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Introduction: Atrocity Crimes Litigation During 2010

David Scheffer*

For the fourth consecutive year, the Center for International Human Rights at Northwestern University School of Law convened the Atrocity Crimes Litigation Year-in-Review (2010) Conference to examine the practice and jurisprudence during one calendar year of five war crimes tribunals: the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. No other law school or university convenes an annual conference of this character, where tribunal officials, practitioners, and scholars in unscripted dialogue analyze the immediately preceding year's work product of the major war crimes tribunals over a very long day. I have had the privilege of moderating the conference discussion each year, and I marvel at how interesting the exercise becomes when one liberates those in the trenches to speak as freely as their jobs permit about the most critical developments and issues confronting the tribunals, in real time.

The most recent conference, held on January 31, 2011, proved no different. This special edition of the *Northwestern University Journal of International Human Rights* (*Journal*) preserves a fulsome record of the day's discourse and the extended views of two of the participants who spoke about their experience and related issues during the conference. The *Journal* editors and I have offered a new feature to this year's special edition, which is an abridged version of the "Lines of Inquiry" memorandum I provide each of the participants prior to the Conference as a road map

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through the discussion. The purpose of the memorandum is to provide the raw data of what transpired in tribunal practice and jurisprudence during 2010 and then suggest the questions I will pose as the moderator. We never get to all of the questions in our one day of dialogue, but the memorandum should give readers a sense of what it is like to capture one year's major developments in the life of the war crimes tribunals and to think about the most topical issues arising from those precedents. This memorandum is followed by an abridged record of the day's dialogue, which will provide readers with fascinating insights into the decision-making processes of the tribunals.

First, though, I want to recognize that the Atrocity Crimes Litigation Year-in-Review (2010) Conference would not have been possible without the generous financial support of the John D. and Catherine T. MacArthur Foundation, which also funded the publication of this special edition, and of the international law firm Baker & McKenzie (Chicago office). I particularly want to thank Mary Page and Eric Sears of the Foundation for their sustained dedication to the Atrocity Crimes Litigation Year-in-Review conferences through the years. The commitment of Douglas B. Sanders and Kyle R. Olson at Baker & McKenzie also is much appreciated. Mr. Olson published an op-ed in *The Chicago Tribune* the day of the conference that both highlighted the event and made an excellent statement about international justice.[1] I also had dedicated assistance in the research leading up to the conference from Northwestern Law students, led by Lysondra Ludwig.[2]

The jurists who participated in the Conference covering the calendar year 2010 included a registrar, prosecutors, an investigator, defense counsel, and scholars. The Registrar of the International Criminal Tribunal for Rwanda, Adama Dieng, joined us after serving more than a decade in that position. His article appears in this special edition. International Deputy Co-Prosecutor, William Smith, of the Extraordinary Chambers in the Courts of Cambodia has been

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[1] Kyle R. Olson, Op-Ed., *Judging International Criminal Justice*, CHI. TRIB., Jan. 31. 2011, *available at* http://www.chicagotribune.com/news/opinion/ct-oped-0131-courts-20110131,0,7526232.story.

[2] Supervisors: Ronit Arie, Lysondra Ludwig, Raia Stoicheva; Student contributors: 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, Katherine Moskop, Alexius O'Malley, Valerie Petein, Kelli Rucker, Joshua Steinman, Raphael Sznajder, Kari Talbott, Christine Terada, Fitsum Tilahun, Kyle Valenti, Kristen Vogel.

serving in Phnom Penh since the early days of the Extraordinary Chambers and spoke eloquently of what transpired there during 2010. The Chief of Prosecutions and Head of Office of the Office of the Prosecutor at the Special Court for Sierra Leone, Jim Johnson, and the Senior Prosecuting Trial Attorney of the International Criminal Tribunal for the former Yugoslavia, Tom Hannis, both contributed vast experience and insight to the discussions. Alex Whiting, the Investigation Coordinator in the Office of the Prosecutor of the International Criminal Court, brought his expertise and "eye-of-the-storm" job experience to illuminate the difficult challenges confronting that court. Defense counsel Rodney Dixon may have been outnumbered, but he demonstrated throughout the day how valuable and wise an excellent defense attorney can be in the work of the tribunals. Professor Valerie Oosterveld from the University of Western Ontario Faculty of Law in Canada served brilliantly as our distinguished academic commentator throughout the discussions and has contributed the lead article in this special edition. Finally, Distinguished Research Professor of Law Emeritus M. Cherif Bassiouni of DePaul University College of Law is the world's leading authority on international criminal law, and we were fortunate to have him deliver the luncheon address on the challenges facing international criminal justice and the tribunals.

