

# **Proceedings of the Third International Humanitarian Law Dialogs**

**August 31-September 1, 2009, Chautauqua Institution**

**Edited by Elizabeth Andersen and David M. Crane**



**American Society  
of International Law**

**Proceedings of the Third  
International Humanitarian Law  
Dialogs**

*August 31 - September 1, 2009  
at the Chautauqua Institution*

**Edited by**

**Elizabeth Andersen**

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and

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*How does it end*

*This time of man on earth?*

*Will it be by a flood of the seas over the land?*

*The return of the monster, Tyrannosaurus Rex?*

*The crash of a comet into the earth?*

*None of these.*

*The forces of nature we shall surmount.*

*We have naught to fear save ourselves. Only ourselves.*

*The tyrant must be forced to end his tyranny.*

*The aggressor must be punished for his aggressions.*

*And law, not force, must rule the world.*

*Man's destiny lies in the hands of man.*

Whitney R. Harris

## **Introduction**

**David M. Crane\***

On the shores of Chautauqua Lake in the rolling hills of Western New York, the international prosecutors assemble each year for the International Humanitarian Law Dialogs. In late August and the first day of September of 2009, this small and exclusive group met at the Chautauqua Institution to honor women and their contributions to the field of international criminal law. Over two days, an impressive group of experts joined the prosecutors from the various international tribunals and court, to discuss the important impact women have played in facing down impunity from Nuremberg to the present day.

The Dialogs began with a somber tribute to one of their own, Henry T. King Jr., a Nuremberg Prosecutor who passed away in the spring of 2009. His old colleague at Nuremberg, William Caming, joined the tribute with a moving speech at the dinner reception, at the Robert H. Jackson Center in Jamestown, New York the Sunday night, 30 August, prior to the Dialogs, the now traditional opening to the event. The Jackson Center also put together a wonderful program honoring our dear friend Henry.

The next day, 31 August, the international prosecutors assembled with their colleagues from around

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\* Professor, Syracuse University College of Law and former founding Chief Prosecutor, Special Court for Sierra Leone, 2002-2005.

## 2 David M. Crane

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the world to spend two days highlighting the role women have played in modern international criminal law. What follows attests to how critical women were in developing the law and policy that now make it possible to prosecute those who commit international crimes.

The Third Annual Humanitarian Law Dialogs opened with a welcome by Mr. Gregory Peterson, President of the Robert H. Jackson Center. Afterward, Syracuse University College of Law's Impunity Watch honored the essay contest winner of the 2009 Summer Institute on Genocide held in the Buffalo area, Sarah Owen of Springfield-GI High School.

As is now our custom, two distinguished scholars gave the introductory lectures. First off was Professor John Q. Barrett's, of St. John's University School of Law, excellent historical lecture on Katherine Fite, a prosecutor at Nuremberg. As one reads through the text, it is striking how much Justice Robert H. Jackson, the Chief American Prosecutor at Nuremberg, relied on her legal judgment and acumen. Professor Diane Amman, University of California at Davis School of Law, followed Professor Barrett's lecture with a broader review and photographic depiction of women at Nuremberg. The two lectures allowed the participants at the 2009 Dialogs to begin to consider how women were a key to the success of the International Military Tribunal there at Nuremberg. Women at all levels were quiet, behind-the-scenes professionals whom history has largely ignored.

### Third International Humanitarian Law Dialogs 3

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The current prosecutors gave their annual update on the issues they are facing today around the world seeking justice for victims of international crimes committed in Yugoslavia, Rwanda, Sierra Leone, and elsewhere. Fatou Bensouda of the International Criminal Court, Norman Farrell of the International Criminal Tribunal for the former Yugoslavia, Alphonse Van of the International Criminal Tribunal for Rwanda, and Joseph Kamara from the Special Court for Sierra Leone each reported their perspectives on the state of their operational tempo. One of the areas of interest was the exit strategies and the challenges of winding down the proceedings being held in The Hague, Arusha, and Freetown.

Found in this text you will be able to review the keynote speeches given during the various lunches and dinners held on those peaceful days at the Chautauqua Institution. As always, each of the keynote speeches richly enhanced the International Humanitarian Law Dialogs. Of note you will find the perspectives of Judge Patricia Wald and Ms. Siri Frigaard discussing women's issues in general and the troubles prosecuting in East Timor respectively. Judge Wald speaks about the expectations of women from courts and tribunals; whereas Ms. Frigaard highlights the challenges she faced as a woman investigating and prosecuting war crimes in Southeast Asia. Their insights were helpful in understanding the complexity of the issues related to women working at the international level. Judge Wald was introduced by Lucy Reed, then President of the American Society for International Law, who quoted Judge Wald about the Pilgrim spirit needed in going to an international tribunal as a woman: In a 2002



interview, she put her decision to leave the DC Circuit for the ICTY in context: "there is also a time when you realize you have only a limited number of years in which to pursue any new or different endeavor, and a little bit of the adventure or Pilgrim spirit rises to the surface."

All of the international prosecutors joined in a roundtable discussion related to gender crimes at the international level in the first afternoon session after lunch. The transcript is enclosed. Moderated by Susana SáCouto of the War Crimes Research Office, Washington College of Law of American University, the Prosecutors reflected upon various discussion points and questions posed by Ms. SáCouto on how women in modern international and internal armed conflict are always the main victims of war crimes and crimes against humanity. The transcript bears careful reading.

On Tuesday morning, Professor Michael Scharf of Case Western Reserve University School of Law gave the participants an update and overview of new developments in international criminal law over the previous year. It is striking how much this field evolves and advances jurisprudentially and procedurally each year.

In the late morning, Tuesday, 1 September, Dr. Kelly Askin of the Justice Initiative of the Open Society Institute moderated a moving panel with current female prosecutors. On the panel were Ms. Lesley Taylor, Special Court for Sierra Leone; Ms. Christine Chung, International Criminal Court; and Ms. Renifa Madenga of the International Criminal Tribunal for

Rwanda. Each spoke of the challenges of being a woman prosecutor at the international level from both a professional and emotional point of view. Ms. Taylor's depiction of her emotional state prosecuting the leadership of the Revolutionary United Front for the massacre at Penduma brought the audience to tears.

The Third International Humanitarian Law Dialogs ended with the reading of the Chautauqua Declaration by Ms. Elizabeth Andersen, Executive Director of the American Society for International Law. This year the Prosecutors paid tribute to Henry T. King, Jr., their deceased comrade, and recognized the important impact women have had on advancing modern international criminal law into the twenty-first century. They also acknowledged the fact that women are victims in most, if not all, of the recent modern conflicts; and in the spirit of Nuremberg hand over to the appropriate justice mechanism and prosecute those who commit international crimes, particularly against women of all ages. The Prosecutors also acknowledged the passing of Alison Des Forges and her contribution in bringing justice to the victims of the Rwandan genocide.

As always at Chautauqua, the international prosecutors and their friends and colleagues who attended or participated in the Dialogs, left refreshed and with a renewed sense of solidarity to continue the fight for the victims of international crimes. It is hoped as one reads the text of the *Proceedings of the Third International Humanitarian Law Dialogs* that this spirit of solidarity will come through for the reader.

These extraordinary days at Chautauqua cannot happen without the sponsorship of several organizations. Special thanks go out to the American Society for International Law; Case Western Reserve University School of Law; the Chautauqua Institution; The Enough Project; Impunity Watch, Syracuse University College of Law; the International Law Grrls Blog; and the Robert H. Jackson Center, Jamestown, New York. Of special note, our thanks go to Ms. Carol Drake of the Robert H. Jackson Center who administratively makes the International Humanitarian Law Dialogs go so smoothly each year and to Mr. Gregg Stanton of the Athenaeum Hotel who makes our stay at the Chautauqua Institution so pleasant and relaxing.

I will close this brief introduction with the words of our friend Henry King: “The spirit of Nuremberg lives!” With those words ringing in your ears, enjoy the *Proceedings of the Third International Humanitarian Law Dialogs* honoring the role of women in international criminal law from Nuremberg to the International Criminal Court.

# Lectures

## **Katherine B. Fite: The Leading Female Lawyer at London & Nuremberg, 1945**

**John Q. Barrett\***

It is an honor to be in the company of so many leaders who are dedicating their professional energies and lives to the pursuit of justice globally. It is particularly an honor to be here with former Nuremberg prosecutor H.W. William Caming, as it was last evening when he spoke at the Robert H. Jackson Center. Bill Caming is a friend and an inspiration—he personifies the generation that started this work in the modern era and achieved so much of what undergirds international law and justice today.

Three other Nuremberg prosecutors and pioneers were part of this conference one year ago: Benjamin

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\* Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York ([www.roberthjackson.org](http://www.roberthjackson.org)). This publication is based on my August 31, 2009, opening lecture at The International Humanitarian Law Dialogs, held at Chautauqua Institution's Fletcher Hall. I am very grateful to David M. Crane, Gregory L. Peterson, Adam C. Bratton, Lucy F. Reed, Elizabeth Andersen, Thomas Becker, Syracuse University, the Jackson Center, the American Society of International Law, Chautauqua Institution, the Whitney R. Harris World Law Institute at Washington University, Case Western Reserve University School of Law, the Planethood Foundation, Enough! and IntLawGrrls for co-sponsoring this gathering and program. I thank St. John's law student Virginia C. Dowd for excellent research assistance and David Clark at the Harry S. Truman Library & Museum and Janet Conroy and Ryan Harrington at Yale University for very helpful responses to my inquiries.

Ferencz, Whitney Harris, and Henry King. Ben continues to fight for international justice, particularly the definition of, and enforcement against, the international crime of waging aggressive war. Whitney, who now is ninety-seven years old, wanted to be with us today but is attending to his health at his home in St. Louis. When I spoke to him two days ago, he said to tell his friends here that he sends his regards, and that he is doing the best he can. Because Whitney Harris's best has always been a very high level of achievement, his message was and is very heartening, and I know that we all wish him well. Henry King, a dear friend to all of us and to the pursuit of justice, no longer can be with us, but his example and his spirit, alive particularly in our memories of his very powerful valedictory address at last year's Dialogs, will be with us always.<sup>1</sup>

I have the unusual burden, as the opening speaker this morning, to follow Elvis Costello, the brilliant composer, musician, and performer of our age, to a Chautauqua Institution stage—on Saturday evening, Elvis and his band, The Sugarcanes, performing in Chautauqua's historic Amphitheater (which he described as a "wooden tent down by the Lake"), closed the Chautauqua summer season with an incredible show.

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<sup>1</sup> See John Q. Barrett, Whitney R. Harris, Henry T. King, Jr., & Benjamin B. Ferencz, *Nuremberg and Genocide: Historical Perspectives*, PROCEEDINGS OF THE SECOND INTERNATIONAL HUMANITARIAN LAW DIALOGS 9-54 (American Society of International Law, Studies in Transnational Legal Policy No. 40, Elizabeth Andersen & David M. Crane, eds., 2009).

Luckily, Bill Caming at the Jackson Center last evening was an intervening presenter. But that only means that I now have two very hard acts to follow. My mention of Elvis Costello is not, however, merely for humor. As he finished his final encore song—his anthem—on Saturday night, it struck me that it asks a question that is at the heart of committed efforts in the realm of international humanitarian law: “What’s so funny ‘bout peace, love and understanding?”<sup>2</sup>

In the people who I have mentioned thus far, there was a common characteristic. It also was present as President Franklin D. Roosevelt worked in 1940 and 1941 with his Attorney General, Robert H. Jackson, and with other administration officials, legislators, and military officers to build the preparedness of the United States, to send support to Great Britain as she stood alone against Nazi attacks, and to respond in other ways to German military aggression that the United States regarded as violative of international law.<sup>3</sup> This characteristic was present as well when President Harry S. Truman, less than two weeks after FDR’s death, asked Robert Jackson, by then almost four years an Associate Justice on the Supreme Court of the United States, to become the United States Chief of Counsel for

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<sup>2</sup> ELVIS COSTELLO & THE ATTRACTIONS, (WHAT’S SO FUNNY ‘BOUT) PEACE, LOVE AND UNDERSTANDING? (Eden Studios 1978).

<sup>3</sup> See generally ROBERT H. JACKSON, THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT (John Q. Barrett, ed., 2003).



what became the prosecutions at Nuremberg of the senior surviving Nazi leaders.<sup>4</sup>

This characteristic also was visible in London during the summer of 1945, where Allied leaders and their staffs met, negotiated, and reached the agreement that led to the international trial at Nuremberg. On August 8, 1945, Soviet representative General I.T. Nikitchenko, British Lord Chancellor William Jowitt, Justice Jackson, and the French representative, Robert Falco, signed the agreement creating a new international court, defining the crimes that were within its jurisdiction and setting up procedures by which it would conduct its proceedings.

In relatively short order, the Allies selected Nuremberg as the trial site. They appointed judges to the new court, the International Military Tribunal (IMT). They wrote and filed an indictment charging twenty-four principal Nazis plus leading Nazi organizations with conspiracy, crimes against peace, war crimes, and crimes against humanity. Starting in November 1945, the Allies pursued a new kind of criminal justice: the international Nuremberg trial. Thereafter, the United States continued to prosecute Nazi war criminals in Nuremberg, which was located in the American zone of military occupation. Twelve subsequent American tribunal proceedings occurred between 1946 and 1949. The last, and the most complicated, was *The Ministries Case* that lasted from

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<sup>4</sup> See *The President's News Conference of May 2, 1945*, in PUBLIC PAPERS OF THE PRESIDENTS: HARRY S. TRUMAN 32, 34 (1945).

1947 until 1949, in which William Caming was a leading prosecutor.<sup>5</sup>

The international trial that began in Nuremberg in November 1945 featured a principal judge and an assistant from each of the four nations. The prosecutors who sat at the United States table during the next year included Justice Jackson and, at various times, his assistants Sidney S. Alderman, Robert G. Storey, John Harlan Amen, Telford Taylor, Thomas J. Dodd, Whitney R. Harris, and Jackson's own son William E. Jackson, his father's executive assistant. The twenty defendants who were physically present in the dock during the trial included Hermann Goering, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Keitel, Albert Speer, and Haljmar Schacht.

\* \* \*

At this point, I hope that you have noticed the common characteristic—the biology—that pervades my historical account: not one woman. That is a good thing as to the Nuremberg defendants—congratulations to the women of Germany who were not the leading perpetrators of Nazism and its crimes. But as to the rest of this leading moment in modern history, it was a man's undertaking in a man's world....

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<sup>5</sup> See XII, XII & XIV TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10.

With one leading exception. Of course numerous women were involved, for good and otherwise, in the Roosevelt administration, Nazi Germany, the World War II alliance, the London Conference, and Nuremberg. In terms of the legal undertaking that was Nuremberg, however, only one female attorney participated, significantly and from the beginning, in the London negotiations, the pretrial work, and the commencement of the International Military Tribunal proceedings at Nuremberg.<sup>6</sup>

Her name was Katherine Boardman Fite. Born in Boston, Katherine Fite was forty years old at Nuremberg. She was raised in Connecticut and New York. She graduated from Vassar College (A.B., 1926), where her father chaired the political science department. Fite then attended Yale Law School, with scholarship assistance during her second and third years from *Kappa Beta Pi*, the legal sorority dedicated to high professional standards among women law students and lawyers. In 1930, she was one of only four women in her law school graduating class of seventy-six. From 1930 until 1934, Fite was an attorney in private practice in New York City. She then moved to Washington and worked for

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<sup>6</sup> Two other attorneys, Harriet Zetterberg (Margolies) and Catherine Falvey, also were members of Justice Jackson's U.S. prosecutorial staff at Nuremberg. Zetterberg in particular did historically notable work there. But neither was, as Katherine Fite was, a senior attorney. And, as press noted during the trial, no woman was permitted to address the International Military Tribunal. See JOSEPH E. PERSICO, *NUREMBERG: INFAMY ON TRIAL* 212 (1994) (describing a radio report on this subject by CBS reporter Howard K. Smith).

two years as an attorney with the United States-Mexico General Claims Commission. In 1937, Fite joined the United States Department of State, working in the Office of the Legal Adviser. In 1945, Fite came to Justice Jackson's staff and to Nuremberg on detail from the State Department, to which she later returned. Fite was single until age fifty-two (1957), when she married Francis French Lincoln and became Katherine Fite Lincoln. Mr. Lincoln was a State Department officer, an economist, a widower, and somewhat older than Katherine. She retired from the State Department in 1962. Mr. Lincoln died in 1968. In widowhood, Katherine Fite Lincoln continued to live in Washington. She later moved to Massachusetts and died in 1989 at age 84.<sup>7</sup>

In summer 1945, Katherine Fite's employment by Justice Jackson was, because of her gender, a notable event. On July 11, the *New York Times* published a page four story headlined "Woman Joins Staff of War Crimes

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<sup>7</sup> See generally *Dr. E.D. Fite, Wrote '40 Civil Service Law*, N.Y. TIMES, May 19, 1953, at 29 (providing the obituary of Fite's father); *Katherine Fite Wed*, N.Y. TIMES, Feb. 1, 1957, at 16; *Weddings*, WASH. POST & TIMES HERALD, Feb. 3, 1957, at F9 (announcing the Fite-Lincoln marriage); *Francis Lincoln, U.S. Economist*, WASH. POST & TIMES HERALD, Aug. 6, 1968, at B4 (obituary); *Katherine Fite Lincoln*, WASH. POST, June 24, 1989, at D6 (obituary); Biographical Sketch, Katherine Fite Lincoln Papers, Harry S. Truman Presidential Museum & Library, Independence, MO, available at [www.trumanlibrary.org/hstpapel/lincoln.htm](http://www.trumanlibrary.org/hstpapel/lincoln.htm).

Group”—Fite was a novelty.<sup>8</sup> Fite, in fact, had been periodically assisting Jackson and his staff in Washington since his appointment in May. Jackson relocated to London in mid-June. Fite was detailed formally to Jackson’s staff on July 15 by Legal Adviser Green Hackworth for a period of three to four months.<sup>9</sup>

### *The London Phase*

When Katherine Fite arrived in London, regular electrical service had not been restored to the bomb-damaged city. She was given a luxurious billet in the Cumberland Hotel off Grosvenor Square near the American Embassy and the Office of Strategic Services office space that was assigned to Justice Jackson and his team. When she first arrived at the office, she was told to report to Claridge’s hotel, where Jackson was staying and often working, because his room was better than his office. Katherine Fite was, like Jackson, smart, outspoken, active, independent, and a very fine lawyer. They hit it off immediately, developing a mutual high regard that weathered work difficulties at times and lasted for the rest of Jackson’s life.

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<sup>8</sup> See *Woman Joins Staff of War Crimes Group*, N.Y. TIMES, July 11, 1945, at 4.

<sup>9</sup> See Letter from Katherine Fite to Dr. & Mrs. Emerson Fite (Sept. 23, 1945), in War Crimes File, K. Lincoln Papers, Truman Presidential Museum & Library, *supra* note 7 [hereinafter Letter from Katherine Fite].

In London, Fite quickly became one of the Jackson staff lawyers who assisted him in his negotiations with his British, Soviet, and French counterparts. The London Conference meetings occurred in Church House at Westminster Abbey. Around tables arranged in a square, each nation sought to explain, across language and conceptual divides, its legal system for criminal prosecution and its concerns about the others' various proposals. Jackson worked to explain that due process required a trial that would not be the ritual before a foreordained execution. He advocated proceeding, based on evidence, in public, in an adversary proceeding in which the accused would have counsel, other resources, and a right to defend himself, and where the prosecutor would carry the burden of proof. Fite sometimes sat in on Allied negotiations, but more often she worked in her own billet and office, drafting language defining the crimes that the IMT would have jurisdiction to adjudicate.

