of the charges and there can be further amplification.

But it is true that the way the PC reasoned in the rape allegations was not under the 6(c) prong—which you talked about and which I was talking about, creating conditions of life to make unbearable and unsustainable conditions of life, but under 6(b), inflicting mental and bodily harm. But that was not completely inconsistent with the way the prosecutor presented the case to the Pre-trial Chamber, and it's also significant that the Pre-trial Chamber considered rape with respect to the *mens rea*, the intent of Al Bashir.

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

DAVID SCHEFFER

I want to turn to Mr. Dixon and Mr. Dieng. Did you want to talk a little bit about whether there has been an imbalance in what the ICC has been focusing on?

RODNEY DIXON

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

And I think what's important in this is to be more frank and honest about how that has happened, and why it has happened. I mean, the Prosecutor has made certain selections. I'm for much more transparency on this, explaining to people why certain selections are made. I mean, in the U.K., and you might have it here, you, as a private citizen, can challenge the Prosecution's decision not to prosecute somebody or to prosecute somebody. You could take it before a court and have it judicially reviewed, and the prosecutor then has to give the reasons as to why they've taken the decision. It's not for the court to decide whether that's the right decision, but it has to be rational and reasonable and comply with basic human rights norms. I don't see why something like that shouldn't be striven for at the international level. We can't go after the Russian generals for Georgia, because can you imagine a Russian general ever being charged and brought to the ICC? Well, if we can't, then we should just say that and explain the reasons why. If it's impossible to move on Israel, these things should come out.

I think where the anger begins to grow is when people just pretend it's not an issue and say, no, no, no. Africa wants us to come there, it's not that we're biased. Well, then I think you do have to explain what the reasons are for the differences, and especially, I think, even more so when there are massive alleged war crimes being committed elsewhere. I mean, we've seen recently what's happened in Sri Lanka, for example. In Colombia—the examples that Professor Bassiouni gave—there are stark contradictions that have to be explained. Otherwise, you simply don't cut the basic logic test anymore. So I'm just asking for more transparency as a start.

ADAMA DIENG

REGISTRAR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

I think it was not proper that Sudan refused to cooperate with the ICC in the case of indicted fugitive Harun. I think that was an insult to all humanity. That's why I was saying also to the African people, let's not forget why we are talking about international criminal justice. Let's not forget the victims, because we are fighting for the victims.

At the end, what I realized today in Africa is that the focus has shifted from the victims to the suspect, to the perpetrator, and I think that is something which is not correct. And, unfortunately,

that's where one also has to realize that international criminal justice is unfortunately closely linked with international politics.

I do remember those days when we were campaigning for the situation in Cambodia to be dealt with. I remember that we were saying that there was a genocide in Cambodia, and the U.S. government was saying, "No, there is no such thing."

Today, we have the court in Cambodia thanks to international support, and that is to say, things have to move, and what is happening today is extremely important.

DAVID SCHEFFER

Jim Johnson has already talked about the Special Court for Sierra Leone coming to a close. There's also an end game for the International Criminal Tribunals for the former Yugoslavia and Rwanda.

The Security Council, as mentioned just briefly by Mr. Dieng in the morning, took a huge, major step in December, just a month ago, with a Security Council resolution that created what we call an International Residual Mechanism for Criminal Tribunals.

VALERIE OOSTERVELD

The issue of the closure of the tribunals is, I think, a fascinating one, because there are legal and practical obligations that continue after the closure of any particular tribunal. Just think about things like victim protection. Victim protection can't just end because the ICTR and the ICTY closed their doors.

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

These things are called residual issues that continue after the closure of these tribunals. So not only did we need to think about the actual ending, how are we going to get things to the end of the

current trials of the tribunals; we had to think beyond that, and it had to be a *sui generis* legal setup.

So there was discussion happening in two different places, within the tribunals, which Registrar Dieng will talk about, and at the Security Council, because it was the Security Council that created the ICTY and ICTR, and, therefore, it's the Security Council that had to deal with the residual issues that came after the closure of those tribunals.

So the ICTY and ICTR are on track for closing within the next few years, and there are still some very important variables that have to be dealt with before or as they move towards closure, which I'm sure Registrar Dieng will comment upon, one of which is that the tribunals are losing staff at an alarming rate, and that is having an impact on how soon they can close. Also, the ICTR Office of the Prosecutor has asked to transfer some cases to Rwanda. If that doesn't happen, can the ICTR still close on time?

And then another question, Will high-level indictees be arrested soon; Mladić for the ICTY and Kabuga for the ICTR, if Kenya decides to cooperate? So within the Security Council, there was discussion over many, many years, but really it only became serious, from my point of view, once Austria stepped into a chair of the informal working group on international tribunals. Austria worked very, very hard to get an agreement on what happens after the closure and the creation of what's called a residual mechanism.