The three articles published in this special edition of the *Journal* examine the practice and jurisprudence of the war crimes tribunals during 2010 from three different perspectives: gender, witness protection and expedited trials, and capacity-building as an important legacy. In *Atrocity Crimes Litigation Year-in-Review for 2010: A Gender Perspective*, Professor Oosterveld paints a mixed picture on gender-related developments in the tribunals, describing both the proliferation of gender crimes in tribunal indictments and their growing appearance in judgments. But there remain, as she explains, "lingering misconceptions and a need for greater gender expertise within prosecutorial and judicial offices."[3] Her article explores the centrality of gender-based violence in the International Criminal Court's recent indictment against Callixte Mbarushimana for crimes of a brutal sexual character in the Democratic Republic of

[3] Valerie Oosterveld, *Atrocity Crimes Litigation Year-in-Review for 2010: A Gender Perspective*, 9 Nw. U. J. Int'l Hum. Rts. 325, 328 (2011).

the Congo,[4] the investigation of gang rapes in Kenya during the post-election violence of 2007-2008,[5] and the genocide committed through acts of rape by Sudanese forces in the International Criminal Court's amended indictment against Sudan's President Omar Al Bashir.[6] She explores how gender-based crimes were discussed during the stocktaking exercise of the Review Conference of the International Criminal Court's Rome Statute, held in Kampala, Uganda, in mid-2010.[7]

Oosterveld explains the significant judgment in *Prosecutor v. Popović et al*.[8] at the International Criminal Tribunal for the former Yugoslavia. Trial Chamber II held that genocide had been committed by Bosnian Serb forces at Srebrenica by targeting men, boys, women and girls as such, namely in different gendered ways. The indictment in *Prosecutor v. Nizeyimana*[9] at the International Criminal Tribunal for Rwanda was amended in 2010 to add rape both as part of the crime of genocide and as a war crime. However, in *Prosecutor v. Hategekimana*,[10] the tribunal found that the evidence did not support significant charges of rape, though the defendant was still convicted of the crime against humanity of rape against one woman on the basis of superior responsibility. In *Prosecutor v. Rukundo*, the Appeals Chamber of the International Tribunal for Rwanda reversed the Trial Chamber and held that the sexual assault of a young woman was not proven to be part of Rukundo's genocidal intent, thereby reducing his sentence by two years.[11] Oosterveld examines the strong dissent by Judge Pocar in

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[4] Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana (Sept. 28, 2010).

[5] Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010).

[6] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010).

[7] Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May - 11 June 2010, Official Records, ICC Doc. RC/11, Annex V(a), Stocktaking of International Criminal Justice, The Impact of the Rome Statute System on Victims and Affected Communities.

[8] Prosecutor v. Popović et al., Case No. IT-05-88-T, Judgment (June 10, 2010).

[9] Prosecutor v. Nizeyimana, Case No. ICTR-2001-55-PT, Refiled Second Amended Indictment (Dec. 17, 2010).

[10] Prosecutor v. Hategekimana, Case No. ICTR-00-55B-T, Judgment and Sentence (Dec. 6, 2010).

[11] Rukundo v. Prosecutor, Case No. ICTR-2001-70-A, Judgment (Oct. 20, 2010).

that judgment. She finds that the majority's reasoning, "particularly the separation of Rukundo's words to the victim from the overall context in which the sexual assault took place, and the classification of the sexual assault as opportunistic—serves to highlight a significant, but unfortunately persistent, misunderstanding about the role of sexual and gender-based violence during genocide, mass violations or armed conflict."[12]

In the conviction of Tuol Sleng prison warden Kaing Guek Eav (alias "Duch") before the Extraordinary Chambers in the Courts of Cambodia on July 26, 2010,[13] Oosterveld finds disturbing (and contrary to precedents of the International Criminal Tribunal for the former Yugoslavia) the court's choice to subsume the crime against humanity of rape under the crime against humanity of torture, which itself was subsumed under the crime against humanity of persecution. The Co-Prosecutors appealed this issue to the Supreme Court Chamber. Finally, the Closing Order issued on September 15, 2010, against four surviving top Khmer Rouge leaders, included the charge of forced marriage,[14] which, Oosterveld writes, "represents a significant positive development for international criminal law…"[15]

The second article in this special edition is authored by Heidi Hansberry, a law student at Northwestern University School of Law who externed in the Victims and Witnesses Unit of the International Criminal Court from May to December 2010. As part of the academic requirements for her "International Externship,"[16] Hansberry wrote a research paper of such outstanding quality that the editors of the *Journal* selected it for publication in this special edition. In *Too Much of a Good Thing in* Lubanga *and* Haradinaj*: The Danger of Expediency in International Criminal Trials*,[17] Hansberry compares two cases, one before the International Criminal Court and the other before the International Criminal Tribunal for the former Yugoslavia, and the impact the judges' decisions at the

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[12] Oosterveld, *supra* note 3, at 350.

[13] Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010).

[14] Prosecutor v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order (Sept. 15, 2010).

[15] Oosterveld, *supra* note 3, at 354.