It is difficult to draw an organizational chart that captures accurately the work of the American lawyers in London. Jackson was of course at the top and Sidney Alderman was, at most times and for most tasks, the number two official. Francis M. Shea and Gordon E. Dean also served near the top ranks. Katherine Fite was among the next level lawyers—both Jackson and Alderman leaned on her regularly. From the Legal Adviser's office, she brought historical and professional knowledge of diplomacy, treaty drafting, and negotiation. She contributed, for example, to the arguments, based in the Kellogg-Briand Treaty, which answered the objection that it would be retroactive

criminalization to prosecute German defendants for waging aggressive war.

*Travel and the Nuremberg Phase*

On Saturday, July 21, 1945, Justice Jackson brought a delegation of U.S., British, and French officials (the Soviets could not attend) from London to Nuremberg to see the courthouse facility and city where the United States proposed to hold the trial. To mark the occasion of their arrival on the soil that had been Nazi Germany, the officials were photographed together at R-28 airfield outside of Fürth. The photograph shows nineteen people wearing pants and one wearing a skirt—Katherine B. Fite.



July 21, 1945: Representatives of the United States, Great Britain, and France stand in front of the plane that brought them to Nuremberg for the first time. Justice Jackson is fourth from the right. Katherine Fite is the woman.



Fite traveled with Jackson on this occasion, and on other serious missions that he undertook that summer and fall. During July, Fite traveled with Jackson to Frankfurt, the seat of the U.S. military occupation zone and the place where he (and they) conferred about military and legal matters with General Edward C. Betts, Colonel Charles Fairman (on leave from Stanford University, where he was a political scientist), and others. Shortly after the July 21 inspection trip to Nuremberg, Fite again flew with Jackson from London back to occupied former Germany to consult officials at the Potsdam Conference. At Schloss Cecilienhof in Potsdam, located in the southwest suburbs of Berlin, the post-FDR “Big Three,” Churchill, Stalin, and Truman had their first summit meeting. (During the meetings, Churchill learned that the Labor Party had won the elections earlier that month, and he was replaced by the new Prime Minister, Clement Attlee.) Their conversations led to the Potsdam accord, which included a commitment to the international negotiations, agreement, and trial details that Jackson and counterparts were negotiating in London.<sup>10</sup>

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<sup>10</sup> See *Joint Report with Allied Leaders on the Potsdam Conference* (Aug. 2, 1945), in *PUBLIC PAPERS OF THE PRESIDENTS: HARRY S. TRUMAN* 179, 190 (1945):

The three governments have taken note of the discussions which have been proceeding in recent weeks in London between British, United States, Soviet and French representatives with a view to reaching agreement on the methods of trial of those major war criminals whose crimes under the Moscow Declaration of October 1943 have no particular geographical localization. The three governments

From Potsdam, Jackson and Fite made a side trip, passing through Soviet Army checkpoints, into the heart of Berlin. They visited Hitler's Reich Chancellery. Upon returning to London, Fite wrote to her parents in Poughkeepsie, New York, that she had been in

Hitler's *Reichskanzlei*—which was obviously a magnificent building—now largely ruins, though the first floor rooms remain. Saw Hitler's magnificent office—with his desk just dumped over in a heap with all the other rubbish. Got rooting around in the debris and discovered personal letters and office notes etc. (this not in Hitler's own room). Why, I said, a historian would go crazy. I had at first started looking for souvenirs—printed documents etc. I quickly discarded that for original documents in the rubbish. I turned up written notes, personal letters to some sort of an S.S. guard his father had written him (he knew the Fuehrer would be safe as long as he was with him) and what appears to have been an index to some files. I shall have them translated in the

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reaffirm their intention to bring those criminals to swift and sure justice. They hope that the negotiations in London will result in speedy agreement being reached for this purpose, and they regard it as a matter of great importance that the trial of those major criminals should begin at the earliest possible date. The first list of defendants will be published before September first.

morning. Some larger books with lists of names I had to discard in the interests of discretion—we were after all in the Soviet zone in a building guarded by the Soviets.

There were literally yards and yards of movie film just kicking around. Mr. Fahy<sup>[11]</sup> got interested and was going to see what could be done to have someone go in and sift the rubbish out.<sup>12</sup>

Soon after Potsdam, Jackson and colleagues reached the London Agreement, which they signed at Church House on August 8, 1945. Jackson and most of his senior staff soon decamped to Nuremberg. Fite, arriving in September, took up residence in the bomb-damaged but functioning Grand Hotel. Unlike senior male attorneys, Fite did not move to a seized German home—there were no female counterparts with whom she could share such quarters. Thus, Fite stayed in the Grand Hotel with junior lawyers and short-term visitors. (She was at least spared staying in the adjacent building, known informally as “Girls’ Town,” where secretaries, stenographers and other women lived in quarters where men were at least theoretically not permitted.)

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<sup>11</sup> In 1945, former Solicitor General of the United States Charles Fahy served as legal advisor to General Lucius Clay in Berlin and was an important participant in policymaking regarding war crimes trials.

<sup>12</sup> Letter from Katherine Fite, *supra* note 9.

In Nuremberg during October and early November 1945, Fite worked more independently of Jackson, who had to manage diplomatic responsibilities, staff issues, prison and prisoner issues, and Tribunal issues while he also drafted his opening statement and prepared other material for trial. In an early October letter to her parents, Fite commented critically on some of the public stances that Jackson took in this phase regarding the efforts of the other prosecuting nations, and on the indictment-drafting process (in which she had no major role):

I think the Justice has made a mistake by giving the [news]papers to understand that only the U.S. means business. I get the impression that the other 3 have now ganged up to put the heat on us & maybe rush us through. At any rate—tho I know nothing first hand—I think the Justice has most unnecessarily given offense to the other countries. In many ways I have been sorry not to have been associated with him directly of late. But in other ways I am glad to have been disassociated. He is an able man but predominantly a politician, and not a strong man. The organization has suffered for the lack of a strong guiding hand. The indictment was rushed through and did not have the thorough going over it should have had for such an historical document. I know of at least one

historical misstatement which I brought to the attention of 4 people and it's still there. Careless work. Office politics. Then some time ago I found a very serious error in punctuation in the signed charter which was, of all places, in the section of crimes vs. humanity—i.e. the Jews, & quite changed the [Indictment's] sense.<sup>13</sup>

Fite was, in Nuremberg, among the U.S. lawyers who analyzed and assembled evidence and thus built the U.S. case. Jackson decided that the case would be built on captured documents more than on witness testimony. His executive officer, Colonel Robert G. Storey, divided the staff into subject matters teams and assigned them to prepare comprehensive trial briefs (summaries of collections of captured documents) for use at trial. Fite, working in tandem with a brilliant partner, Col. Benjamin Kaplan (U.S. Army), analyzed, assembled, and briefed the evidence against the Reich Cabinet, one of the indicted Nazi organizations.<sup>14</sup>

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<sup>13</sup> *Id.* (Oct. 8, 1945).

<sup>14</sup> See Robert G. Storey, Memorandum for Mr. Justice Jackson, Subject: Trial Briefs (Nov. 12, 1945) (reporting, by topic and lawyers' names, that more than forty trial briefs had been completed within assigned deadlines, "although the lawyers, assistants, and secretaries worked day, night, and Sundays, and many times in extreme cold"), in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, DC, Box 111, Folder 1. Benjamin Kaplan, following Nuremberg and a stint in private law practice in New York City, became a Professor of Law at Harvard

*The Trial*

The Nuremberg trial started on November 20, 1945. Justice Jackson delivered his majestic opening statement the next day. The American case came first. Attorneys filled the next few weeks in court reading trials briefs in summary presentations. The Kaplan-Fite case against the Reich Cabinet was presented to the IMT by Col. Storey in December. By that time, Fite's three-to-four-month leave from the State Department had expired. Although she was asked to stay in Nuremberg for the full trial or at least until late January, she decided to return to Washington.<sup>15</sup> She left Nuremberg when the IMT took a Christmas recess, reaching the United States by early January.

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Law School and, later, an Associate Justice of the Massachusetts Supreme Judicial Court. See Benjamin Kaplan, *Book Review*, 68 HARV. L. REV. 1092-97 (1955) (reviewing WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG (1954)) (detailing his perspectives on Nuremberg).

<sup>15</sup> See generally Letter from Katherine Fite, *supra* note 9.



December 19, 1945: Justice Jackson (center) and staff celebrate Christmas at his requisitioned house near Nuremberg; Katherine Fite is to the right of the tree.

The loss of Fite and other talented lawyers at this early point in the trial, near the conclusion of the U.S. direct case but months before the other nations' cases, the defense cases, and the cases against the indicted organizations were presented, adversely affected both the U.S. effort and the trial process generally. In effect, Justice Jackson lost a lot of his "A team" at the end of 1945. To be fair, some of the successors who rose to fill the resulting vacancies were of top quality. Nevertheless, some of the strongest members of the original U.S. staff were back on American soil in 1946. Katherine Fite, Benjamin Kaplan, Gordon Dean, and

quite a few others would have been very important assets in Nuremberg for the rest of the trial.

*Fite's Letters: Comments on Gender*

Katherine Fite's 1945 letters to her parents, which later were donated to the Truman Library, transcribed and placed on line, are filled with illuminating details and comments. One topic on which she wrote was the experience of being the token woman on the U.S. legal staff. On July 23, during the London phase of the work, she wrote:

Justice J. is a grand person, very simple, very witty, very kind and thoughtful. And a very heavy load [is] on his shoulders. He has arranged for some of us to hear a case in the House of Lords tomorrow, through "the Attorney", as the British say, I suppose. I believe I am to be included by virtue of my [being] female and perhaps State Dept status. It makes it a bit embarrassing to be included when my army colleagues with whom I work much of the time are not. But they're grand persons ... and don't seem to begrudge it to me.<sup>16</sup>

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<sup>16</sup> *Id.* (July 23, 1945).



In August, as the London negotiations were concluding, Fite wrote:

[T]ho being the only woman on the staff has many drawbacks, from the social point of view it pays. A masculine society is eager for women and we have the added advantage of being in civilian clothes. Tho when we go into Germany for the trial we army have to get into uniform to be more easily identified. ... My army colleagues are, I am sure, jealous of my trips, for I do go places and travel in high circles but they are very gallant about it. At least I am seeing how topside fares in military occupation.<sup>17</sup>

Fite continued to enjoy deluxe quarters, transportation, and meals. On November 11, near the eve of trial, she wrote to her parents about her life in Nuremberg:

I started out to tell you of the Justice's cocktail party for Senator [Claude] Pepper [D.-FL] yesterday—very pleasant—then on in a smaller party to dinner at the [Grand] hotel, and our night club [there], which is the center of our local life. Sat next to the Senator who regaled the party with tales of his visit to

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<sup>17</sup> *Id.* (Aug. 5, 1945).

King Ibn-Saud and his tent city. The biggest event of the King's life was his [February 1945] visit on [President] Roosevelt's battleship. (They had to put all the women off the ship, including [the President's daughter] Anna) [T]he Senator ... does not like Mr. Hackworth [the Legal Adviser]. Lots of people don't. Tonight another VIP dinner party at the Justice's [house] for the Senator. Long dresses. You see the panel of eligible women for such parties is small. So I always get there and usually get the seat of honor. It's fun, and also an effort when you're tired—as I am today.<sup>18</sup>

### *Conclusion*

After Nuremberg, Katherine Fite returned to the State Department and continued her distinguished career. She wrote an official summary of the IMT's Judgment.<sup>19</sup> She also stayed in close touch with Jackson, who she supplied, over the next years, with State Department and other information concerning Nuremberg, such as reports on the subsequent proceedings under General

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<sup>18</sup> *Id.* (Nov. 11, 1945).

<sup>19</sup> See Katherine B. Fite, *The Nürnberg Judgment: A Summary*, XVI DEPT. OF STATE BULL. (No. 392, Jan. 5, 1947), at 9-19, reprinted as U.S. DEPT. OF STATE PUBLICATION 2727, EUROPEAN SERIES (1947).

Telford Taylor, William Caming, and others. Fite also saw Jackson at social gatherings, including Nuremberg staff reunions. She was the kind of talent whose gender I hope today would not be noticed—I hope that she would be like the women among us in the field of international justice: high-level, accomplished persons, professionally indistinguishable from the men.

In Katherine Fite's time, however, the gender difference and "gendered" behavior were notable. Justice Jackson, for instance, on at least an occasion or two, spoke about Fite and wrote notes addressing her as "Katie." Her family correspondence shows no use of that nickname. To her parents, Fite sometimes signed herself as "Titter," a nickname, perhaps from childhood, that I am sure was known to and used by only family. Some of her college friends called her "Kat" or "Kay." On all professional memoranda and in much correspondence, including Justice Jackson's, however, she was referred to as Miss Fite, Counsel Fite, Major (by assimilated military rank) Fite, or Katherine.

"Katie," coming from a fifty-three-year-old male boss to a forty-year-old senior assistant lawyer who went not by that name but by her given "Katherine," seems a bit too familiar, if not diminishing, if not sexist. Given Fite's overall high regard for and friendship with Jackson, however, I am confident that she kept any objection to herself.



1945: Justice Jackson and Katherine Fite, posing as if working on his office desk, Palace of Justice, Nuremberg.

## Portraits of Women at Nuremberg

Diane Marie Amann \*

Many of us who work in the field of international criminal law owe our interest at least in part to proceedings held in the aftermath of World War II. Cementing my own interest was *The Anatomy of the Nuremberg Trials*, the indispensable 1992 memoir by leading U.S. prosecutor Telford Taylor.<sup>1</sup> At a much more exalted level, Judge Navanethem Pillay, now the UN High Commissioner for Human Rights, has said that she

first came across the Nuremberg Trials on a shelf in the library at the University of Natal in apartheid South Africa. A student enrolled in classes for nonwhites, Pillay

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<sup>1</sup> TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992) [hereinafter TAYLOR, ANATOMY].

spent hours reading the trial transcripts, transfixed by the ideal of justice represented in the account of countries coming together to hold individuals responsible for the most heinous acts.<sup>2</sup>

No doubt other international criminal law jurists have a similar story to tell. Nor is there much doubt that most assume that at these trials few, if any, roles were played by women.

Reading Taylor's *Anatomy* likely will leave but one lasting recollection of women at Nuremberg. On July 5, 1946—three weeks to the day before Chief U.S. Prosecutor, Robert H. Jackson, began the closing argument at the Trial of the Major War Criminals<sup>3</sup>—a Paris designer invented a belly-button-baring swimsuit.<sup>4</sup> The Parisian named the suit, modeled by a striptease dancer when “[n]o respectable model would,” after the

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<sup>2</sup> *A Child at the Time of the Nuremberg Trials, Navanethem Pillay now Carries their Legacy Forward*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/news/spotlight/ils/related/bus-driver.html> (last visited May 19, 2010) (undated article, presumably written while Pillay, formerly a Judge at the International Criminal Tribunal for Rwanda, was an International Criminal Court Judge).

<sup>3</sup> Closing Statement of Mr. Justice Robert H. Jackson, Chief Counsel for the United States, July 26, 1946, *reprinted in* 19 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 397 (1948).

<sup>4</sup> KELLY KILLOREN BENSIMON, *THE BIKINI BOOK* 10-11, 18, 26 (2006) (describing immediate postwar development of the suit by Louis Réard and a rival).

South Pacific atoll at which the United States had just conducted its first atomic bomb test.<sup>5</sup> The suit indeed proved a bombshell at its Nuremberg debut that same summer. The occasion, Taylor noted, was a party that Katherine Biddle held for the sixtieth birthday of her husband Francis, the American judge at Nuremberg. Members of all four Allied delegations—the Russians, the French, the British, and the Americans—came to the requisitioned villa that the Biddles called home. “It was a lovely evening,” Taylor wrote, “the food and drink were served outdoors around the large swimming pool, and Catherine (an accomplished poetess) spoke charmingly of enduring love.” He continued:

After dinner the swimming pool was put to use. The first two in were Jenny Pradeau and Janine Herisson, among the prettiest and youngest of the French delegation, who appeared in what were soon to be known as bikinis. Few if any of us had previously seen these provocative garments, and the sides of the pool were soon crowded with ogling males.<sup>6</sup>

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<sup>5</sup> *Id.* at 26; see also *A Brief History of the Bikini*, SLATE, <http://www.slate.com/id/2145070/slideshow/2145060/fs/0//entry/2145040/> (last visited May 19, 2010) [hereinafter *Brief History*] (including a photo of striptease dancer modeling the suit).

<sup>6</sup> TAYLOR, ANATOMY, *supra* note 1, at 398 (retaining, in passage quoted in text, Taylor’s misspelling of Katherine Biddle’s first name).

The passage conjures an image of a curvy body clad in a few cloth triangles as the singular emblem of women at Nuremberg.

Taylor's account is not unique in this regard. Memoirs and other historical accounts tend seldom to mention women. The name of Katherine Fite—whose essential contribution to the London Charter John Q. Barrett details in this volume<sup>7</sup>—does not figure prominently in these works. Two women's names do appear: Hitler's mistress, Eva Braun, who committed suicide with him shortly before the war's end, and Ilse Koch, the camp superintendent's wife known as the Beast of Buchenwald.<sup>8</sup>

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<sup>7</sup> John Q. Barrett, *Katherine B. Fite: The Leading Female Lawyer at London & Nuremberg, 1945* in PROCEEDINGS OF THE THIRD INTERNATIONAL HUMANITARIAN LAW DIALOGS 9-30 (Elizabeth Andersen & David M. Crane eds. 2010).

<sup>8</sup> On Braun, see, e.g., WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG 458-65; CHRISTOPHER J. DODD WITH LARY BLOOM, LETTERS FROM NUREMBERG: MY FATHER'S NARRATIVE OF A QUEST FOR JUSTICE 6, 96, 105, 1047 (2007). On Koch, see HARRIS, *supra*, at 434 (quoting an affidavit on "Buchenwald barbarism" that alleged the skins of prisoners' corpses "were turned over to SS Standartenfuehrer Koch's wife, who had them fashioned into lamp shades and other ornamental household articles"). Koch was one of many women convicted and executed following postwar trials relating to camp atrocities. See *Ilse Koch Hangs Herself in Cell; Nazi 'Beast of Buchenwald' Was Serving Life Term*, N.Y. TIMES, Sept. 3, 1967, at 1. Two women stood trial at Nuremberg. Dr. Herta Oberheuser, a dermatologist who conducted medical experiments, was convicted in the *Doctors' Case* and sentenced to twenty years. WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 990-91 (1990). Inge Viermetz, a civilian aide to an SS officer, was acquitted in the *RuSha Case*. TELFORD



Occasionally, a book refers to women who testified at the trials,<sup>9</sup> and a few mention in passing Tania Long, who, along with her husband, covered Nuremberg for *The New York Times*.<sup>10</sup>

Yet women did play key roles at Nuremberg, even at the first trial.

Many women joined Long in the press gallery, among them *New Yorker* reporter Janet Flanner (left), an American expatriate who criticized Jackson's cross-examination efforts and branded the proceedings "'dull and incoherent,'" and the English writer Rebecca West, whom Taylor said had a "brief encounter" with Judge Bidle.<sup>11</sup>



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TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 177-79 (1949) [hereinafter TAYLOR, REPORT].

<sup>9</sup> An example is the reference to testimony by one "Madame Boundoux" in HARRIS, *supra* note 8, at 439.

<sup>10</sup> See DODD, *supra* note 8, at 265-66, 282; see also *Tania Long, 85, a Reporter for the Times in World War II*, N.Y. TIMES, Sept. 6, 1998, available at <http://www.nytimes.com/1998/09/06/nyregion/tania-long-85-a-reporter-for-the-times-in-world-war-ii.html?scp=1&sq=tania+long&st=nyt>.