Austria, to its credit, overcame very serious opposition from China and Russia and got a Security Council resolution, as we said, on December 22, 2010. So this resolution will set up residual mechanisms, which will embody the legal reality of the ICTY and the ICTR after their closure, and the branch for the ICTY of the residual mechanism will begin to operate on July 1, 2013, and the one for the ICTR on July 1, 2012.

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

I just wanted to mention the Special Court for Sierra Leone. I know that Jim Johnson had mentioned it earlier, but we really shouldn't forget about it because—with all of these discussions going on within the Security Council at a relatively high level and all of the preparations going on with the tribunals—they have been, in some

sense, separate from that of the Special Court for Sierra Leone. The Special Court was sort of left high and dry in some respects to just figure out its own way to deal with its residual mechanism.

And the Special Court has been doing it. The Special Court is very advanced in its completion mandate. If you look at how many things have already been closed down in Freetown, how much has already been prepared, and all of the plans that have been put into place, the Special Court—even though it has had fewer people to do it with—has made substantial progress in this, and it will have its own residual mechanism. But I want to stress something. There's a difference here in the funding mechanisms at the moment, between the residual mechanisms for the ICTY and ICTR and the Special Court for Sierra Leone.

The Special Court for Sierra Leone was rescued in December 2010 with the contribution of \$12.3 million by the United Nations so it could continue through to the end of the Charles Taylor trial. This is because it's based on voluntary funding, and it's been having severe difficulties raising the money as of late to fund itself.

The various senior officials of the Court had 171 fundraising meetings this past year alone, and did not raise enough money just to get to the end of the Charles Taylor trial. The residual mechanism is going to be funded in the same way, through voluntary funding, and I have serious worries about how it's going to raise that money after the Taylor trial and appeal is over.

DAVID SCHEFFER

Mr. Smith, could you walk us into Trial 2 at the Cambodia Tribunal a little bit? What are the four defendants charged with? What was the significance of the Pre-trial Chamber just recently confirming the genocide charge against all four of these individuals?

WILLIAM SMITH

Yes. It's a very important case for Cambodia. These are the main architects and ideologues behind this plan to turn Cambodia into a homogenous society, an agricultural society. Families were broken up, young people were forced to marry and procreate, people were forced to work 14 hours a day. So it's—the indictment itself, certainly we think it's a very important, very credible document, particularly in international criminal law. It's a document that was

about 700 pages long, about 400 pages of fact and law and application of them both, and about five and a half thousand footnotes supporting the charges.

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

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

The Defense appealed the decision. They basically said that international customary law—violations of grave breaches, crimes against humanity and genocide weren't customary law at the time in 1975, and, as a result, they can't be charged with that. It would breach the principle of legality. They said because the Cambodian courts—at that time, there were no courts that would prosecute these crimes; therefore, they couldn't be prosecuted retrospectively. Also in relation to defendant Ieng Sary, the appeal was that he had been given an amnesty in the past, therefore he couldn't be prosecuted before this court. So basically they challenged every aspect of the indictment.

The Pre-trial Chamber came back and said, "Look, these crimes—genocide, crimes against humanity, war crimes—were customary international law back in 1975." The Yugoslavia Tribunal really just dealt with the issue as to whether or not these crimes were customary international law back in the early '90s. So this court had the extra challenge of going back to 1975 to see whether or not customary international law had formed to that point on these particular crimes.

So the Pre-trial Chamber rejected all the Defense appeals bar two aspects. First, they said that for crimes against humanity, it's required that there be an armed conflict occurring—connected to the crimes against humanity—and the Prosecution's position was that an armed conflict is not required to prove a crime against humanity. But the Pre-trial Chamber found that there was a nexus required between those crimes and armed conflict, going back to perhaps how they were prosecuted in World War II.

That point was appealed. We opposed it, and then the court has come down and said, "Look, no, it is a requirement."

But just two other aspects: First, the Pre-trial Chamber has given its decision. The Trial Chamber is not bound by the Pre-trial Chamber, and under civil law and under this court, the Trial Chamber can legally classify the crimes in the way it wants at the end of the case, in any event.

And the second point, the Trial Chamber that dealt with the *Duch* case, in dealing with crimes against humanity, didn't require a nexus with armed conflict. So in some respects, it seems like a little bit of a waste of time because as soon as we go to the Trial Court, they rejected that contention in the *Duch* case. So it won't really make much difference for the second trial.

DAVID SCHEFFER

And then if you could finish up on this, the second divergence of the Pre-trial Chamber from the co-investigating judges was to designate rape as an "other inhumane act." How do you read that?