[16] International Externships, http://www.law.northwestern.edu/humanrights/academicopportunities/externships.html.

[17] Heidi Hansberry, *Too Much of a Good Thing in* Lubanga *and* Haradinaj*: The Danger of Expediency in International Criminal Trials*, 9 NW. U. J. INT'L HUM. RTS. 357 (2011).

trial and appeals levels have made on the protection of witnesses and the speed with which trials proceed.

In *Prosecutor v. Thomas Lubanga Dyilo*,[18] a case entailing charges of enlisting and conscripting child soldiers in the Democratic Republic of the Congo, the Trial Chamber of the International Criminal Court compelled the disclosure of the identity of an "intermediary" witness of the prosecution to the defense. The judges reasoned that implementation of protection measures for that witness would require an unacceptable time delay. In the face of the prosecution's intransigence on disclosure, the Trial Chamber issued a stay of proceedings that imperiled the entire future of the trial. In October 2010, the Appeals Chamber decided to reverse the stay of proceedings, but with reasoning that "did little to clarify how the Trial Chamber ought to handle protection disagreements in the future."[19] While confirming that the Trial Chamber has the last word on issues regarding protection of witnesses, the order to stay the proceedings was deemed a disproportionate response to the prosecution's resistance to disclosure. Hansberry, however, criticizes the Appeals Chamber for granting exclusive discretionary power to the Trial Chamber at the expense of witness protection, explaining that in fact witnesses no longer have an effective advocate in the Trial Chamber. The Appeals Chamber seemingly ignored any proper role for the Victim and Witnesses Unit.

In *Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, which involves charges of participation in a joint criminal enterprise to commit crimes against humanity and war crimes by the Kosovo Liberation Army, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia denied the prosecution's request for more time to secure the testimony of two key witnesses who refused to testify before the Trial Chamber. They cited intimidation and fear as their reasons for such refusal. The Trial Chamber, who in the prosecution's view chose an expeditious trial over a fair one, then proceeded to acquit three of the four

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[18] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2582, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 entitled, "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (Oct. 8, 2010).

[19] *Id*.

defendants.[20] The Appeals Chamber, in its judgment of July 21, 2010, emphatically reversed the Trial Chamber and held that "widespread and serious witness intimidation" surrounded the trial.[21] The appeals judges prioritized, as Hansberry notes, "the right of witnesses to feel and be protected as a necessary condition to a fair trial."[22] It quashed the acquittals and ordered a partial re-trial.

By comparing the two cases and the Trial and Appeals Chambers' judgments, Hansberry provides insightful and interesting observations about the fate of witnesses, the "expediency" factor in trial management, and the protection of due process in international criminal justice.

Adama Dieng, the long-serving Registrar of the International Criminal Tribunal for Rwanda, provides a useful overview of the contributions his tribunal has been making to Rwandan and African justice in his article, *Capacity-building efforts of the ICTR: A different kind of judicial legacy*.[23] After summarizing some of the most significant jurisprudential achievements of the tribunal, Dieng describes in detail various capacity-building initiatives. These have included an ambitious Outreach Program to explain the tribunal's work to the Rwandan people throughout the country, training programs for jurists, advocates, and human rights activists from Rwanda on a variety of legal topics, a program to support and protect witnesses through the tribunal's Witnesses and Victims Support Services, the protection of detainees and prisoners' rights, the promotion of the use of new technologies in judicial proceedings, and the slow march towards the referral of cases to the domestic courts of Rwanda. Dieng concludes that the tribunal "has most certainly influenced, if not improved, the way criminal justice is exercised on the [African] continent."[24]

I have known Professor Cherif Bassiouni since 1993 and grown to admire his unparalleled scholarship in international criminal law and his active participation in the real world of atrocities and the search for justice in the aftermath. His voluminous writings and highly honored career speak for themselves, but his

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[20] Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-T, Judgement (Apr. 3, 2008).
[21] Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A, Appeal Judgement (July 21, 2010).
[22] Hansberry, *supra* note 17, at 390.
[23] Adama Dieng, *Capacity-building efforts of the ICTR: A different kind of judicial legacy*, 9 NW. U. J. INT'L HUM. RTS. 403 (2011).
[24] *Id*. at 421-22.

address to the conference on January 31, 2011, is a remarkably frank statement about the realities of armed conflicts and international justice in the modern world that proves, once again, why we all treasure this son of Egypt and proud American "upstander" for the rule of law. Set forth are extracts from Bassiouni's address that everyone—jurists, scholars, law students, and government officials—would benefit enormously from reading and pondering as a reflection of the past and a guide for the future.

My hope is that the extracts from the conference dialogue and my "Lines of Inquiry" memorandum, as well as the articles, can inform the work of the tribunals and serve as useful teaching sources at universities and law schools where the discipline of what I call "atrocity law" is growing every year.[25]

[25] *See* DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 424-28 (forthcoming, Princeton University Press 2012).