<sup>11</sup> DODD, *supra* note 8, at 267 n.11; *id.* at 43-44 (quoting Flanner); TAYLOR, ANATOMY, *supra* note 1, at 547-48, n.\*. See *Reporting Nuremberg*, NEW CRITERION, Sept. 1, 1998, at 74, 1998 WLNR 7950844.

News accounts placed another woman lawyer, besides Fite, at Nuremberg early on. Irma Von Nunes had been admitted to the Georgia bar in the 1920s while still a teenager,<sup>12</sup> and during World War II became a captain in the U.S. Women's Army Corps. Reports describe her, without further elaboration, as the first woman involved in the war crimes trials.<sup>13</sup> Among non-lawyers assigned to the trial was Captain Virginia Gill, executive to the prosecution.<sup>14</sup> As the memoir of prosecutor Whitney R. Harris noted, moreover, Jackson was aided throughout by "his secretary, Mrs. Elsie L. Douglas."<sup>15</sup> Many women served as interpreters. Among them was twenty-three-year-old Edith Simon who, as she later recalled, served as a translator at pretrial interviews with Hermann Göring, a leading Nazi defendant "not particularly thrilled to see a woman, a Jewish woman, as his interpreter."<sup>16</sup> Yet though a courtroom photograph

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<sup>12</sup> *Brookfield High School Notes*, COURIER, May 29, 1929.

<sup>13</sup> See KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 184 n.\* (1986).

<sup>14</sup> See PETER HEIGL, *NÜRNBERGER PROZESSE - NUREMBERG TRIALS* 82 (2001).

<sup>15</sup> HARRIS, *supra* note 8, at 14.

<sup>16</sup> See Alexandra J. Wall, *Edith Coliver, International and S.F. Activist, Dies at 79*, J WEEKLY, Jan. 4, 2002, available at <http://www.jweekly.com/article/full/17031/edith-coliver-international-and-s-f-activist-dies-at-79/> (noting that Simon, known as Edith Coliver after marriage, had been born in Germany and earned a bachelor's degree at the University of California-Berkeley before going to work at Nuremberg).

of the Soviet prosecution table includes an unnamed woman,<sup>17</sup> no work yet found mentions a woman judge, prosecutor, or defense counsel in the courtroom at the first trial.

Thus, it is no surprise that in a 2005 speech, Judge Patricia M. Wald could name no woman among what Francis Biddle had called an “exceptionally strong supporting cast” of lawyers who assisted the judges at Nuremberg.<sup>18</sup> The lawyers who were named included two former Supreme Court clerks and two law professors.<sup>19</sup> All of them were men—men who held positions in the profession not open to women in the mid-twentieth century. It is true that a woman did clerk for the U.S. Supreme Court in October Term 1944, but she was not succeeded by another woman until 1966.<sup>20</sup>

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<sup>17</sup> Photograph captioned “Table of Soviet attorneys – Nuremberg, Germany, 1945/6,” [http://www1.yadvashem.org/exhibitions/nuremberg/nuremberg\\_10.html](http://www1.yadvashem.org/exhibitions/nuremberg/nuremberg_10.html) (last visited May 19, 2010).

<sup>18</sup> Patricia M. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 *CARDOZO L. REV.* 1559, 1568 (2006) (quoting FRANCIS BIDDLE, IN *BRIEF AUTHORITY* 119 (1962)).

<sup>19</sup> *Id.* at 1568-69 (mentioning law professors Herbert Wechsler and Quincy Wright and former clerks Robert Stewart and Adrian Fischer).

<sup>20</sup> ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 89-90*, Table 2.11 (2006) (stating that the first woman Supreme Court clerk was Lucile Lomen, who clerked for Justice William O. Douglas in October Term 1944 Term, and the second was Margaret J. Corcoran, who clerked for Justice Hugo Black in October Term 1966); Linda Greenhouse, *Women Suddenly*

As for academia in that period, Professor Herma Hill Kay has written that “when World War II ended, exactly three women held tenure or tenure-track appointments” on faculties belonging to the Association of American Law Schools.<sup>21</sup> It is therefore truly remarkable that women did succeed in working as lawyers at Nuremberg.

Among the several women who represented defendants,<sup>22</sup> a notable example is Elisabeth Gombel, the

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*Scarce Among Justices' Clerks*, N.Y. TIMES, Aug. 30, 2009, at A1, available with corrected spelling of Lomen's name at <http://www.nytimes.com/2006/08/30/washington/30scotus.html> (last visited May 19, 2010) (same). Five years after the close of the first Nuremberg trial, Wald herself earned her law degree, then clerked for a federal judge at the intermediate appellate level; she would go on to become the first Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and a Judge on the International Criminal Tribunal for the former Yugoslavia. *The Honorable Patricia M. Wald*, AMERICAN INNS OF COURT, <http://www.innsofcourt.org/Content/Default.aspx?Id=321> (last visited May 19, 2010).

<sup>21</sup> Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 6 (1991).

<sup>22</sup> The presence of women defense counsel may reflect the absence of German men eligible to serve as attorneys. Women who represented defendants included: Gerda Doetzer; Agnes Nath-Schrieber, who assisted her husband in representing defendants; and Dr. Erna Kroen, who spent thirty years as a music director in her hometown of Leverkusen after her work in the *Farben* trial. See TAYLOR, REPORT, *supra* note 8, at 307, 319-20; *Bayer's culture makers*, BAYER KULTUR, <http://www.culture.bayer.com/en/cultural-department.aspx> (last updated Nov. 11, 2009).

only woman to have served as chief counsel on either side. Gombel had been a legal adviser in the Junkers Aircraft Factory. She became lead counsel for Ernst Wilhelm Bohle, an officer in the German Foreign Department charged in the *Ministries Case*, after the initial appointee dropped out for unspecified reasons.<sup>23</sup> As stated in a Nuremberg history by Illinois attorney John Alan Appleman, at arraignment, “much to the amazement of the Tribunal, Prosecution, and all persons concerned,” Bohle became the only Nuremberg defendant to plead guilty. He entered a plea to a single count of “membership of the SS with knowledge of its criminal activities,” and was sentenced to five years. Appleman advanced a gender angle for this “amazing” turn of events, writing: “One wonders whether the fact that he had a woman counsel had anything to do with his decision to enter the plea of guilty.”<sup>24</sup> Even though Gombel’s client spent less time in prison than nearly all convicted in the case,<sup>25</sup> the comment does not convey compliment.

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<sup>23</sup> TAYLOR, REPORT, *supra* note 8, at 336-37.

<sup>24</sup> JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 223 (1954).

<sup>25</sup> Sentences for defendants convicted at trial ranged from time served for one defendant and four years for another, all the way up to twenty-five years in prison. Two defendants were acquitted. *Id.* at 222-23.

One non-American woman prosecutor was Dr. Aline Chalufour of France, who had worked for General Charles DeGaulle in Canada during the war, and was one of three prosecutors at the British military trial pertaining to the Ravensbrück camp.<sup>26</sup> In a letter home, Fite wrote that Chalufour was “really very intelligent and congenial—and I lack congenial feminine companionship.”<sup>27</sup>

A number of American women served as prosecutors; a very few will be mentioned here.

“Miss Sadie Belle Arbuthnot,” (right) as *The New York Times* called her, earned her law degree at night school while she was a secretary at the U.S. Department of



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<sup>26</sup> See ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES 144 (Patricia Heberer & Jürgen Matthäus eds., 2008); TAYLOR, ANATOMY, *supra* note 1, at 213; Letter from Katherine Fite to Mr. and Mrs. Emerson Fite, (Oct. 14, 1945), [http://www.trumanlibrary.org/whistlestop/study\\_collections/nuremberg/documents/index.php?documentdate=1945-10-14&documentid=nuremberg2016&studycollectionid=&pagenumber=1](http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-10-14&documentid=nuremberg2016&studycollectionid=&pagenumber=1) (last visited May 19, 2010) [hereinafter Fite letter].

<sup>27</sup> Fite letter, *supra* note 26.

Justice, presumably during the New Deal.<sup>28</sup> Arbuthnot served on the prosecution team during the *Justice Case*, then became the first woman judge in the court system that the United States established in the part of Germany that it occupied after the war.<sup>29</sup>

Belle Mayer Zeck, who had practiced as a federal government lawyer after graduating from Fordham Law School, worked on the *Farben* trial of industrialists.<sup>30</sup> After Nuremberg she and her husband William Zeck, another member of the prosecution team, became Democratic Party activists in Rockland County, New York; at one point, she made an unsuccessful bid for a state legislative seat. Mayer Zeck died at age eighty-six in 2006, on the same day as Drexel Sprecher, another prosecutor at Nuremberg.<sup>31</sup>

Mary M. Kaufman also worked on the *Farben Case*.<sup>32</sup> During the New Deal she was an organizer for

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<sup>28</sup> Associated Press, *U.S. Woman Judge in Germany*, N.Y. TIMES, Sept. 29, 1950, at 10.

<sup>29</sup> *Id.*; see APPLEMAN, *supra* note 24, at 157-58; TAYLOR, REPORT, *supra* note 8, at 170 n.112.

<sup>30</sup> *Belle Zeck, 87, Prosecutor at Nuremberg, Dies*, N.Y. TIMES, Apr. 5, 2006, at A5 [hereinafter *Belle Zeck*].

<sup>31</sup> Douglas Martin, *Drexel A. Sprecher, 92, U.S. Prosecutor at Nuremberg*, N.Y. TIMES, May 8, 2006, at B8 (observing that Sprecher and Zeck both died on Mar. 18, 2006); *Belle Zeck, supra* note 30 (stating that Zeck died on Mar. 18, 2006).

<sup>32</sup> APPLEMAN, *supra* note 24, at 177.

the Works Progress Administration, studied part-time, and earned her law degree from St. John's University.<sup>33</sup> While an attorney for the National Labor Relations Board, Kaufman continued to organize for the WPA, eventually finding her way to Nuremberg. On return to the United States, she embarked on a high-profile career as a leading attorney for Elizabeth Gurley Flynn and others tried under the Smith Act during the McCarthy period.<sup>34</sup> Kaufman helped to found the National Lawyers Guild, and was also active in antiwar protests and as a lawyer for arrested protesters. Indeed, she linked international criminal law of the Nuremberg era to issues of nuclear and chemical warfare in the Vietnam era.<sup>35</sup>

Last, but by no means least, was Cecelia Goetz. The New York-born daughter of a lawyer, she decided to study law, and earned all her degrees at New York

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<sup>33</sup> *Mary M. Kaufman*, 82, *Lawyer; Cases Involved Communism*, N.Y. TIMES, Sept. 11, 1995, at 13; *Personal Information for Mary Kaufman*, JEWISH WOMEN'S ARCHIVE, <http://jwa.org/archive/jsp/perInfo.jsp?personID=121> (last visited May 20, 2010).

<sup>34</sup> See generally Margaret Jessup, *Kaufman, Mary Metlay*, in 2 GREAT AMERICAN LAWYERS: AN ENCYCLOPEDIA 424-32 (John R. Vile ed., 2001).

<sup>35</sup> *Mary M. Kaufman, The Individual's Duty under the Law of Nurnberg: The Effect of Knowledge on Justiciability*, 27 GUILD PRAC. 15 (1968). See also *Mary M. Kaufman, Judgment at Nurnberg – An Appraisal of Its Significance on Its Twentieth Anniversary*, 25 GUILD PRAC. 66 (1966); *Mary M. Kaufman, Statements, Declarations, and Agreements Leading to the War Crimes Trials at Nurnberg, Germany, and Relevant Documents*, 25 GUILD PRAC. 88 (1966).



University.<sup>36</sup> She was graduated at the top of her class at NYU Law School, where, as Editor-in-Chief, she became the first woman in the United States ever to head a major law journal. Yet she could not find a job after her 1940 graduation. One of her classmates explained years later:

‘Her concentrated experience as Editor-in-Chief of the Law Review could not be followed by jobs in the private or judicial systems as a clerk to a judge. That was totally unavailable at the time. Limited opportunities came to be available in the federal government in Washington at the beginning of World War II when men were being drafted or otherwise joined the armed services.’<sup>37</sup>

Even so, Goetz found herself working for two years at her father’s firm. Her desire to become a trial attorney met “the prejudice against females as government litigators” that abided, according to one author, “even in departments known to be headed by liberals”; Goetz, it

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<sup>36</sup> See Goetz, *Cecelia H. (Helen)*, in THE CAMBRIDGE DICTIONARY OF AMERICAN BIOGRAPHY 277 (John S. Bowman ed. 1995) [hereinafter Goetz Cambridge entry]; Goetz, *Cecelia Helen*, in I WHO’S WHO IN AMERICA 1294 (48th ed., 1994) [hereinafter Goetz WHO’S WHO entry].

<sup>37</sup> *Alumnus/Alumna of the Month*, Sept. 1, 2004, <http://www.law.nyu.edu/alumni/almo/pastalmos/20042005almos/ceceliagoetzseptember/index.htm> (last visited May 19, 2010) (quoting Herbert Rubin) [hereinafter *Alumna*].

was suggested, “was ‘much too attractive to be a good lawyer.’”<sup>38</sup>

Eventually, Goetz landed a job in what is now known as the Civil Division of the U.S. Department of Justice in Washington, D.C.<sup>39</sup> She “became the first woman ever to be offered a supervisory role” at DOJ, but turned it down because she wanted to join the prosecution team at Nuremberg.<sup>40</sup> She was rejected because of her sex—even though nurses and secretaries already were there, she was told that there was no housing for a woman lawyer.<sup>41</sup> So she applied directly to Taylor himself. As Goetz told an interviewer in 1984:

‘Fortunately he did not share such antifeminist views and he immediately directed that I be appointed to the prosecution team. Nevertheless, in order for me to be processed, Taylor had to sign a “waiver of disability” form—the

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<sup>38</sup> DAWN BRADLEY BERRY, *THE 50 MOST INFLUENTIAL WOMEN IN AMERICAN LAW* 173 (1996).

<sup>39</sup> Goetz WHO’S WHO entry, *supra* note 36, at 1294 (stating that at the time it was called the Claims Division); *see* Goetz CAMBRIDGE entry, *supra* note 36, at 277.

<sup>40</sup> *Alumna*, *supra* note 37.

<sup>41</sup> BRADLEY BERRY, *supra* note 38, at 174.

disability being the fact that I was a woman.’<sup>42</sup>

Goetz earned prominence among the women attorneys. Serving as one of three major associate



counsel in the *Krupp* industrialists’ case (left),<sup>43</sup> she was the only woman to give an opening statement at a Nuremberg trial. The practice was for prosecutors to take turns reading what

was a very long opening. As one of five Americans to read the address in *Krupp*, Goetz stirred excitement. One reporter, present to profile Goetz for the *New York Sun*’s “News of Women” section, wrote:

Listening to her reading part of the opening statement in the hushed courtroom, marriage and children don’t seem to fit into the picture. It would seem a shame to take her away from what must be a brilliant future. The British were particularly impressed. At the first

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<sup>42</sup> BERGER MORELLO, *supra* note 13, at 184 (quoting Goetz); see also *Telford Taylor Panel: Critical Perspectives on the Nuremberg Trial*, N.Y.L.S. J. HUM. RTS. 453, 516 (1995) (remarks of Judge Cecelia Goetz) [hereinafter Goetz remarks].

<sup>43</sup> TAYLOR, REPORT, *supra* note 8, at 190 n.174.

opportunity they swarmed over to congratulate her on her striking performance.<sup>44</sup>

This deserves note, and not only because of the reporter's musing on Goetz' marriageability.<sup>45</sup> The *Krupp* opening statement contained little flourish; it was, rather, a recitation of sobering facts.<sup>46</sup> The change in readers carried with it no change in authorship. Nor was Goetz given any noteworthy lines, save one reference to the misery of slave laborers.<sup>47</sup> That those in the courtroom nonetheless applauded underscores the novelty of Goetz's feat. It almost seems that for a woman to deliver her lines without error was in itself astonishing.

In addition to this reading and her trial preparation efforts, Goetz elicited testimony at trial. Excerpts of her

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<sup>44</sup> Judy Barden, *Our Woman in Nurnberg*, N.Y. SUN, Jan. 21, 1948, at 18.

<sup>45</sup> Goetz later married and gave birth to two sons. Goetz WHO'S WHO entry, *supra* note 36, at 1294.

<sup>46</sup> See IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 60-131 (1950) (opening statement for the prosecution).

<sup>47</sup> *Id.* at 87-102 (including that portion of opening statement read by Goetz). Goetz' notable line stated that defendants "participated in the formulation and presentation of demands for slave labor to be fed into the maw of the industrial machine, and in the spoliation of occupied territories." *Id.* at 98.

cross-examinations show that the Germans, like all hostile witnesses, frequently tried to deflect or dodge her questions. Yet Goetz was tenacious, refusing to accept their evasions.<sup>48</sup> The excerpts demonstrate that she was a very good lawyer.

On return to New York, Goetz earned an LL.M. in tax law and practiced at a number of firms. In 1978, she became the first woman appointed to the federal bankruptcy court in the Second Circuit; later, she helped to found the National Association of Women Judges. Yet she downplayed her role as a woman judge. In words presaging debates that swirled about the recent appointments of Sonia Sotomayor and Elena Kagan to the U.S. Supreme Court, Goetz told the *New York Law Journal* in 1982:

‘Once you put on a robe, the male-female distinction disappears, at least as far as the people who appear before you are concerned. They don’t see you as either male or female.

The judge’s role overrides the individual. I really don’t see any essential difference between a good male judge and a good female judge. All judges must have patience, a willingness to listen, compassion and, above all, integrity. I’m

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<sup>48</sup> *Id.* at 957-60, 969-72, 989.

afraid there's nothing very startling in all of that.<sup>49</sup>

Perhaps more startling is the fact that Goetz—like most of the women lawyers,<sup>50</sup> and unlike many of the men—never wrote about Nuremberg. “I have not written anything about Nuremberg and I myself have wondered why that was,” she said at a 1995 symposium that explored links between the trials after World War II and those newly formed after war in the Balkans and genocide in Rwanda.<sup>51</sup> Her remarks fell far short of celebratory. She admitted that she had “hesitated” to speak “when I realized that the probable object was to use Nuremberg as a precedent for trials of the atrocities now going on elsewhere.”<sup>52</sup> Warning against use of the “flawed” Nuremberg precedent that had accepted the defense of necessity or coercion—in effect, the “Hitler made me do it” defense—Goetz described the outcome of the matters on which she worked as “unsatisfactory,”

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<sup>49</sup> Alan Kohn, *Bankruptcy Judges Have Same Philosophy*, N.Y.L.J., Sept. 7, 1982, at 1, col. 2 (quoting Goetz).

<sup>50</sup> See *supra* note 35 (pointing to an exception, Mary M. Kaufman).

<sup>51</sup> See Goetz remarks, *supra* note 42, at 516. Made at the Fifth Annual Ernst C. Stiefel Symposium, “1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability,” these remarks, *id.* at 515-30, appear to constitute Goetz’ entire published recollections of Nuremberg.

<sup>52</sup> *Id.* at 516.

and her time at Nuremberg as “unhappy.”<sup>53</sup> She recalled “the burden of interpretation,” “the widespread destruction of evidence,” the “problem” that “we were all very young,” “did not speak German,” and thus were compelled to rely on “unsophisticated” and at times “hostile” research staff.<sup>54</sup> Finally, she said, “Nuremberg itself was a very unpleasant place to be. It had been bombed out,” and, contrary to the implication of the Marlene Dietrich-Spencer Tracy dalliance in *Judgment at Nuremberg*, “We were not supposed to fraternize with Germans.”<sup>55</sup>

All this transpired during what Goetz called “a period of pervasive gender bias.”<sup>56</sup> Although she used the term to describe her difficulties in landing the position, the observation no doubt applied as well to the job itself. It was a time when male staffers unabashedly ogled their female counterparts at a pool party,<sup>57</sup> when

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 526-29.