WILLIAM SMITH

It's basically the same argument as with the crimes against humanity and the nexus. They said back in 1975 to 1979, rape hadn't materialized into international customary law as an offense of its own, and so it would only be categorized as an "other inhumane act." So they did an analysis of the jurisprudence. Again, the Prosecution opposed the Defense in relation to that, but the Pre-trial Chamber came out and said, "No, rape wasn't a crime under customary international law for crimes against humanity."

Again, the Trial Chamber in *Duch* didn't accept that in the first trial, and it said, "No, rape was a crime against humanity back in '75 to '79." And so it will be a moot point when it comes to the Trial Chamber, but that's what the Pre-trial Chamber thought.

DAVID SCHEFFER

There was a very significant development in 2010 for the ICC, and that is the decision to move forward with an investigation of Kenya and the 2007-2008 post-electoral violence that occurred there.

On March 31st, the Pre-trial Chamber granted the Prosecutor's request to commence an investigation on crimes against humanity allegedly committed in Kenya, and there was a very substantive dissenting opinion by Judge Hans-Peter Kaul. He filed a dissenting opinion to the Pre-trial Chamber majority decision that, in fact, there's a reasonable basis to believe that crimes against humanity occurred in Kenya. Judge Kaul disagreed.

Why did that happen, Mr. Whiting?

ALEX WHITING

It's a very interesting issue. It wasn't on the basis that there weren't crimes, that they weren't widespread, that they weren't serious, that it didn't merit ICC attention or any of those reasons. It's on a very particular and interesting legal issue that arises from Article 7, which is the Crimes Against Humanity section in the Rome Statute, which requires that when crimes against humanity are charged by the ICC, "the crimes be pursuant to or in furtherance of a state or organizational policy."

What Judge Kaul found is that he focused not on policy, but on "state" or "organizational." What he found is that, okay, it can be either a state or non-state party; that's fine, that wasn't the issue. But what he found is that the organization behind the crimes has to be—if it's not a state organization, it has to be like a state organization. It has to have the same characteristics as a state organization. So it has to be functioning over a period of time, have effective command, been able to implement its orders and capable of committing widespread or systematic crimes. So what he's imagining is if it's not a state that's committing these crimes, it's an organization—like a rebel organization that is established, that has been functioning and so forth. So Judge Kaul found there was insufficient evidence that there was an established organization that was behind the violence. And his concern, as he says in his dissent, is that if you don't have this requirement of a state or organization behind the crimes, then crimes against humanity could be applied to mob violence, organized crime, you know, those sorts of ordinary domestic crimes.

VALERIE OOSTERVELD

May I get sort of academic on this? I think it's fascinating to see the debate between Hans-Peter Kaul and the others. I think it's

because this case is the closest we've ever had to that line between where you say something is a serious ordinary crime and where you say it's a crime against humanity. So this entire case, entire set of cases, is going to be exploring where that line is.

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

DAVID SCHEFFER

What is happening within the ICC to start to prepare for the day of aggression investigations and prosecutions?

ALEX WHITING

Well, it sort of is far off in the future, but it doesn't feel, at least at the moment, urgent and imminent, and of course, it has to be confirmed.

But I think it raises a number of interesting and challenging questions; first of all, how will we go about investigating that crime? What kinds of cases will come to the ICC? How will they do it?

Now, I suppose the hope is that the result of this very complicated mechanism for getting cases to the court will be that only cases where there is some consensus, where there's some international support for the case itself, will actually reach the court, and therefore, if the court engages one of these crimes of aggression, there will be a lot of countries backing it and a lot of support for the activity. That's sort of how I read some hope into this complicated thing.

VALERIE OOSTERVELD

I must preface this by saying I served on the Canadian delegation to the Kampala negotiations (2010) and got to see this from the inside—but anything I say is said in my personal capacity. With that said, I think that internally, within the ICC, people have to educate themselves on what this means, because it's incredibly complex. The Assembly of States Parties will have to spend the next number of years really looking closely to see if this is workable for the Court and make a decision in 2017.

There were a wide variety of countries in Kampala, those who really wanted the crime of aggression and thought it was relatively straightforward, all the way to countries that were really worried about including the crime of aggression because of the potential politicization of it.

ADAMA DIENG

I think it was a great achievement. I think what happened in Kampala was, in my view, really something symbolic. I think the adoption of this article [on aggression] was purely symbolic. One could not leave Kampala without something. I mean, this review conference at the end, what did it produce? That's where I think I agree with Cherif Bassiouni, that there is a need maybe to conduct an assessment of the functioning of the ICC.

Regarding the crime of aggression, for many years we were working on it, but we were pragmatic. What about having this crime of aggression when you still have these superpowers, the United States and the Soviet Union? But even though the Soviet Union is no longer there, you still have Russia on one side.

So to say that it was good, we achieved something in Kampala with this configuration, seven years later we will review it, and I'm not sure that at the time of the review you will have the same dynamics, because things may change—I'm not a pessimist, but I think much will depend how the world evolves in the coming years.