<sup>55</sup> *Id.* at 530; see *Judgment at Nuremberg* (Stanley Kramer dir., 1961).

<sup>56</sup> Goetz remarks, *supra* note 42, at 516.

<sup>57</sup> TAYLOR, ANATOMY, *supra* note 1, at 398, *quoted supra* text accompanying note 6. Elsewhere in his memoir, Taylor reported that one woman interpreter was “known as ‘The Passionate Haystack,’” and that Judge Biddle “found her rather stiff” at a dinner party despite the reputation implied by the nickname. *Id.* at 547-48.

“masculine” women were subject to ridicule,<sup>58</sup> when reference to a “bordello, brothel, whorehouse” might set off “a wave of laughter” in the courtroom.<sup>59</sup> A time when the hometown paper’s account of “Our Woman at Nurnberg” dwelt as much on the woman’s physical appearance and dieting woes as her legal acumen.<sup>60</sup>

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<sup>58</sup> Journalist Janet Flanner enjoyed a successful career though she dressed in men’s clothes and lived openly with a woman. See Annalisa Zox-Weaver, *At Home with Hitler: Janet Flanner’s Führer Profiles for the New Yorker*, NEW GERMAN CRITIQUE, Oct. 1, 2007, at 101, 2007 WLNR 26104319. But other women encountered scorn. Of the lawyer described at text accompanying notes 12-13, this was written: “Little Miss Von Nunes wears her hair cut like a boy’s, affects an almost masculine garb and declares that marriage, like jail, is a good thing, but that she prefers to see other people in both.” See LILLIAN FADERMAN, TO BELIEVE IN WOMEN: WHAT LESBIANS HAVE DONE FOR AMERICA 313 (2000) (recounting description as an example of the “mild innuendos regarding a professional woman’s inversion” in early twentieth-century America).

<sup>59</sup> TAYLOR, ANATOMY, *supra* note 1, at 546 n.\* (describing such an incident during first Nuremberg trial).

<sup>60</sup> “Meeting Cecelia socially, the last thing you would imagine her to be is a lawyer,” ventured the New York *Sun* article about Goetz Barden, *supra* note 44. It went on: “Thick black curly hair falls to her shoulders and frames a pixy face. She is 5 feet 3 inches tall, but won’t tell her weight. ‘This overseas diet has put on ten pounds,’ she said with a sigh. Her looks would fool anybody into thinking she spent a gay irresponsible life . . . .” *Id.* In similar vein was a German news story that described “the Greek nose and the extraordinarily red mouth” of lead defense counsel Gombel, a “striking blonde.” *Brief an Elisabeth*, DER SPIEGEL, Aug. 21, 1948, at 7, available at <http://www.spiegel.de/spiegel/print/d-44418737.html> (last visited May 20, 2010).



Offering a glimpse into the pervasive dismissal of work by women—indeed, by anyone deemed feminine—is this passage in historian Joseph E. Persico’s 1994 book on the first trial:

Justice Birkett enjoyed exercising his talent for invective against the interpreters. A speech in the vigorous, masculine Russian of the prosecutor, Rudenko, had been rendered into English by an effete interpreter whom Birkett complained sounded like ‘a “refayned” decaying cleric, a latecomer in making an apology at the vicarage garden party rather than the prosecutor of major war crimes.’ Gruff German generals were interpreted by young women with chirpy little voices, diminishing the power of the witnesses’ testimony.<sup>61</sup>

The comment suggests the challenges women like Edith Simon faced, not only from an erstwhile Nazi leader, but also from Allied officials.

And yet some of the women at Nuremberg—like some women elsewhere in the decades after World War II—pursued pathbreaking careers. A photo of Paris stripper Micheline Bernardini wearing *le bikini* thus bears more than passing relation to the photo of Cecelia

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<sup>61</sup> JOSEPH E. PERSICO, *NUREMBERG: INFAMY ON TRIAL* 263-64 (1994) (quoting British associate Justice William Norman Birkett, and referring to Soviet Chief Prosecutor Roman Andreyevich Rudenko).

Goetz wearing a barrister's robe as she addresses the Nuremberg tribunal. Goetz and her sisters gained entry into a room from which women always had been excluded, and thus opened doors for women in subsequent generations. The bikini played a not entirely dissimilar role that same year. Its inventor was inspired, in fact, after noticing that at beaches women were "rolling up and pulling down the tops and bottoms of their two-piece suits as far as possible to expose as much of their bodies to the sun as they could."<sup>62</sup> His innovation sparked outrage in institutions that relegated women to a defined place in society. The Vatican banned the bikini as late as 1964. But by then it had caught on. As stated in *The Bikini Book*, the tiny tog "fit perfectly with the sexual liberation of the '60s, which went hand-in-hand with the advent of the birth control pill."<sup>63</sup> Though the relationship between women's sexuality and women's progress is complex, at least for some women, autonomy in one aspect of life increased autonomy in others. Thus it intrigues to learn that Janine Hérisson, one of the "prettiest and youngest" women whose bikinis reduced men to poolside ogglers, appears to have had a successful career translating novels from English to French.<sup>64</sup>

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<sup>62</sup> KILLOREN BENSIMON, *supra* note 4, at 10.

<sup>63</sup> *Id.* at 11.

<sup>64</sup> See *au*: "Hérisson, Janine," [http://melvyl.worldcat.org/search?q=au%3A%22He%CC%81risson%2C+Janine%22&fq=&se=nodgr&sd=desc&dblist=638&qt=first\\_page](http://melvyl.worldcat.org/search?q=au%3A%22He%CC%81risson%2C+Janine%22&fq=&se=nodgr&sd=desc&dblist=638&qt=first_page) (last visited May 19, 2010).

Though many women remained relatively silent after Nuremberg, two artifacts from the 1990s indicate that they did not forget their work there.

One is a letter that *Farben* prosecutor Belle Mayer Zeck (below right) wrote at age seventy-six. A *New York Times* magazine article had questioned the legitimacy of the Nuremberg trials, in part on the ground that they rested, after all, on international law. Her tart reply: “[T]o dismiss treaties and international conventions as ‘creative’ is to deny that international law exists. The fact that enforcement procedures are lacking in these conventions does not vitiate their effect.”<sup>65</sup>



The other is the recollection by Cecelia Goetz, then nearly eighty, “diminutive, white-haired,” and using a cane, of the decades-old decision of the United States to

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<sup>65</sup> Belle Mayer Zeck, *The War and the Law*, N.Y. TIMES, § 6, at 6 (May 28, 1995).

release arms merchant Alfried Krupp after he had served only a third of his sentence. Goetz uttered a cry familiar to any foiled lawyer: “‘I’m still outraged. It was a total miscarriage of justice.’”<sup>66</sup>

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<sup>66</sup> Lyn Riddle, *Remembering Nuremberg Prosecution of Nazis Still Stirs Pride, Passion*, ATLANTA J. & CONST., Sept. 26, 1997, available at 1997 WLNR 3137608 (quoting Goetz). See also Goetz remarks, *supra* note 42, at 524 (criticizing the commutation of Krupp’s sentence).

**International Criminal Law  
Year in Review: 2008-2009**

**Michael P. Scharf\***

It is an honor to once again participate in the International Humanitarian Law Dialogs here at the Chautauqua Institution.

Sixteen years ago, the modern era of international criminal law began with the creation of the Yugoslavia Tribunal. I was fortunate to be at the forefront of that effort. As Attorney-Adviser for UN Affairs at the U.S. State Department at the time, I was assigned to help draft the Statute and Rules of the Tribunal.

The creation of the Yugoslavia Tribunal was followed a year later by the Rwanda Tribunal and subsequently by the Special Court for Sierra Leone, the International Criminal Court (ICC), the Cambodia Tribunal, and, most recently, the Lebanon Tribunal.

Let me begin by taking stock of what these tribunals have accomplished through 2009:

The Yugoslavia Tribunal has tried 120 defendants in eighty-six trials, with eleven acquittals, 109 convictions, and twenty-seven done serving their time. Six cases

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\* John Deaver Drinko—Baker & Hostetler Professor of Law, and Director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law. The Author thanks Brin Anderson, Case JD 2010, for her assistance in researching and writing these remarks.

involving fourteen defendants are on appeal; seven cases involving twenty-one defendants are at trial; three cases involving four defendants are at pre-trial; and only two accused remain at large—one of them being Ratko Mladic.

The Rwanda Tribunal has tried thirty-seven defendants, with six acquittals, thirty-one convictions, and five done serving their time. Seven defendants are on appeal, twenty-three are at trial, and five are at pre-trial.

The Special Court for Sierra Leone has completed two cases, one is on appeal, and one (Charles Taylor) is on trial.

The Cambodia Tribunal has one trial ongoing, and one trial involving five defendants set to start this fall.

The International Criminal Court has exercised jurisdiction over four situations: Congo, Central African Republic, Uganda, and Darfur. With respect to Congo, it has begun the trial of Lubanga, and the trials of Katanga and Chui are set to commence next month. The Central African Republic case of Gambo is in pre-trial proceedings. The four Uganda accused remain at large. And with respect to Darfur, rebel leader Al Garda turned himself in, back in May, and will appear at a confirmation hearing in October, while Sudanese President Bashir and his henchman Harun remain at large.

The past twelve months have witnessed a number of the most significant developments relating to the tribunals. Let me take a few minutes to describe them.

*International Criminal Tribunal for the Former Yugoslavia (ICTY)*

A. The ICTY Arrests Karadzic

The most significant arrest in 2008 for the International Criminal Tribunal for the former Yugoslavia was the arrest of Radovan Karadzic.<sup>1</sup> Karadzic, at large for over thirteen years, was the top Bosnian Serb leader during the conflict and ethnic cleansing in the 1990s.<sup>2</sup> The ICTY indicted Karadzic twice on charges of genocide, crimes against humanity, and war crimes.<sup>3</sup> Among these indictments, Karadzic is charged with genocide in connection with the massacre at Srebrenica where thousands of Bosnian Muslim men and boys were brutally murdered.<sup>4</sup> Karadzic was

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<sup>1</sup> *Top War Crimes Fugitive Karadzic Arrested—Serbia*, REUTERS, July 21, 2008, available at [http://www.reuters.com/article/homepageCrisis/idUSL21964587.CH\\_.2400](http://www.reuters.com/article/homepageCrisis/idUSL21964587.CH_.2400).

<sup>2</sup> *Id.*

<sup>3</sup> *Prosecutor v. Karadzic*, Case No. IT-95-5/18-I, Motion to Amend the First Amended Indictment (Int'l Crim. Trib. for the former Yugoslavia Sept. 22, 2008), <http://www.icty.org/x/cases/karadzic/tdec/en/090216.pdf>.

<sup>4</sup> *Year-in-Review 2008*, 42 INT'L L. 229, 866 (2009) (citing *Bosnia: Karadzic Arrest a Blow Against Impunity*, HUMAN RIGHTS WATCH, July 21, 2008, available at <http://www.hrw.org/english/docs/2008/>

arrested in Belgrade and then transferred to The Hague on July 30, 2008.

Many commentators believe that the Karadzic trial will redeem the ICTY in the eyes of its critics, especially following Slobodan Milosevic's four-year trial that ended without a conviction due to Milosevic's death.<sup>5</sup>

At the same time, Karadzic's trial bears some unwelcome similarities to the prolonged trial of Milosevic. His first court appearance was on July 31, 2008, at which he indicated that he would assert the right of self-representation. Concerned that Karadzic would use time stalling techniques as he attempted to represent himself, the ICTY adopted a new rule on December 12, 2008, allowing judges to impose counsel on defendants wishing to represent themselves.<sup>6</sup> Many expressed concern that this new rule would only frustrate the process more, as the defendants would stubbornly refuse to cooperate with the imposed counsel.<sup>7</sup> While Karadzic now has a legal team led by American lawyer

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07/21/bosher19421.htm).

<sup>5</sup> *Id.*

<sup>6</sup> *Doubts Raised About Rule Letting Judges Impose Counsel*, INSTITUTE FOR WAR AND PEACE REPORTING, Dec. 12, 2008, available at [http://www.iwpr.net/?p=tri&s=f&o=348501&apc\\_state=henptri](http://www.iwpr.net/?p=tri&s=f&o=348501&apc_state=henptri).

<sup>7</sup> *Id.*



Peter Robinson, Karadzic is still completely in charge of his own defense.<sup>8</sup>

In an attempt to expedite Karadzic's trial, the Tribunal judges requested that the prosecution reduce the number of charges in his indictment. As of July 2009, Karadzic was indicted for eleven different charges on crimes alleged to have been committed in twenty-seven different municipalities,<sup>9</sup> for which he denied any responsibility in late June 2009.<sup>10</sup> If the prosecution does not narrow the charge list, the Court stated "they will do the job for them."<sup>11</sup>

Further delays in the Karadzic trial include a pre-trial motion by Karadzic to dismiss his case because he allegedly received immunity from the United States

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<sup>8</sup> *Prosecution Wants Long Trial, Karadzic Counsel Says*, EARTH TIMES (July 23, 2009, 5:35:39 GMT), available at <http://www.earthtimes.org/articles/show/278621,prosecution-wants-long-trial-karadzic-counsel-says--feature.html>.

<sup>9</sup> *International Court Judges Tell Prosecutors To Speed Up Karadzic Trial*, DOW JONES NEWswire, July 24, 2009, available at <http://www.nasdaq.com/aspx/stock-market-newsstory.aspx?storyid=200907230618dowjonesdjonline000451&title=international-court-judges-tell-prosecutors-to-speed-up-karadzic-trial>.

<sup>10</sup> *Former Serb Leader Denies War Crimes Charges*, ADN KRONOS INT'L, June 30, 2009, available at <http://www.adnkronos.com/AKI/English/Security/?id=3.0.3486311636>.

<sup>11</sup> *International Court Judges Tell Prosecutors to Speed Up Karadzic Trial*, *supra* note 9.

Government in 1996 in exchange for a promise that Karadzic would disappear from public life.<sup>12</sup> U.S. diplomat Richard Holbrooke, who Karadzic alleges made the immunity deal, has repeatedly denied that any agreement existed between the United States and Karadzic and calls the claims “an absurd and laughable lie that Karadzic has been spreading for years.”<sup>13</sup> Then, in early July 2009, the ICTY issued a second ruling stating that “the chamber does not accept the accused’s contention that the tribunal is bound by the [Holbrooke] agreement.”<sup>14</sup> With the Court refusing to acknowledge the alleged immunity deal, the Court’s judges believe that Karadzic’s trial will not begin until after September 2009.<sup>15</sup>

#### B. Security Council Extends its Mandate for the ICTY Tribunal

Further pressure to expedite Karadzic’s trial stems from the Tribunal’s original goal of finishing trials by the end of 2008 and the appeals by the end of 2010.

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<sup>12</sup> *Karadzic Demands Holbrooke, Albright Appear in Court*, REUTERS, Aug. 6, 2008, available at <http://www.reuters.com/article/latestCrisis/idUSL6488814>.

<sup>13</sup> *Id.*

<sup>14</sup> *War Crimes to Try Karadzic, Rejects “Deal,”* ASSOC. FOREIGN PRESS, July 8, 2009, available at <http://www.google.com/hosted/news/afp/article/ALeqM5i3Kac1PCEz6QcGyt2SanTJzxNkbQ>.

<sup>15</sup> *Id.*

However, with twenty-three cases currently on trial, thirteen cases on appeal, and two suspects still at large as of July 2009,<sup>16</sup> these deadlines seem unrealistic. In order to help the Court meet its deadlines, the Security Council appointed four additional ad litem, or temporary, judges to the ICTY in February 2008.<sup>17</sup> This temporary measure was enacted to allow the ICTY to “conduct additional trials as soon as possible in order to meet the completion strategy objectives.”<sup>18</sup> Even with the addition of the ad litem judges, the Security Council amended the completion deadlines for the ICTY most recently in July 2009, mandating that all cases of first instance be finished by 2009. In 2010, the Court should then begin to reduce the number of on-going cases.<sup>19</sup> However, Judge Fausto Pocar, President of the ICTY from 2005-2008, believes the UN will extend the mandate of the Court even past the 2010 deadline if

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<sup>16</sup> *Status of Cases*, INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/action/cases/4>.

<sup>17</sup> *Security Council Agrees to Increase Number of Judges at UN’s Balkan Tribunal*, UN NEWS CENTRE, Feb. 20, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=25691&Cr=icty&Cr1=>.

<sup>18</sup> *Id.*

<sup>19</sup> *Security Council Extends Terms of Judges at the ICTY and ICTR*, INT’L CRIM. L. BUREAU (July 8, 2009), available at <http://www.internationallawbureau.com/blog/?p=360>.

necessary in order to try the two remaining fugitives, Ratko Mladic and Goran Hadzic.<sup>20</sup>

C. Hadzic and Mladic are Still at Large; Without Their Arrests, Serbia Cannot Become a Member of the European Union

As of July 2009, Goran Hadzic and Ratko Mladic are still at large. However, authorities believe Mladic will not remain at large much longer, because Serbian authorities have stepped up efforts to capture the former Bosnian Serb general.<sup>21</sup> The arrest of Mladic, indicted by the ICTY in 1995 for the Srebrenica massacres, and the arrest of Hadzic are key conditions for Serbia's progress toward membership in the European Union.<sup>22</sup> While Serbia had hoped that the arrest of Karadzic in 2008 would bolster its attempts to join the European Union, the member nations said that Mladic's arrest was a requirement before they could entertain accepting Serbia into the EU.<sup>23</sup> Thus, Serbian authorities have stepped up surveillance and increased their efforts to

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<sup>20</sup> *Mladic Can Face Trial After 2011*, B92 NEWS, Dec. 2, 2008, available at <http://www.b92.net/eng/news/crimes-article.php?mm=12&dd=2&yyyy=2008>.

<sup>21</sup> *Bosnian Serb Mladic Won't Stay at Large Much Longer*, REUTERS, July 27, 2009, available at [http://www.nytimes.com/reuters/2009/07/27/world/international-uk-serbiamladic.html?\\_r=2&scp=1&sq=Mladic&st=cse](http://www.nytimes.com/reuters/2009/07/27/world/international-uk-serbiamladic.html?_r=2&scp=1&sq=Mladic&st=cse).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

arrest Mladic, and officials believe that it will not be much longer before he is arrested.<sup>24</sup>

D. The ICTY will Draft a Compilation of its Best Practices for other International Courts Tackling War Crimes

The ICTY, with the assistance of the UN Interregional Crime and Justice Research Institute (“UNICRI”), will draft a compilation of its best practices that can then be used by other international and domestic regimes tackling war crimes, crimes against humanity, and genocide.<sup>25</sup> The document will include “all of the ICTY’s expertise on its proceedings, ranging from investigations to the enforcement of its sentences, and drawing from the work of the Office of the President, Chambers, Prosecution and Registry at the tribunal.”<sup>26</sup> A digest of ICTY jurisprudence is also being considered for publication, and UNICRI will organize the publication and distribution of the documents.<sup>27</sup> This valuable project will protect and transfer the legacy of the cases and the knowledge gained from the Tribunal’s work for future courts dealing with similar issues.

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<sup>24</sup> *Id.*

<sup>25</sup> *UN tribunal and Justice Research Institute Start Project to Safeguard Court’s Legacy*, UN NEWS CENTRE, Apr. 23, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=26435&Cr=icty&Cr1=>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

*International Criminal Tribunal for Rwanda (ICTR)*

A. France Ultimately Turns Over Ntawukuriryayo to the ICTR for his Trial

Dominique Ntawukuriryayo, a Rwandan genocide suspect, was captured in October 2007 in the south of France for his involvement in a 1994 massacre that killed over 800,000 Tutsis and moderate Hutus. While the lower court ruled that Ntawukuriryayo should be extradited, France's Supreme Court overruled the court in early 2008 due to procedural defects.<sup>28</sup> However, France agreed to transfer Ntawukuriryayo in May 2008, after he lost his final appeal in France's highest court.<sup>29</sup> His transfer to the ICTR was completed in June 2008, and his trial began in May 2009.<sup>30</sup>

B. The Tribunal is Unable to Find Host Countries Willing to Accept the Acquitted

Since its inception, the ICTR has acquitted six indictees, including Emmanuel Bagambiki, Ignace Bagilishema, Gratien Kabiligi, Jean Mpambara, Andre

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<sup>28</sup> *France Stops Genocide Transfer*, BBC NEWS, Jan. 16, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7191590.stm>.

<sup>29</sup> *Rwanda: Government Welcomes French Court Ruling to Transfer Key Fugitive*, NEW TIMES, May 9, 2008, available at <http://www.newtimes.co.rw/index.php?issue=13525&article=6209>.

<sup>30</sup> *Trial of Former sub-prefect Ntawukuriryayo opens*, HIRONDELLE NEWS AGENCY, May 6, 2009, available at <http://www.hirondellenews.com/content/view/3284/329/>.

Ntagerura, and Andre Rwamakuba.<sup>31</sup> However, most of these acquitted individuals still are in the custody of the ICTR because no host countries are willing to accept them. The ICTR released a plea for the “co-operation of all countries that form the international community, from which the tribunal draws its mandate,” to receive the acquitted individuals because the ICTR has only a limited temporal existence. The plea was prompted by a motion from Ntagerura, who is having trouble receiving asylum in Canada.<sup>32</sup> Kabiligi, acquitted in December of 2008, also seeks a host country. The other four acquitted individuals were able to seek asylum in France or Belgium but neither country is interested in “making it a habit” to accept these individuals.<sup>33</sup> Unfortunately, unlike those acquitted in the ICTY who are regarded as heroes in their homelands, those individuals acquitted in the ICTR do not have any desire to return to Rwanda. Nonetheless, the ICTR endeavored to help those acquitted seek asylum, and Ntagerura’s appeal is now

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<sup>31</sup> *Status of Cases*, INT’L CRIM. TRIB. FOR RWANDA, available at <http://www.ictor.org/default.htm>.

<sup>32</sup> *ICTR Pleads to UN-Member Countries to Accept Genocide Acquitted Persons*, HIRONDELLE NEWS AGENCY, May 19, 2008, available at <http://www.hirondellenews.com/content/view/2007/333>.

<sup>33</sup> *ICTR Does Not Know What to Do with its Prisoners Who Have Been Released*, HIRONDELLE NEWS AGENCY, Dec. 22, 2008, available at <http://www.hirondellenews.com/content/view/2783/353>.

pending before the UN High Commissioner for Refugees.<sup>34</sup>

### C. *Butare* Trial Draws to a Close

The *Butare* trial, which began in June 2001, tried defendants allegedly responsible for the genocide of Tutsis in the Butare region. The trial most notably includes Pauline Nyiramasuhuko as a defendant—she is the first woman ever to be charged with genocide and rape as a crime against humanity.<sup>35</sup> She is the former Minister for Women and the Family and is charged, along with her son and four others, with inciting troops and the militia to rape hundreds of women. Nyiramasuhuko allegedly ordered soldiers to rape women and children before killing them in the Butare region during the 1994 genocide. Indeed, on various occasions, Nyiramasuhuko was said to have informed soldiers that raping the women could be considered as a reward.<sup>36</sup>

The *Butare* trial was formally closed on December 2, 2008, but the prosecution recalled four witnesses in February 2009. Closing arguments were

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<sup>34</sup> *Id.*

<sup>35</sup> *Rwandan Denies Genocide Charges*, BBC NEWS, Jan. 31, 2005, available at <http://news.bbc.co.uk/2/hi/africa/4223035.stm>.

<sup>36</sup> *Pauline Nyiramasuhuko*, TRIAL WATCH, available at [http://www.trial-ch.org/en/trial-watch/profile/db/facts/pauline\\_nyiramasuhuko\\_201.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/pauline_nyiramasuhuko_201.html).



then held in April 2009. All in all, the trial lasted 726 days, with over fifty-nine prosecution witnesses and 130 defense witnesses heard.<sup>37</sup>

During the closing arguments, defense counsel for all six defendants requested that their clients be acquitted.<sup>38</sup> The Prosecutor has requested life imprisonment, which is the maximum sentence in the ICTR, because “without them, the genocide in Butare would not have been possible.”<sup>39</sup> The judges expect to issue a decision in mid 2010.<sup>40</sup>

#### D. Rwanda Seeks to Have Cases Transferred to Kigali

In June 2008, Judge Dennis Byron, President of the ICTR, requested the Security Council to extend the Tribunal’s mandate so that it can continue prosecuting those responsible for the genocide in Rwanda in spring of 1994. With five recent arrests, Judge Byron expected to be able to finish most cases by the end of 2008, with

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<sup>37</sup> Letter dated May 14, 2009 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, U.N. Doc. S/2009/247 (May 14, 2009), available at <http://www.ictor.org/default.htm> [hereinafter ICTR 2009 Completion Strategy Letter].

<sup>38</sup> *Butare Trial: Another Ex-Governor Asks for Acquittal*, HIRONDELLE NEWS AGENCY, Apr. 28, 2009, available at <http://allafrica.com/stories/200904290627.html>.

<sup>39</sup> *Id.*

<sup>40</sup> ICTR 2009 Completion Strategy Letter, *supra* note 37.

some continuing into 2009. However, as of July 2009, twenty-three trials are in progress, five are awaiting trial, seven on appeal, and thirteen fugitives still remain at large.<sup>41</sup>

Yet, Rwanda objected to extending the Tribunal's mandate, because the Government felt that "efforts and resources should be redirected at further improving Rwanda's capacity to deal with cases referred by the Tribunal to its national courts."<sup>42</sup> At the same time, both the ICTR and international human rights organizations believe that a lack of sufficient legal safeguards prevents the transfer of these cases to Rwanda.<sup>43</sup> Perhaps the Security Council was persuaded by the Tribunal's allegation that many of the remaining fugitives would not receive a fair trial if transferred to the domestic courts in Rwanda, thereby reinforcing the need to extend the mandate for the ICTR.<sup>44</sup> Thus, in July 2008, the Security Council extended the ICTR's mandate for Trial

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<sup>41</sup> *Status of Cases*, INT'L CRIM. TRIB. FOR RWANDA, *supra* note 31.

<sup>42</sup> *Rwanda Objects to Extension of ICTR Judges Mandate*, HIRONDELLE NEWS AGENCY, July 18, 2008, available at <http://www.hirondellenews.com/content/view/2286/333/>.

<sup>43</sup> *Year-in-Review 2008*, *supra* note 4, at 868.

<sup>44</sup> *Id.* See also *UN Court Rejects Genocide Accused's Transfer to Kigali*, HIRONDELLE NEWS AGENCY, Nov. 20, 2008, available at <http://www.hirondellenews.com/content/view/2649/333/> (stating that the ICTR judges do not believe that those accused of genocide could receive a fair trial in Kigali).

Chambers until the end of 2009 and for the Appeals Chambers until the end of 2010.<sup>45</sup> Then, in July 2009, the Security Council extended the term of office for five permanent judges at the ICTR and eleven temporary judges until December 31, 2010, or until the completion of the cases to which they are assigned if sooner.<sup>46</sup>

*Extraordinary Chambers in the Courts of Cambodia  
(ECCC)*

A. Detained Suspects Denied Provisional Release  
Despite Poor Health

The five detained suspects in the ECCC all requested that they be released on bail. Kang Keng Iev, alias Duch, argued in late 2007 that detaining him for eight years without trial breached his human rights. His subsequent request for bail was denied on December 3, 2007, because the Court was concerned that he may flee or threaten witnesses.<sup>47</sup> "The provisional detention is a necessary measure to ensure the security of the witnesses [and] the charged persons, to preserve evidence, to ensure the presence of the charged person during the

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<sup>45</sup> *Rwanda Objects to Extension of ICTR Judges Mandate*, *supra* note 42.

<sup>46</sup> *Security Council Extends Terms of Judges at the ICTY and the ICTR*, *supra* note 19.

<sup>47</sup> *Khmer Rouge Jailer Appeal Rejected*, AL JAZEERA ENG., Dec. 4, 2007, available at <http://english.aljazeera.net/NR/exeres/D2B13FB4-4EB7-4FE5-9243-4E672B41FE6D.htm>.

proceedings, and to preserve public order," stated Judge Prak Kimsan.<sup>48</sup>

On March 20, 2008, the ECCC also rejected Nuon Chea's request for release on bail, despite his poor health and chronic heart condition. Pointing to similar reasons as in the Duch denial, the judges feared that Chea would pressure witnesses, destroy evidence, and potentially escape.<sup>49</sup> Similarly, in July 2008, the ECCC also denied bail to Ieng Thirith, because they were worried that she might intimidate victims or make compromises with former co-conspirators.<sup>50</sup> Finally, in November 2008, both Ieng Sary and Khieu Samphan were denied bail and had their provisional detention extended.<sup>51</sup>

## B. Civil Party Participants are Permitted

Because of the ECCC's pioneering rule to allow

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<sup>48</sup> *Id.*

<sup>49</sup> *Cambodian Tribunal Rejects Khmer Rouge Official's Appeal Against Detention*, ASSOC. PRESS, Mar. 20, 2008, available at [http://www.irrawaddy.org/article.php?art\\_id=11029](http://www.irrawaddy.org/article.php?art_id=11029).

<sup>50</sup> *Ieng Thirith to Remain in Detention: Tribunal*, VOA KHMER, July 9, 2008, available at <http://www.voanews.com/Khmer/archive/2008-07/2008-07-09voa1.cfm?CFID=269091862&CFTOKEN=96609644&jsessionid=8830e53f3d272c1e45f4442d1a73f2047497>.

<sup>51</sup> *Court Opts to Extend Khieu Samphan's Pretrial Detention*, 3 PILPG WAR CRIMES PROSECUTION WATCH, no. 32, 2008, available at [http://www.publicinternationallaw.org/warcrimeswatch/archives/wcpw\\_vol03issue32.html#cam5](http://www.publicinternationallaw.org/warcrimeswatch/archives/wcpw_vol03issue32.html#cam5).

victim participation in Court proceedings, the first gender-related abuse complaint was filed in September 2008. Som Southevy, a transgender woman, filed a complaint alleging that she was repeatedly assaulted sexually and forced to marry another woman under the Khmer Rouge regime.<sup>52</sup> It is the hope of the Tribunal and of Southevy that her complaint will encourage other victims of sexual abuse to come forward to file similar complaints with the Court. While rape is not explicitly articulated in the ECCC's statute, Southevy's attorney believes that the crime of rape can fall under the category of crimes against humanity and can still be heard by the ECCC.<sup>53</sup>

### C. Consensual Statements Made Without a Lawyer Present are Admissible

In early January 2008, Cambodia's Khmer Rouge Tribunal ruled that Nuon Chea's (a.k.a. Brother Number 2) statements without presence of counsel would be admissible at trial.<sup>54</sup> The Extraordinary Chambers in the Courts of Cambodia said that Chea was advised numerous times not to make statements until

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<sup>52</sup> *Khmer Rouge Tribunal Bare Sexual Abuse*, INTER PRESS SERVICE, Sept. 8, 2008, available at <http://www.ipsnews.net/news.asp?idnews=43819>.

<sup>53</sup> *Id.*

<sup>54</sup> *Cambodian Court Declares Former Khmer Rouge Leader Statement Stands*, EARTH TIMES, Jan 25, 2008, available at <http://www.earthtimes.org/articles/show/178407,cambodian-court-declares-former-khmer-rouge-leader-statement-stands.html>.

legal counsel arrived. However, Chea disregarded the warnings and made the statements anyhow. Based on this “consensual” encounter, the ECCC ruled that the statements are admissible at trial. Over objections by Chea’s legal defense team—in a statement to the press—the Court indicated “[i]n reality, it appears difficult to imagine a situation where the waiver could have been clearer and more deliberate than in this case, without questioning the intellectual capacity of Mr. Nuon Chea, which does not appear to be in question here.”<sup>55</sup>

#### D. Torture Statements Ruled Admissible

In a July 2009 decision citing my *Washington and Lee Law Review* article, “When, if Ever, is Torture Evidence Admissible,” the Pre-Trial Chamber ruled that biographical statements provided by detainees at S-21 (a Khmer Rouge torture facility) just prior to torture were admissible in the trial of the five Cambodian leaders because (1) they were given before actual torture commenced; (2) the personnel of the ECCC were not involved in the interrogations; and (3) they were being used against the superiors of the people who committed the torture, rather than the person subject to torture.

#### E. Duch Expresses Remorse Throughout His Trial Proceedings

On August 12, 2008, the ECCC indicted Duch and charged him with crimes against humanity and war crimes for his operation of the Phnom Penh prison

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<sup>55</sup> *Id.*

(“S-21”), which ultimately was used as a torture center.<sup>56</sup> In December 2008, domestic charges of torture and premeditated murder were added to the indictment.<sup>57</sup> Duch headed the S-21 prison, which was the Khmer Rouge's largest torture facility. About 16,000 men, women, and children are believed to have been held there, but only fourteen are thought to have survived.<sup>58</sup>

Since the trial began in February 2009, Duch has been remorseful and apologetic for his actions as leader of the S-21 prison. When he took the stand in April 2009, Duch said, “I would like these people to please know I would like to apologize.”<sup>59</sup> Unlike the other leaders detained by the Cambodian Tribunal, Duch has taken responsibility for his actions, admitted his guilt, and has asked for forgiveness. However, survivors from

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<sup>56</sup> *Cambodian Tribunal Indicts Khmer Rouge Jailer*, ASSOC. PRESS, Aug. 12, 2008, available at <http://www.foxnews.com/wires/2008Aug12/0,4670,CambodiaKhmerRouge,00.html>.

<sup>57</sup> *Former Krouge Prison Chief to Face Extra Charges*, ASSOC. FOREIGN PRESS, Dec. 5, 2008, available at [http://www.google.com/hostednews/afp/article/ALeqM5gT8jPEPYwVyasuHeBPJDzd\\_go6eg](http://www.google.com/hostednews/afp/article/ALeqM5gT8jPEPYwVyasuHeBPJDzd_go6eg).

<sup>58</sup> *Id.*

<sup>59</sup> *I Am Sorry, Duch Tells S-21 Victims*, VOA KHMER, April 2, 2009, available at <http://www.voanews.com/Khmer/archive/2009-04/2009-04-02-voa4.cfm?CFID=269103732&CFTOKEN=29372999&jsessionid=883037c14dd885c32c77623c1950273234a1>.

the S-21 prison feel that Duch's apology is "unacceptable."<sup>60</sup>

While the prosecution is still presenting its case in the Duch trial, the ECCC trial judges recently held that video footage taken by the Vietnamese will be excluded due to authenticity difficulties.<sup>61</sup> The trial judges did not rule as to whether authenticity could be proven, but rather felt that the verification procedures would take too long. In addition, the Court felt that the video footage did not add additional evidence that is not already present in the witness testimony.<sup>62</sup>

*Special Court for Sierra Leone*

A. Revolutionary United Front (RUF) Trio Found Guilty of War Crimes and Crimes Against Humanity, including a Separate Count for Forced Marriage as a Crime Against Humanity

The Revolutionary United Front leaders, Issa Sesay, Morris Kallon, and Augustine Gbao, were convicted in February 2009 of war crimes and crimes against

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<sup>60</sup> *Id.*

<sup>61</sup> *Admission of Vietnamese Film Footage as Evidence is Rejected*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, July 29, 2009, available at [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=302](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=302).

<sup>62</sup> *Id.*



humanity.<sup>63</sup> The trio was found guilty of “significantly contributing” to a joint criminal enterprise with former Liberian President Charles Taylor to control diamond fields to finance their warfare. Issa Hassan Sesay was sentenced to fifty-two years in prison, former commander Morris Kallon to forty years, and former chief of security Augustine Gbao to twenty-five years.<sup>64</sup>

The three leaders were also found guilty of forced marriage, and their conviction marks the first time that a forced marriage charge was handed down in an international court of law.<sup>65</sup> While the Special Court originally viewed forced marriage as a redundant charge already covered by charges of rape and sexual slavery, Stephen Rapp, the Chief Prosecutor at the Special Court, insisted that forced marriage was in fact a discrete crime. Rapp stated that “[forced marriage] almost always involved sex, but it involved other things—an exclusive, essentially lifetime relationship under the control of a man, a demand that this individual [the wife] provide ... household services, travel with the man, care for his needs, and everything else.” The Court’s recognition of forced marriage as a discrete crime could have a positive

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<sup>63</sup> *S Leone Trio Guilty of War Crimes*, BBC NEWS, Feb. 25, 2009, available at <http://news.bbc.co.uk/2/hi/africa/7910841.stm>.

<sup>64</sup> *Sierra Leone Rebels Jailed for Crimes Against Humanity*, CNN, Apr. 8, 2009, available at <http://edition.cnn.com/2009/WORLD/africa/04/08/sierra.leone.war.crimes/>.

<sup>65</sup> *In Africa: Justice for ‘Bush Wives,’* CHRISTIAN SCIENCE MONITOR, June 9, 2008, available at <http://www.csmonitor.com/2008/0610/p06s01-woaf.html?page=1>.

effect on how the ICC tries cases in Uganda and the Democratic Republic of Congo, where gender abuse and forced marriages have already been documented by human rights groups.<sup>66</sup>

#### B. U.S. Convicts Taylor's Son of Torture

In September of 2008, the United States tried Charles McArthur Emmanuel, also known as "Chuckie Taylor, Jr.," for alleged charges of torture and conspiracy to commit torture overseas.<sup>67</sup> Emmanuel, born in Massachusetts and son of former Liberian President Charles Taylor, grew up most of his life in the United States. In 1994, when he was a teenager, Emmanuel moved back to Liberia to be with his father. While in Liberia, Emmanuel was commander of the "Demon Forces," which was a paramilitary anti-terrorist unit in the Liberian Government. He was accused of shooting three people at a checkpoint bridge in Liberia. His other alleged crimes took place during 1999-2002 when Emmanuel was responsible for intimidating and silencing his father's opponents by any means necessary.<sup>68</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Torture Trial Set for ex-Liberian leader's Son*, 3 PILPG WAR CRIMES PROSECUTION WATCH, no. 29, 2008, available at [http://www.publicinternationallaw.org/warcrimeswatch/archives/wc\\_pw\\_vol03issue29.html#scsl](http://www.publicinternationallaw.org/warcrimeswatch/archives/wc_pw_vol03issue29.html#scsl).

<sup>68</sup> *Id.*

Witnesses for the prosecution claimed that Emmanuel poured hot, burning plastic onto their faces. Another victim testified that as a prisoner, he was forced to sodomize other prisoners while Emmanuel watched and laughed.<sup>69</sup> Other victims also testified that the Demon Forces amputated and mutilated victims' bodies.

After about a month of testimony, the jury found Emmanuel guilty on all counts, including counts of torture and conspiracy to commit torture. Emmanuel's case was the first case brought under a 1994 law making it a crime for U.S. citizens to commit torture overseas.<sup>70</sup> Emmanuel was sentenced to ninety-seven years imprisonment for his crimes.<sup>71</sup> The significance of Emmanuel's sentence and conviction are monumental, because the United States is taking steps to claim justice for the victims and to ensure that perpetrators will not seek sanctuary in the United States.<sup>72</sup>

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<sup>69</sup> Ex-Liberia President, Son Face UN, US Charges, 3 PILPG WAR CRIMES PROSECUTION WATCH, no. 30, 2008, available at [http://www.publicinternationallaw.org/warcrimeswatch/archives/wc\\_pw\\_vol03issue30.html#sl2](http://www.publicinternationallaw.org/warcrimeswatch/archives/wc_pw_vol03issue30.html#sl2).

<sup>70</sup> 18 U.S.C. § 2340A; see also *US: First Verdict for Overseas Torture*, HUMAN RIGHTS WATCH, Oct. 30, 2008, available at <http://www.hrw.org/en/news/2008/10/30/us-first-verdict-overseas-torture>.

<sup>71</sup> *Taylor's Son Jailed for 97 years*, BBC NEWS, Jan. 9, 2009, available at <http://news.bbc.co.uk/2/hi/americas/7820069.stm>.

<sup>72</sup> *US: First Verdict for Overseas Torture*, *supra* note 70.

### C. Charles Taylor Trial Moves to Defense Phase

When the prosecution concluded its case in February 2009, the Chief Prosecutor Stephen Rapp said that his team had achieved “what we set out to do.”<sup>73</sup> Chief Prosecutor Rapp further noted that “it has been demonstrated that it is possible to prosecute a former chief of state in a trial that is fair and efficient, even where the indictment covers wide-ranging crimes. We have seen international justice conducted in accordance with the highest standards.”<sup>74</sup>

However, Charles Taylor’s defense team disagrees with Chief Prosecutor Rapp’s characterization. Rather, the defense, while it does not deny that atrocities occurred in Sierra Leone, believes that “[t]he problem with this case since its inception has been the linkage evidence—the quality or the lack thereof linking Mr. Taylor to the alleged offences.”<sup>75</sup> Therefore, Taylor’s defense team asked for his acquittal.<sup>76</sup>

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<sup>73</sup> *Testimony for the Prosecution Concluded in Taylor Trial*, AFRICAN PRESS ORG., Feb. 2, 2009, available at <http://appablog.wordpress.com/2009/02/02/sierra-leone-testimony-for-the-prosecution-concluded-in-taylor-trial/>.

<sup>74</sup> *Id.*

<sup>75</sup> *Charles Taylor’s Defence Counsel Seeks his Acquittal*, REUTERS, Apr. 6, 2009, available at [http://www.reuters.com/article/homepageCrisis/idUSL6369203\\_CH\\_2400](http://www.reuters.com/article/homepageCrisis/idUSL6369203_CH_2400).

<sup>76</sup> *Id.*

Naturally, the prosecutors opposed the acquittal motion, stating that without Charles Taylor, there could not have been a conflict in Sierra Leone—Taylor supplied the means, he supplied the men, and he supplied many of the commanders early in the struggle.<sup>77</sup> Defense counsel attempted to argue, that while Taylor did supply ammunitions to the rebel forces in Sierra Leone, there was no evidence that Taylor had direct intent that his acts would lead to the commission of the crime. Nevertheless, the Special Court rejected Taylor’s motion for acquittal because the prosecutors presented evidence “capable of supporting a conviction.”<sup>78</sup> The trial resumed June 29, 2009 with Taylor’s defense.<sup>79</sup>

### *Conclusion*

The several international tribunals are hitting their stride as completion of their mandates draws nearer. Meanwhile, the existence of the ICC is spurring the creation of domestic war crimes tribunals—like

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<sup>77</sup> *Prosecutors Oppose Motion to Acquit Former Liberian President Taylor*, VOA NEWS, Apr. 9, 2009, available at <http://www.voanews.com/english/archive/2009-04/2009-04-09-voa37.cfm?CFID=266094680&CFTOKEN=60120647&jsessionid=00304f1914790d41c56541949184ac7a3e58>.

<sup>78</sup> *Court Dismisses Charles Taylor’s Acquittal Motion*, 4 PILPG WAR CRIMES PROSECUTION WATCH, no. 3, 2009, available at [http://www.publicinternationallaw.org/warcrimeswatch/archives/wc\\_pw\\_vol04issue3.html#scsl](http://www.publicinternationallaw.org/warcrimeswatch/archives/wc_pw_vol04issue3.html#scsl).

<sup>79</sup> *Id.*

Uganda's Special War Crimes Chamber that I have been working this past year (under a USAID grant) to establish. Let me end with this provocative thought: one commentator observed this summer that with its explosion of case law, the area of international criminal law is engendering more scholarship and interest than "more important" areas of international law.

# Commentary

## Bringing War Criminals to Justice at Nuremberg

William Caming\*

### I.

#### *In Memory of Henry T. King, Jr.*

Henry King, Jr. passed away on May 9, 2009, less than three weeks shy of his ninetieth birthday on May 27, 2009. Henry and I were not only fellow prosecutors at Nuremberg, but also close friends throughout our lives. He was the personification of the perfect Yale gentleman—courtly, courteous, and kind, with an excellent sense of humor. Coming from a Harvard man, that is high praise, indeed.

When Henry would come to New York from time to time to visit his son, Dave, in Brooklyn, I would often motor in or take the train from Summit, NJ—and we would lunch together at a favorite restaurant of his, the “Oyster Bar,” in Manhattan’s Grand Central station. Each conversation would open with a proud, fatherly account of the goings on of his two children, Suzanne and Dave. He also loved to reminisce at our lunches—and over the telephone as well as by e-mail—about his realistic friendship with Albert Speer over the twenty years Speer spent in Berlin’s Spandau prison. Their friendship continued after Speer’s release and culminated in Henry’s insightful book, *The Two Worlds of Albert Speer*.

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\* Former Nuremberg Trial Counsel.



Henry's constant outpouring of speeches and writings on Nuremberg, and on Justice Robert H. Jackson, whom he so greatly admired, and the unfailing promotion of international criminal justice, always amazed me. Each was a specially-crafted work, reflecting his idealism, the fire in his belly, and his uncanny ability to capture his audience emotionally. And I vividly recall his joy when the permanent International Criminal Court at The Hague became a reality, with significant contributions from the three Nuremberg musketeers, Whitney Harris, Ben Ferencz, and Henry.

Henry often pointed out how his time in Nuremberg had wholly changed the direction of his life. He became an unfailing champion of those seeking the holy grail of universal human rights and justice for all mankind. Henry never lost that boyish enthusiasm he had for the quest, and this was constantly reflected in his conversations, speeches, and writings. As his good friend Whitney Harris recently said, "In all that he accomplished in his lifetime, Henry King put the destiny of his country first. He gave every measure of devotion to America and its noble purpose to lead the world to peace, freedom, and democracy."

Henry greatly admired Justice Jackson's eloquence at Nuremberg, which inspired him to devote much of his life to seeking the same "holy grail." I thought his talk at The Hague in December 2000, when he commented upon Jackson's opening statement at the IMT trial, put in a nutshell Henry's own ideals, philosophy, and aspirations:

Jackson's words that November day will never be forgotten by those who heard them. In eloquence, they matched the importance of the occasion. I believe that they will live forever in human history because they express the hopes of all of us—of all mankind—for a better world where we can live together under a rule of law characterized by peace with justice.

What a lovely epitaph. God speed, my friend!

II.

*The Ministries Case, Case No. 11,  
Ernst von Weizsaecker et al.*

It is a great pleasure to be with you this evening in this hallowed hall dedicated to the memory and accomplishments of Justice Robert H. Jackson. At the turn of the last century, George Santayana, the noted philosopher, cautioned, "Those who do not remember the past are bound to repeat it."

After a long, often-delayed journey, on July 1 of 2002, the train bearing the newly-established permanent International Criminal Court, powered by its Nuremberg locomotive, reached its final destination, The Hague. The start of this journey began more than sixty years ago—in October 1945 in Nuremberg—when the first trial of the leaders of the vanquished Third Reich commenced.

When the Third Reich unconditionally surrendered in May 1945, questions immediately arose as to the disposition of its leaders. Initially, the British and Russian Governments, supported by U.S. Secretary of the Treasury, Henry Morgenthau, and Secretary of State Cordell Hull, favored “victors’ justice” or summary execution of the top Nazis. However, cooler heads prevailed: Supreme Court Justice Robert H. Jackson, President Roosevelt’s choice to be U.S. Chief of Counsel for War Crimes, and Secretary of the Army Henry Stimson, successfully argued that it was imperative that an incontrovertible record of the Nazi regime be made for posterity. And, interestingly, in January 1942, in the darkest days of World War II, when Germany, like a colossus, stood astride most of Europe, the leaders of the ten or so governments-in-exile, in London, issued the St. James Declaration strongly supporting fair and public war crimes trials to document the unspeakable crimes committed and to bring to justice the perpetrators.

Thus, in August 1945, the four victorious allied powers—England, France, the Soviet Union, and the United States—agreed to the so-called London Charter, defining the crimes to be tried and the procedures under which the Nuremberg trials were to be conducted. Nuremberg, in the U.S. “zone of occupation,” was selected as the site, primarily because of its symbolic significance as the citadel of the Nazi party and where, in 1935, the seeds of the Holocaust were planted when the infamous Nuremberg decrees were issued, depriving German Jews of their rights as citizens.

Although Nuremberg lay in ruins, its Palace of Justice was relatively intact and contained a large courtroom and a wing of multi-tiered cells where the prisoners and material witnesses could be housed. All in all, thirteen trials were held in Nuremberg. The first and most celebrated trial was the so-called International Military Tribunal (IMT) trial with Hermann Goering et al. It was to be the only joint four-powers trial. The twenty-two defendants in the dock were the highest ranking leaders of the Third Reich still alive—Hitler, Himmler, and Goebbels having died by their own hands.

*Reichsmarschall* Hermann Goering, second only to the *fuehrer* in power, was the most colorful and domineering of the defendants. The other defendants included the enigmatic Rudolph Hess, secretary to the *fuehrer*; Martin Bormann, his successor, who was tried in absentia; Ernst Kaltenbrunner, Heinrich Himmler's scar-faced deputy; Von Ribbentrop, the foreign minister; the military leaders—Generals Keitel and Jodl, Admirals Doenitz and Raeder; Albert Speer, Hitler's architect and minister of war production (whose biography Henry King wrote); the wily economic minister, Schacht; Franz von Papen, former German Chancellor; and the notorious Jew baiter, Julius Streicher. They were indicted for the commission of the following crimes set forth in the London Charter:

- Crimes against Peace: planning, preparing, initiating, and waging wars of aggression—which Justice Jackson called “the ultimate crime,” from which all the other crimes flowed.
- War Crimes.

- Crimes against Humanity: those crimes committed after the outbreak of war on September 1, 1939—the “war nexus”—against the civilian populations of conquered Europe, and the genocidal extermination of Jews, gypsies, and others.
- Crimes committed against German nationals, such as German Jewry, before the outbreak of WWII on September 1, 1939, were not within the Court’s jurisdiction.
- Conspiracy to commit any of the foregoing crimes.

In his brilliant, historic opening statement on November 21, 1945—as timely today as it was then—Justice Jackson declared, before a hushed two-tier gallery thronged with several hundred dignitaries and reporters: “The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot survive their being repeated.” He marveled, “...that four great nations flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that power has ever paid to reason.” He also presciently warned: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow .... To pass these defendants a poisoned chalice is to put it to our own lips as well.”

Justice Jackson wisely elected to base the prosecution's case on irrefutable documentary proof—"to establish," as he said, "incredible events by credible evidence," much of which was created by the defendants themselves and has stood the test of time. This is the basic approach that we employed, too, in the subsequent trials, relying on incontrovertible written records to support oral testimony. Fortunately, the Third Reich generated monumental amounts of reports, diaries, and other incriminating records, of which we were in possession.

After some eleven months, on October 1, 1946, the judges read their lengthy, carefully-reasoned IMT judgment and passed sentence. No further joint four-power trials were held. The four powers agreed, however, that each of the four zones of occupation could conduct further international trials.

In December 1945, shortly after the commencement of the IMT trial, the four powers had enacted Control Council Law No. 10. This law became the charter for any subsequent war crimes trials held in any of the four zones of occupation for war criminals other than those tried in the IMT trial. It incorporated the four-power London Agreement of August 8, 1945, and its IMT Charter, defining the crimes. It was designed to establish a uniform basis for such war crimes trials. In addition, any subsequent trials were bound by the holdings in the IMT judgment of October 1946, such as its declaration of the criminality of certain organizations (e.g., the leadership corps of the Nazi party and the SS).

Twelve additional trials were held in Nuremberg before international military tribunals—each a three-member panel—generally of U.S. judges selected from our highest state courts. Brigadier General Telford Taylor, who had played a prominent role in the IMT case, succeeded Justice Jackson as U.S. Chief of Counsel for these twelve trials. Unfortunately, time constraints preclude my discussing these trials, other than to say that they concerned crimes committed by: Nazi judges; diplomats; prominent industrialists, such as Krupp; physicians conducting inhumane medical experiments; SS commanders of concentration camps and of *Einsatzgruppen* units or death squads in the east; and generals, whose troops were involved in hostage killings and other crimes.

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Let me turn now to the trial in which I was deeply involved—the *Ministries Case*—Case No. 11, concerning Baron Ernst von Weizsaecker et al. This case was the largest, longest, and last-to-be-concluded of the Nuremberg trials (November 18, 1947 to April 11, 1949). Like the other eleven trials, the *Ministries Case* was tried in the same spacious courtroom in Nuremberg's Palace of Justice as the IMT trial.

Three major trials had originally been contemplated to cover the vast subject matter—virtually every phase of criminal activity of the Third Reich—but radically-altered political circumstances and waning public interest dictated otherwise. The defendants ultimately

indicted were the product of a most difficult selection process, requiring painful choices.

The indictment was filed on November 18, 1947, against twenty-one high-ranking defendants, who were charged with crimes against peace; engaging in a common plan or conspiracy; war crimes; crimes against humanity against German nationals and civilian populations in the occupied territories; plunder and spoliation; slave labor; and membership in criminal organizations. Among the defendants finally chosen were:

- Baron Ernst von Weizsaecker, Von Ribbentrop's deputy, and State Secretary of the Foreign Office (in addition to five other key diplomats);
- Paul Koerner, Herman Goering's all-powerful deputy in the four year plan;
- Himmler's personal confidante and Chief of the SS main office, SS Lieutenant General Gottlob Berger;
- Hitler's press czar, Otto Dietrich;
- Hans Heinrich Lammers, the satanic and powerful chief of Hitler's Reich chancellery;
- Ernst Wilhelm Bohle, chief of the Nazi party's Ausland organization with jurisdiction over German nationals living abroad;
- The Reich Minister of Finance, Count Schwerin von Krosigk, and two bankers, Emil Puhl of the Reich Bank and Karl Rasche of the Dresdener Bank; and
- The industrialist Paul Pleiger, chairman of the "Hermann Goering Works" and Reich



plenipotentiary for coal and steel in the occupied territories.

Perhaps the most controversial selection was that of the career diplomat, Baron Ernst von Weizsaecker. About sixty-six years old at the time of his trial, he was a tall, distinguished-looking and polished aristocrat, with many influential friends abroad. He had served with distinction as a naval officer in World War I and had entered the diplomatic service in 1920. He held increasingly important ministerial posts abroad and became head of the political division of the Foreign Office in Berlin in 1936.

When the ardent Nazi, Von Ribbentrop, replaced Baron von Neurath as Foreign Minister in the spring of 1938, he chose Weizsaecker to be his state secretary and permanent deputy—a position that he held until May 1943, when he was appointed the German Ambassador to the Holy See.

At the trial, Weizsaecker was represented by four counselors. His senior counsel consisted of Dr. Helmut Becker, an experienced and most capable German advocate, and Warren Magee of the Washington D.C. Bar (one of three non-German defense counsel at the Nuremberg trials). His two assistant counselors were Sigismund von Braun, a young diplomat and the brother of rocket scientist Werner von Braun, and his son, Richard von Weizsaecker (who later served with distinction as the President of the Federal Republic of West Germany for two terms in the 1980s).

Weizsaecker was held in the highest regard at home and abroad. His character witnesses were formidable. They included, among others, the Bishop of Norway, who had headed the Norwegian resistance movement; a monsignor from the Vatican, representing the Pope; and several members of the British Foreign Office.

Diplomats like Weizsaecker were not Nazis in any party or organizational sense and were personally repelled by many facets of the regime. But, like his peers, he was a fervent nationalist, testifying on cross-examination that as “a civil servant, one does not serve the constitution, but the Fatherland.” He was also a covert and mostly passive member of the so-called German resistance, which small group’s opposition ebbed and flowed as the military fortunes of the Third Reich rose and fell. All in all, he was a formidable and wily defendant.

In its prefatory remarks in its judgment, the *Ministries* Tribunal cited with approval a benchmark of the IMT judgment, one which had resonated through virtually all of the Nuremberg proceedings, saying:

... Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.

The *Ministries* Court, sitting as an international military tribunal, was comprised of three judges. The presiding judge, William C. Christianson, was formerly a member of the Minnesota Supreme Court. Robert J. Maguire, a leading member of the Bar and a standing master in chancery for the Federal District Court in Oregon, was, like Christianson, eminently fair, unfailingly courteous, and hard-working. Both had piercing intellects and vision. Unfortunately, Judge Leon Powers, formerly of the Iowa Supreme Court, was of a wholly different stripe. From the opening days of the trial, he displayed a hostile, implacable, and impatient attitude toward the prosecution and often toward his fellow judges. He appeared to have little or no grasp of the enormity of the crimes committed by the Nazi regime and seemed woefully indifferent to the suffering and devastation caused. For example, in describing in his dissenting opinion the role of Lammers, a Reich minister, chief of Hitler's Reich chancellery, and a personal confidante of the *Fuehrer* and the formulator of his laws and decrees, Judge Powers concluded: "his relationship to those decrees and responsibility for them was not substantially different in principle than that of a stenographer who typed them."

The narrowness of Judge Powers' outlook can best be gauged by his words in his dissenting opinion, disagreeing almost entirely with the conclusions reached in the majority opinion: "I violently disagree with the opinion that we are engaged in enforcing international law that has not yet been codified and that we have an obligation to lay down rules of conduct for the guidance of nations of the future."

The indictment was filed in November 1947. Some 160 court sessions were held, and seventeen months elapsed before judgment was rendered in April 1949. The total record, including counsels' briefs, ran to some 79,000 pages. The judgment itself consisted of 692 pages in its published version, of which Judge Powers' dissenting opinion constituted seventy-one pages.

The *Ministries Case* closely paralleled the first IMT case, with the exception of the military men, who were tried separately in the high command and hostage cases. Once again, with more evidence than was available at the time of the IMT trial, the anatomy of a dictatorship was laid bare. In a very real sense, this concluding case was a fitting denouement to the Nuremberg epic.

During the eleven months in 1948 that the evidence in the *Ministries Case* was being introduced, the dark, lengthening shadows of the Cold War reached with ever-increasing intensity into the Palace of Justice at Nuremberg. By then, all opposition to communism in Eastern Europe had been ruthlessly crushed by the Soviet Union. And in the midst of the trial, Stalin imposed the Berlin Blockade—in effect, splitting Berlin into eastern and western sectors. On June 24, 1948, President Truman responded with the Berlin Airlift. Simultaneously, our foreign policy and that of Western Europe were radically reshaped to combat the march of communism across the map of Europe. It was envisioned that West Germany would be resurrected and swiftly rearmed, to serve as a bulwark against communism.

It was in this surcharged political atmosphere that the judges in the *Ministries Case* heard the evidence and pondered their decisions. In large part, the outbreak of the Cold War, and the rising anti-communist sentiment in our country, contributed to the extreme lenity of the sentences imposed for crimes of the greatest severity.

The *Ministries* judgment broke new ground by two landmark holdings. In addition to the conviction of all but three defendants of war crimes and crimes against humanity, five were convicted of crimes against peace. These were the first convictions for the commission of crimes against peace that were obtained at Nuremberg since the IMT judgment—and, to quote General Taylor, “in a vastly altered international political climate.”

The *Ministries* judgment also broke new ground by holding that the “invasions” of Austria in February 1938 and of post-Munich Czechoslovakia in March 1939—bloodless conquests achieved by an overwhelming display of military might, without resort to a “shooting war”—were acts wholly aggressive in character and, accordingly, crimes against peace.

A poignant memory is the wrenching testimony for the prosecution of Madam Radlova, who on the evening of March 14, 1939, accompanied her father, the ailing and elderly President Hacha of Czechoslovakia, who had been peremptorily summoned to a midnight tryst with Hitler and his staff, including Weizsaecker, at the eagle’s nest. She described the insistent and unyielding demands of Hitler, that fateful night, that Hacha sign a document imploring the Third Reich to “protect” his

country—from the Third Reich. Goering threatened to have his *luftwaffe* destroy Prague from the air. Deathly ill and exhausted, Hacha finally capitulated in the wee hours of the morning.

In the twelve trials following the first IMT trial, 185 had been indicted, 177 were tried, and 142 were convicted; twenty of whom were given life sentences, ninety-eight were sentenced to terms of imprisonment, and twenty-four were sentenced to death. In April 1949, when the trials concluded, all of the prisoners were sent to Landsberg prison, Bavaria, in the U.S. Zone, to serve their prison terms or be executed. Sixteen awaited execution (eight having been previously executed), including a number of *Einsatzgruppen* commanders.

The Federal Republic for West Germany came into existence in May 1949, less than a month after judgment was rendered in the *Ministries Case*. Shortly thereafter, in June 1949, the U.S. Military Government for the American Zone ceased operations, and John McCloy of the State Department was appointed as the U.S. High Commissioner to Germany.

In January 1951, without any publicity or consultation with any of the Nuremberg judges or prosecutors but with consultation with German officials and counsel, Commissioner McCloy cited his review of the convictions and released a number of the prisoners, reduced the sentences of others, and reduced twelve of the death sentences to terms of imprisonment. Only four were executed. By 1958, the last three prisoners in Landsberg—all of whom had been *Einsatzgruppen* commanders condemned to death in Case No. 9—were

released. In essence, this was the price that West Germany exacted for reestablishing its armed forces as a bulwark against the U.S.S.R.

### III.

#### *The Legacy of Nuremberg*

The thirteen Nuremberg trials were truly historic—a new beginning. They modernized the laws of war, blazed new trails, and laid the foundation on which the edifice of today's permanent International Criminal Court in The Hague was ultimately built. More specifically:

- There was universal condemnation of certain horrific crimes and endorsement of the concept of universal jurisdiction in all nations over such crimes.
- The age-old doctrine of unbridled national sovereignty no longer served as an absolute shield.
- For the first time, a nation state's leaders—including heads of state—were held personally accountable for their roles in the commission of crimes against peace, war crimes, and crimes against humanity. Traditional defenses that these were acts of state, or done pursuant to superior orders, no longer prevailed.
- It was implicitly recognized that, unfortunately, international tribunals were only capable of trying a very small number of the top leaders

who were most responsible for the crimes committed.

- And it was recognized, too, that each person has certain inalienable human rights, which cannot be curtailed or disregarded by nation-states including their own.

But Nuremberg also pointed out a most formidable hurdle: for a rule of international law to prevail, there must be the political will to accept, support, and enforce it. That is still so true today. Nuremberg demonstrated the dire global need to replace the law of force by the force of law.

Shortly after the conclusion of the first IMT trial, the United Nations General Assembly unanimously adopted a resolution on December 11, 1946, confirming, as expressions of binding international law, the Nuremberg principles recognized in the London Charter and the IMT judgment. This clearly endorsed the Nuremberg rulings, eroding the centuries-old concept of absolute national sovereignty and criminalizing acts of aggression.

As Justice Jackson asserted to the IMT Tribunal in the closing remarks of his opening statement: “The real complaining party ... is civilization .... It does expect that your judicial action will put the forces of international law ... on the side of peace, so that men and women of good will, in all countries, may have ‘leave to live by no man’s leave underneath the law.’”



IV.

*International Conventions Stemming from the  
Nuremberg Trials*

As stated above, the principles laid down in the London Charter and the IMT judgment were endorsed by a UN General Assembly resolution of December 11, 1946, some two months after the IMT judgment was rendered.

They were also reflected in the Universal Declaration of Human Rights, adopted on December 10, 1948.

They were reflected, too, in the UN-sponsored Convention on the Prevention and Punishment of Genocide, dated December 9, 1948. Unlike the London Charter, which required a war nexus, the Convention covered genocide in both peacetime and wartime.

Four Geneva Conventions relating to the conduct of warfare were passed on August 12, 1949, namely,

- Convention #1 related to the amelioration of the wounded and sick in the armed forces in the field;
- Convention #2 related to the amelioration of the conditions of the wounded, sick, and shipwrecked members of the armed forces at sea;
- Convention #3 related to the treatment of prisoners of war; and
- Convention #4 addressed the protection of civilians in time of war.

The European Convention on Human Rights of November 4, 1950 (and all of its protocols) is a direct outgrowth of Nuremberg, and it is flourishing today under the aegis of the Council of Europe.

The Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment of December 10, 1984, is a descendant of the crimes against humanity counts of the Nuremberg trials. This Convention adopts the principle of “universal jurisdiction” enunciated at Nuremberg.

## **Reflections on Women in International Criminal Law**

**Marilyn J. Kaman\***

I have been asked to speak on the topic of “Reflections on Women in International Criminal Law.” My reflections, necessarily, come from my own mission abroad, during 2002-2003, as an international judge for the United Nations Mission in Kosovo. I will tell you more about that mission in a moment, and to do so, I will use examples of four women to describe my experiences. Two names you will recognize, and two you will not. But all four women should be familiar to you for the role they have played in the pursuit of international justice for women.

But first, a little background. As you may remember, Kosovo is a province of today’s Serbia-Montenegro and is a land that has been subject to competing beliefs and claims for centuries. Historians mark an important date as 1389, when the Ottoman Empire engaged in battle at a battlefield (Kosovo Polje/Fushë Kosovë) on the outskirts of present-day Pristina. Four hundred years of rule by the Ottoman Empire followed that battle, which came to be regarded as a battlefield of humiliating defeat by Serbian ancestors. In 1912, Turkish domination ended, and Serbia annexed Kosovo in 1912, while an independent Albanian state was declared in the same year. In 1943, communist Yugoslavia was formed.

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With the death of Yugoslav President Josef Tito in 1980, the uneasy truce keeping the republics of Yugoslavia together unraveled. In 1987, Serbian leader Slobodan Milosevic returned to Kosovo Polje/Fushë Kosovë, by then fabled as a place of humiliating defeat six hundred years earlier. Milosevic rallied ethnic Serbs by declaring, “No one should dare to beat you!” setting the stage for Kosovo’s conflict between Kosovar Serbs and Kosovar Albanians.

During the 1990s, judges were dismissed from their posts, Serbian police took over from Kosovar Albanian police, and Albanian schools were closed. Kosovar Albanian resistance to Serbian actions grew and in late 1997 the Kosovo Liberation Army made its first public appearance. Serbian authorities planned, and implemented, a campaign of expulsion from Kosovo of the Kosovar Albanian population.

Back in Minnesota, I read the newspaper stories that carried pictures of the forced exodus, as well as mass graves. On March 23, 1999, NATO intervened. The 1999 war ended on June 8, 1999, and the United Nations made the decision to become the interim civilian administration for the province, including re-establishing the rule of law. By then, however, ethnic tensions ran high and the judicial system had been destroyed. My own understanding of these events then was only intellectual, gleaned from reading the morning newspaper before going to work.

Only three years later, I would find myself boarding a plane, bound for Kosovo to become a participant in the

process of rebuilding a destroyed justice system. When I arrived in Kosovo, I had orientation in Pristina, the capital, for several days, and then I was posted to a city called Pec/Peja. Or is it Peja/Pec? These are two names—one Serbian, one Albanian. And even the order in which you say the names supposedly signifies a bias or preference. Again, it would be difficult being an impartial international judge in Kosovo, where every move was scrutinized. Anyway, Pec/Peja is located about sixty miles to the West of Pristina, at the base of the Albanian Alps. It is a lovely area with a foreboding history.

The foundation for my work as an international judge in Kosovo was laid by a woman in the aftermath of another war—World War II. That woman’s name is Eleanor Roosevelt. As you know, in 1945, U.S. President Harry Truman appointed Roosevelt as a delegate to the United Nations General Assembly. She played an instrumental role, along with others, in drafting the *UN Universal Declaration of Human Rights*. This Declaration begins with the recognition of the “inherent dignity and of the equal and inalienable rights of all members of the human family [a]s the foundation of freedom, justice and peace in the world.”

Proceeding from those opening sentences, the Universal Declaration then sets out thirty articles detailing the rights of human kind. These rights, generally, fall into two categories—civil and political rights (right to life, liberty, and security of person; free speech and assembly, prohibition of slavery, torture, and cruel, inhuman degrading treatment; no arbitrary arrest, detention or exile; presumption of innocence; freedom of

thought, opinion, conscience, and religion; freedom of movement; right to a fair trial; right to equal protection; right of asylum; right to own property) and social, economic and cultural rights (right to work; right to education; right to an adequate standard of living; right to rest and leisure; right to social security; right to participate in the cultural life of the community).

Roosevelt herself later referred to the Universal Declaration as "the international Magna Carta of all mankind." Interestingly, the vote of the General Assembly on the Declaration in 1948 was unanimous, except for eight abstentions by certain Muslim countries, which took exception to the implications of the Declaration as to freedom in marriage. It would be an exception that would be still in force in 2002 and one that I would encounter while I was a judge in Kosovo.

Following the Universal Declaration, the march toward international criminal justice also took a step forward with the Nuremburg trials and again with the establishment in 1993 of the International Criminal Tribunal for the former Yugoslavia and in 1994 the International Criminal Tribunal for Rwanda. Kosovo followed in time in 1999, only this time the United Nations would internationalize Kosovo's domestic courts by bringing in international judges to sit with local judges and, hopefully, to bring a measure of impartiality to the outcome. That is what my job was.

Almost immediately upon arrival in Pec/Peja, I came to know of the second woman I would like to mention in my reflections today, and her name is

Haxjere Sahiti. She was married on a Sunday, murdered on a Monday, and buried in the woods in the same afternoon. Married life lasted less than twelve hours for her. It ended with the twenty-year-old Kosovar Albanian woman lying dead on her family's living room carpet, with seven bullets fired into her torso. The killer was her brother Ismet; the murder was witnessed by her mother and brother. Her crime was supposedly not being a virgin on her wedding night, thus bringing her family into disrepute. Under traditional Albanian cultural code, known as the Code of Leke Dukagjini, a bride may be returned to her family if she "is not as she should be" on her wedding night; or, the groom may kill her himself—with a bullet traditionally given to the groom at the wedding by the bride's father (as in this case). The problem? Upon exhumation of Haxjere's body, it was, indeed, determined that she had been a virgin, after all.

The international police, with whom I worked, investigated this crime and tried to find the killer. Another problem? No one wanted to give information to the police, for to do so would "point the finger"—again against the Code of Leke Dukagjini. Under the Code, "Blood Follows the Finger." If you accuse someone, then the consequences may return to you or your family (by being killed). In the context of investigating, prosecuting, and adjudicating criminal offenses, this means that witnesses do not want to "point the finger," or tell police or the courts what they know about a given case. To do so would violate notions of maintaining family "honor." To do so would mean that the potential witness (or their family) would "pay"—with their lives—for the information given to police. In Haxjere

Sahiti's case, her family professed to the international police that they knew nothing about the circumstances surrounding her murder.

As an international judge in Kosovo, I was asked to sit on "politically sensitive cases"—of war crimes, crimes against humanity, ethnically-motivated disputes, trafficking in drugs and human beings, genocide. I also acted as an "investigative judge"—more akin to a prosecutor in the United States—and determined whether sufficient evidence existed to charge someone with a crime. In the process of conducting my duties, I faced many unconventional obstacles that necessarily exist in a mission environment. With Hajere Sahiti's case, I unexpectedly confronted a new obstacle for me—that cultural norms dictate what a "permissible killing" is and dictate the silencing of knowing witnesses.

I experienced yet another obstacle that was only theoretically known to me in the case of Sabahate Tolaj. Sabahate was thirty-five years old, turning thirty-six in November 2003—after I left mission. She was not married and had no children. She was born and lived in the village of Poberxh (pronounced something like Poberdge) in the municipality of Decani. Sabahate had completed the Aviation School in Sarajevo. During the 1999 War in Kosovo, she was a member of the Kosovo Liberation Army. By 2003, under the United Nations Mission in Kosovo, Sabahate had been a police officer for roughly two years and a half. First she had worked as a Kosovo Police Service officer in Decani in the Patrol Unit and later the Investigations Unit. Then she was transferred to Peja, where I also was stationed.



Sabahate worked in the Murder Squad of the Investigations Unit, and that is how we met. She was investigating high profile murders in the region and referred those investigations to the international judges, like myself. Sabahate and I had numerous conversations and we felt a particular kinship with one another.

One day I asked her about her safety. You see, I had bodyguards and she did not. Sabahate just shrugged and said, “This is what I do. I enjoy it. And it is the right thing to do. So, I do not worry.”

On November 24, 2003, at 7:45 in the morning, Sabahate and two other Kosovo police officers were going to work when they were attacked in a “drive-by” assassination plot. Sabahate and another police officer were killed; the third police officer survived his wounds. The suspects’ vehicle overtook the victims and opened fire with automatic rifles into the interior of the victims’ vehicle. A white Audi 80 vehicle, believed to have been driven by the suspects, was later recovered. After nearly four years of investigations and court hearings—justice comes slowly—the convictions were read out in Peja District Court on September 21, 2007. Bedri Krasniqi was sentenced to twenty-seven years because of double murder. The other accused were acquitted because there was not enough evidence to prove the charges against them.

Sabahate was killed only a couple of months after I returned home. My sadness over her death is still present for me. An all-too-familiar post-script exists in Sabahate’s death and the conviction of her killer. In December 2008, wire services in Kosovo carried the

following news story: “Double murderer escapes Kosovo prison.” The story read as follows:

A man convicted for the murder of two Kosovo Police Service members in 2003 escaped from the Dubrava prison, it has been confirmed. A statement in Pristina indentified him as Bedri Krasniqi, and added that nine members of the correctional services were held on suspicion that they helped him escape. Krasniqi was reported missing, but police say that he likely escaped in the night between Saturday and Sunday, ‘which makes the investigation more difficult.’ Search is now underway for the inmate, who was last year found guilty and sentenced to 27 years behind bars for murdering two and wounding another KPS member on the Pec-Decani road. As of this date, the murderer has not been located.

Thus, while doing my work in Kosovo, we worked with an outmoded criminal code, difficulties in securing witness cooperation, building cases despite disappeared witnesses, and working through translators of two languages.

After I returned home, I met the last woman I would like to honor today and who also has integral ties to Kosovo: Natasa Kandic. Natasa Kandic is a human rights activist in Serbia. In 1992, she founded the

Humanitarian Law Center (HLC) in Belgrade, a nongovernmental organization aimed at protecting the rights of minorities in Serbia. Since 1990, she has pursued the facts surrounding both civil and criminal human rights abuses against repressed minorities throughout the former Yugoslavia. Since founding HLC in 1992, she has earned a reputation for accurate and unflinching reporting of war crimes. Throughout the 1990 wars in the Balkans, she was the subject of repeated threats, harassment, and harsh physical assault. Ms. Kandic has researched killings, disappearances, torture of prisoners of war, and patterns of ethnic cleansing in times of armed conflict by interviewing witnesses and victims. Upon collecting a large body of documentation on war crimes, the HLC in August 1994 began cooperating with the International Criminal Tribunal for the former Yugoslavia (ICTY) at The Hague. And, as of June 1999, it has also been cooperating with prosecutors' offices in Serbia, Montenegro, and Kosovo, providing them with information and expert assistance with regard to war crimes trials.

When the 1999 bombing began in Kosovo, Kandic jumped into her car and drove some four hundred kilometers by herself, dodging NATO missiles and police roadblocks. When she got to Kosovo, she was shaken by what she saw. She said, "I spoke to women and children who were robbed, then held in burning houses for intimidation. I saw the houses, the rooms in which the bodies had been burned." During the NATO campaign, Natasa Kandic frequently visited Kosovo and spoke on Radio Free Europe, the BBC, Deutsche Welle,

and the Voice of America. Her reports were published extensively in the foreign media.

Natasa Kandic was born in 1946. She received a B.A. in Sociology in 1972; from 1974 to 1979, she was a researcher and analyst in housing and related problems for the Belgrade Trade Union Organization. She is a recipient of, among others, the Human Rights Watch Award (1993), the Lawyer's Committee for Human Rights Award (1999), and the National Endowment for Democracy Award (2000, with Veton Suroi). In 2002, she received the award of the Human Rights Committee in Leskovac (Serbia), and on May 28, 2003, the Tutin Municipality Plaque for her ten-year efforts for the promotion of human rights in the Sandzak region. Her name was also on Time magazine's list of thirty-six "European Heroes" in 2003.

My time as an international judge in Kosovo has had a profound impact upon me. I am often asked, "What did you learn?" I will tell you now some of what I learned:

I learned to be by myself, for in an apartment without reliable heat and electricity, one has time to think.

I learned how much I cherish my family and friends, both from home and in Kosovo. I learned international law. If murder was a familiar legal concept to me, war crimes and crimes against humanity were not. Now I am passionate about learning that new body of law.

I learned that cultural norms can find their way into the courtroom, and have an impact upon guilt or innocence.

I learned that not everyone wants to reestablish the rule of law and will kill innocent police officers toward their end.

I learned that rendering verdicts was important, but I ultimately learned that inculcating a belief in the rule of law was more abiding than any one verdict I rendered.

I learned that each one of us can do our part in advancing the cause of international justice for women, and for bringing to life the values of the Universal Declaration of Human Rights.

In 2000, Natasa Kandic wrote the following words to a General in the Yugoslav Army:

I stand where I have always stood, defending the right to life, the right to freely use one's native language, the right to freedom of movement, the right to publicly criticize authorities. I stand in support of every court that punishes the perpetrators of war crimes and those who ordered crimes against humanity. Ethnicity is irrelevant; a crime is a crime.

These are values enshrined by the efforts of Eleanor Roosevelt, values sacrificed with the killings of Haxjere Sahiti and Sabahate Tolaj, and values to which we can rededicate ourselves today, in whatever way we are able

to, as Natasa Kandic has done. That is why we will sign the Third Chautauqua Declaration this week—to rededicate and redouble our efforts toward seeking justice for women in international criminal law.

Thus, I reflect on the crime victim, the bystander, the perpetrator, the police investigator, the prosecutor, the defense attorney, the judge, the translator, the professor, and the human rights champion. They—and we—are bound together toward this goal, and together we will succeed.

These are my reflections on women in international criminal law.

**Introduction of Judge Patricia Wald,  
Dinner Keynote Speaker**

**Lucy Reed\***

On behalf the American Society of International Law and all participants here at Chautauqua, it is a privilege to welcome and introduce Judge Patricia Wald as this evening's keynote speaker.

I feel I must start by disclosing a conflict of interest of sorts. I first met Judge Wald while working at her husband Bob's law firm, Wald Harkrader & Ross, in Washington, DC, where I started just about exactly thirty years ago. You may have noticed I just broke two rules of proper introductions: first, I spoke about myself and, second, I spoke about the keynote speaker's spouse. And I am about to break a third rule, by touching upon the keynote speaker's age: Judge Wald could be my mother.

As expected, I sense some shock. Don't be shocked. Most of us here are prosecutors or advocates, who appreciate a demonstrable fact. Really, it is a fact that Judge Wald **could** be my mother: one of my college classmates was Pat and Bob's oldest daughter, Sarah Wald.

Actually, with all respect to my own beloved mother, I wish Judge Wald **were** my mother or, perhaps

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\* President, American Society of International Law 2008-2010; Partner, Freshfields Bruckhaus Deringer US LLP (New York).

more correctly, my sister. And who would not? Listen to this incredibly impressive brief biography.

Judge Wald graduated from Yale Law School in 1951, and then clerked for the legendary Judge Jerome Frank of the U.S. Second Circuit Court of Appeals. She was the first woman lawyer at Arnold & Porter, before devoting herself full-time for ten years to raising five children. There followed ten years of practicing in the new field of public interest law and serving as the Assistant U.S. Attorney General for Legislative Affairs. Then she became a legendary U.S. appellate judge in her own right, being named the first woman judge on the U.S. Court of Appeals for the D.C. Circuit in 1979 and going on to serve as the first woman Chief Judge of the D.C. Circuit from 1986 to 1991. In her twenty years on that bench, Judge Wald wrote some 830 opinions. After retirement, she became the U.S.-appointed Judge on the International Criminal Tribunal for the former Yugoslavia (ICTY). And, throughout, Judge Wald was a tireless promoter of democracy in Eastern Europe, working with the American Bar Association's CEELI program to monitor elections and advise on constitution drafting. And she managed to write over one hundred articles, on important and practical topics.<sup>1</sup>

That was a list of some of Judge Wald's major accomplishments. But Judge Wald is more than a list.

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<sup>1</sup> Including one in the Michigan Law Review particularly relevant to these International Humanitarian Law Dialogs, "War Tales and War Trials," comparing war novels and criminal tribunals. 106 MICH. L. REV. 901 (2008).



Weaving her extraordinary accomplishments together is her relentless commitment to, and advocacy for, civil liberties, for the rights of women and children, for the rights of the mentally ill and poor, and for equal justice under law. In a 2002 interview, she put her decision to leave the DC Circuit for the ICTY in context: "there is also a time when you realize you have only a limited number of years in which to pursue any new or different endeavor, and a little bit of the adventure or Pilgrim spirit rises to the surface."<sup>2</sup>

We are truly fortunate that this Pilgrim spirit brought Judge Wald to international humanitarian law and the ICTY. In the Trial Chamber, Judge Wald was a member of the panel that rendered the ICTY's first conviction for genocide, in the *Krstić* case, in connection with the Srebrenica massacre. Let me read you a sentence from the introduction of that judgment that I often return to:

The Trial Chamber cannot permit itself the indulgence of expressing how it feels about what happened in Srebrenica, or even how individuals as well as national and international groups not the subject of this case contributed to the tragedy. The defendant, like all others, deserves individualised consideration and can be convicted only if the evidence presented

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<sup>2</sup> Newsletter of the Federal Courts, Vol. 34, No. 3 (March 2002), available at [www.uscourts.gov/ttb/mar02/interview.html](http://www.uscourts.gov/ttb/mar02/interview.html).

in court shows, beyond a reasonable doubt, that he is guilty ...<sup>3</sup>

In the Appeals Chamber, presiding over the *Kupreškić* case, Judge Wald again demonstrated her commitment to utmost judicial fairness. Finding insufficient factual proof (the case involved a thirteen-year-old witness with changing testimony), the *Kupreškić* panel reversed three convictions against Bosnian Croats charged with massacring the inhabitants of a Muslim village—as Judge Wald has written, “thereby incurring extreme displeasure among many in the prosecutor’s office and some victims’ groups as well.”<sup>4</sup> Judge Wald appealed to the principle laid down by Justice Robert Jackson, which we heard Bill Caming quote at the Jackson Center last night, that even incredible events must be established by credible evidence.

Moving beyond the ICTY, and as relevant to these International Humanitarian Law Dialogs, Judge Wald has written that, if the international criminal tribunal movement fails, “it will seriously deflate any pretensions for the practical significance of international criminal

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<sup>3</sup> *Prosecutor v. Krstić*, Case no. IT-98-33-T (Aug. 2, 2001), ¶ 2. On appeal, Krstić’s conviction for genocide was reversed. But a conviction for aiding and abetting genocide was upheld, establishing his case as the first in which ethnic cleansing during the Bosnian war was recognized as genocide.

<sup>4</sup> P. Wald, *International Criminal Courts—A Stormy Adolescence*, 46 VA. J. INT’L L. 319, 325 (2006).

and humanitarian law. The United States was until recently a leader in their creation and development; stepping away from its unique place in the field leaves a yawning gap."<sup>5</sup> In not unconnected vein, the Executive Director of the American Society of International Law, Betsy Andersen, and I are particularly grateful that Judge Wald agreed to co-chair the Society's Task Force re-examining the United States' relationship with the International Criminal Court. The result is a superb report, which—we like to think—is being carefully studied in Washington as we meet here.

This evening, Judge Wald will reflect on what women want and hope for from the international criminal tribunals. Based on her writings, I expect she will remind us that much progress has been made, but much more remains to be done. I expect she will remind us that women must be more present at all levels of international justice, not just at the pinnacle. Judge Wald has written, in her article entitled, "The Anonymous Past: Women and International Justice," "My fear is this—the world of academia that studies us [women] is studded with female stars—but the world that operates the system is still very much on the cusp as far as progress for women is concerned."<sup>6</sup> Judge Wald reminds us that, as women scholars have shown, international humanitarian law remains permeated with

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<sup>5</sup> *Id.* at 345-46.

<sup>6</sup> P. Wald, *The Anonymous Past: Women and International Justice*, p. 121, in *Gender Matters: Women and Yale in its Third Century* (Yale University Women Faculty Forum, 2001).

male norms: “[International humanitarian law is still of limited relevance to their most basic problems in times of unrest—displacement and refugee arrangements, distribution of aid and assistance, training of military peacekeepers.”<sup>7</sup>

Women must be doers. As Judge Wald is—including, by the way, by knocking on doors for then Presidential candidate Barack Obama in Iowa for eight days in the middle of the winter with a group of, in her words, “wonderfully gritty older women.”<sup>8</sup>

That was my last reference to age. And I will not break yet another rule of introductions by talking too long about our keynote speaker, although I could and you would not be bored. I present Judge Patricia Wald.

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<sup>7</sup> *Id.* at 123.

<sup>8</sup> Available (among other places) at: <http://www.my.barackobama.com/page/community/post/samgrahamfelsen/Cyfr>.

## **What Do Women Want From War Crimes Tribunals?**

**Patricia Wald\***

I am honored to be here tonight, but daunted by the breadth and depth of the subject matter discussed in the panels by so many prosecutors, defense attorneys, academics, and commentators far more in the know than I. My own two year experience at the ICTY is decidedly lean compared with theirs. But when I asked David Crane what I should talk about, he basically took his cue from recent U.S. Supreme Court nominees—suggesting, in effect, I avoid all matters of substance and just say a few words about my personal encounters in the tribunal world. Given the caliber of the speakers who have preceded me, I thought the competition too rough and decided to go a different route.

Given our Dialogs' theme of "Women in International Law," I intend to focus on what women in the broadest sense—womankind, if you will—have a right to expect from the international and hybrid tribunals and why they have so strong a stake in their success. Obviously, I do not purport to speak for all women but only to glean from my own decade in the field some common concerns. Much of what I am about to say (it will be brief—Lucy Reed has warned me about a God given fifteen minute rule) has been written about before. Indeed, I am told that more trade journals and books have been penned on the subject of our tribunals than any other aspect of international law in the past two decades. But I will try to place some familiar truths into

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\* Former Judge, International Tribunal for the former Yugoslavia.

this comparatively new context of the role of women in international law.

First and foremost, I begin with the acknowledged fact that women and children represent the largest constituency of international humanitarian law and the tribunals that breathe life into it; they are the bulk of the casualties of war and the refugees of ground and air combat; they are also the most numerous victims of war crimes, crimes against humanity, and genocide. A few statistics—I hope not outdated—make the point. One out of every 150 persons on earth is a refugee or displaced person due to armed conflict or human rights violations; 75 percent of them are women or children. In the Balkan conflict, there were an estimated 20,000 victims of sexual assault; an expert panel concluded that nearly every woman and girl over the age of twelve who survived the Rwandan genocide was raped. According to a Washington Post columnist on the scene, “the Congo remains the worst place in the planet to be a woman...Over 12 years... hundreds of thousands of women and girls have been raped and tortured, their bodies destroyed by unimaginable acts.” Rape is on the increase in Eastern Congo right now and both militia rebels and national army soldiers are involved. The girl children born of rape are now (themselves) being raped. In Darfur, women in the camps dare not seek firewood or food (let alone work) for fear of sexual predators. The LRA under ICC indictee General Kony holds hundreds of women and children hostage in the Goma forest.

As the recently departed news icon Walter Cronkite was wont to say—“That’s the way it is” or, in the tart

phrase of Kurt Vonnegut, in his antiwar polemic *Slaughterhouse Five*, “So it goes.” And so it has gone for centuries as far as women are concerned. But the winds of war are changing direction—a bit anyway—and women worldwide look to our tribunals to stiffen up the breezes, to revisit the rules of engagement, to make it more perilous for combatants as well as civilian and military leaders to ignore or downplay the sufferings of women as “collateral consequences” of war, expected sidebars to the main military or political events. Just as they bear the greatest impact of war, women should have a right to claim a high priority in the strategic thinking of the tribunals—their predators, in places high and low, legitimately rank among “the most serious offenders” the tribunals were mandated to try.

But what does such an acknowledgement mean in practice? Most of the tribunals have been in operation for close to ten years now (some for fifteen) and there is no question that dramatic strides have been made. All of the tribunal charters specify, or have been interpreted to include, rape and other sexual violations as war crimes and crimes against humanity. Tribunal jurisprudence has elaborated on the variations of sexual abuse that qualify. The *Krstić* case on which I sat, has pronounced the effect of executing 7-8,000 young male household heads—though sparing the women—as a form of genocide that intentionally destroyed a targeted group of Muslims in Srebrenica. Tribunal rules have made rape prosecutable by eschewing rigid definitions that required actual physical force in favor of recognizing broader kinds of coercion and intimidation. They have declared rape in some circumstances to be a form of torture and a tool of genocide.

Diane Orentlicher, in her report on the impact of the ICTY in Serbia, quotes a Bosnian woman: “ICTY jurisprudence created a new kind of awareness that women had been used as a means of war. They became personalized and recognized. This enabled them to become more active” in their own causes. Entire cases have been built on gender crimes and virtually all of the recent indictments emanating from the International Criminal Court have contained gender based allegations.

So, what else should women want or expect? Over the years, I have heard repeated complaints from some women inside the Office of the Prosecutor that the focus on gender based crimes must, but does not always, come soon enough, at the very beginning of an investigation, by the field team who makes the initial cuts on tracking down witnesses and picking potential charges. It is these first responders who have to be sensitized to the range of potential crimes involving women and children and how best initially to elicit the information to prove them. In many cultures, sexually abused women are not the most vocal of complainants or the most eager of witnesses. Often, they themselves have been punished by their own communities for the crime of being victimized. In Darfur, for instance, the women in the refugee camps are said to be afraid of disclosing crimes committed against them because of the widespread infiltration of government informers into the camps. In Burma, according to a recent report compiled by the Harvard Law School Human Rights Center, based on UN reports, rape by soldiers of civilian women has continued at an “alarming” pace, involving soldiers from over fifty battalions in one province alone and disproportionately



targeted at women from ethnic minorities. Although there was no attempt to conceal the bodies of those who were later killed and no official action was ever taken against the soldiers, the surviving women too often decline to protest for fear of retaliation.

For all these reasons, gender crimes may indeed be harder to investigate than other kinds of war crimes and often harder to prosecute as well not only because of the traumatic effects on the victim who must face her perpetrator anew in the courtroom, but also because of the difficulty of linking the rapist with the military or civilian commander in a faraway headquarters who ordered or approved the rape-terror strategy. Notwithstanding the obstacles, women do have a right to expect that these despicable crimes will be given their rightful priority in the tribunals' strategic litigation plans. This means, in the view of many women tribunal veterans, that intensive gender crime training for all levels of prosecutorial staff—and judges, too—demands “more than one three hour lecture.”

I mention briefly a few additional concerns of women. Some of the gender crimes included in the Rome Statute have yet to be prosecuted and though for a comparatively young tribunal like the ICC that is understandable, the opportunity to flesh out their contours in appropriate cases needs to be kept in mind; they include forced pregnancy, enforced sterilization, gender-based persecutions (more about that later) and trafficking in women and children. The utilization of special advisors in the prosecutors' offices for women and children's issues should be a locus for identifying appropriate cases to flesh out these crimes—for training

personnel and advising the rest of the prosecutorial staff on issues such as confidentiality, evidentiary privileges, and even sentencing since it involves distinct considerations in gender-based crimes.

My second point is that women want to be a significant part of the tribunal process. In the words of one of my former colleagues still laboring away at the ICTY, “as long as men make the decisions for women, irrespective of how well-intentioned they may be, the particular experiences of women in armed conflict will always be overlooked.” Progress in integrating women fully into all aspects of the tribunals’ activities has been encouraging but still far from optimal; indeed, the UN itself mirrors that same measured rate of advancement. The tribunals have generated some outstanding women leaders, several are here tonight. The number of luminaries includes two chief prosecutors at the ICTY and three tribunal Presidents at the ICTY, ICTR, and SCSL. Yet, in totality, the number of women judges has not been up to the mark, except perhaps for the ICC where the Rome Statute mandates representation of women in appropriate numbers, and at the SCSL where they make up four out of eleven members of the Court. While I was on the ICTY, we had two out of fourteen who were women; there are now none (except for the ICTR woman judge appointed to the Joint Appellate Chamber); there have never been more than three at one time. At the ICTR, there are three out of fourteen. In late 2001 as I was leaving, only one woman had been nominated for the new group of judges coming in and it took an explosion of outrage by NGOs and European press to galvanize the nomination of more women as *ad*

*litem* judges to help fill the gap. (There are now three *ad litem* women judges in each of the two UN courts.)

Part of the difficulty in getting more women into leadership positions is obviously traceable to the selection process; judges on the UN courts at least appear to be selected by region so the onus is on the national governments to nominate women. They, in turn, have appeared likely to do so principally when their own domestic constituencies put pressure on them. Thus, women's groups and NGOs should turn their attention to becoming even more active in the electoral and nomination sphere with regard to ICC elections and new ad hoc courts that may come on the scene.

Why is it so important to have a significant number of women judges and high level prosecutors? We have very recently been asking this same question about judges in the United States where our record (about one-third of federal judges are women) is not brilliant and our Supreme Court record (never more than two out of nine) is downright pitiful. Other nations have done far better. So far research does not give a definitive answer as to whether women decide a substantial number of cases differently than men, but I will tell you women do bring different life experiences to the court and given the concentration in the tribunals, on campaigns and assaults against civilians most of whom are women, their insights are especially relevant.

Our own Supreme Court demonstrated the case for women's input in a recent case involving the strip search of a thirteen-year-old school girl suspected of carrying a few aspirin. While some of the men judges thought her

experience not so different from their own schoolboy disrobing for gym class—though it resulted in her leaving school and developing an ulcer—the single woman on the Court expressed her exasperation at argument and called the experience “humiliating.” The Court ultimately found such a drastic response by the school a violation of the girl’s fundamental right. In tribunal history, some have attributed the progress already made in recognition of gender crimes as major instruments of war at least partially to the infusion of talented women judges and prosecutors, however few their number. They have also pointed out that the five major gender crime precedents were made in cases where at least one woman judge sat, highlighting, of course, the commanding role of Judge Navay Pillay who, after hearing plentiful evidence of gender crimes admitted to prove other offenses, requested mid-trial in the *Akayesu* case that the Prosecutor go back and re-decide whether to bring a separate gender crime charge. Her intervention ultimately resulted in the first major gender crime conviction in tribunal history.

Here I would stress the importance of women judges and prosecutors themselves not hesitating to draw on their own sensitivities and experiences in interpreting the law and the relevance of evidence in fact-finding. I do not, of course, mean women should give free reign to their preferences, an accusation frequently hurled at judges in my country by critics who do not like their decisions. All judges should follow the law as it is written, and as interpreted by prior courts whose rulings bind them. But as all judges, domestic and international come to know, the precise scope of a somewhat vague

provision in a statute or the precise reach of a prior ruling or the status of an alleged crime in international customary law or which of two allegedly conflicting provisions in the Charter should prevail or whether a provision was intended to cover an atypical situation or which justifications were meant to be credited as legitimate defenses—all these dilemmas demand judgment, not just word parsing by a judge and her life experiences will inevitably, and should, influence that judgment in many cases. We should not deny the tribunals the benefit of women's unique experiences and insights; they can and do make a difference. I have seen it on the courts—at home and abroad—in which I have judged.

I think women judges and prosecutors also have special obligations to pay attention to the treatment of other women in the judicial process. Women judges and prosecutors can change the atmosphere of a courthouse for other women: those who work for them and those who appear before them as witnesses or litigators can feel less isolated or out of place when there are women in positions of power and prestige in the courtroom. This proved true in my own experience in U.S. courts as well as at the ICTY. Some research shows that litigants' evaluation of justice is directly related to how they perceive their own treatment by court personnel; in turn, how the judges and prosecutors act toward them will trickle down to all levels of courthouse personnel.

In the tribunals there is a special need for women judges and prosecutors to be sensitive to the plight of women witnesses and victims. Often these women and young girls have been traumatized not only by the

crimes committed against them, but also by threats of retaliation if they testify and by shunning in their villages because of the nature of the crimes. The tribunals have set up Victims and Witnesses Protection units to offer escort services, temporary housing during court proceedings, and, in some cases, counseling; but, at least in my time, and I suspect now as well, these units are not always adequately resourced for the demands upon them. It is vitally important that women judges and prosecutors support and champion the Registry's financial needs for adequate services.

Women witnesses, I am sorry to say, have occasionally, albeit rarely, faced hostile or demeaning questioning or even derogatory comments and embarrassing attempts at humor at their expense, sometimes participated in by judges. On those rare occasions, women judges have a special obligation to admonish counsel and to express their own discomfort, not to sit silently by or let them go unchallenged. Hopefully the mere presence of women judges will deter misplaced humor or demeaning treatment of witnesses by overzealous or insensitive counsel, but these incidents do happen.

The ICC is the only international court that allows victims direct participation in the criminal proceedings, and there have been numerous rulings already in the pre-trial phases as to whom, and when such victims or their representatives, can participate. It is a terrifically difficult feat to bring off—letting victims join in some phases of the investigation and the pre-trial management of the case and to actually interrogate witnesses and

present evidence at the trial itself. It is clear from the early decisions of the pre-trial chambers that decisive lines have to be drawn as to how flexible in this regard a fair and efficient trial for the defendant can be. This very novel experiment (at least for an international court) will require careful monitoring and creative cooperation to walk the line successfully between meaningful participation for victims and an orderly and reasonably speedy trial for defendants. Based on my own trial experiences, I know that women who have suffered the loss of family members (one woman who testified in one of my trials saw three generations of her men-folk wiped out in a week) want not only accountability but compensation. Only the ICC and the EECC have direct authority to grant compensation. Where the money will come from is, of course, a primary problem—a Victims Trust Fund has been established but the demands on it will likely outmatch the supply in a short time. Here is an area in which women and their allies must themselves be reasonable in their expectations and demands; they cannot expect full compensation for their economic losses, let alone their emotional sufferings. And, indeed, after a decent interval has passed to see how the system works, they should be tolerant enough to cooperate in an evaluation as to both how intense an intervention by victims the process can sustain and what priorities on compensation from a limited fund are most reasonable.

Women outside the tribunal process also need to be given the opportunity to understand what the tribunals are trying to do in order to draw their own judgments on how successful they are. This means a much greater emphasis on outreach than previously—though some hybrids like the SCSL have pioneered in going out into

the villages to explain their goals and processes. The necessity for understanding and support from women in the outside world also suggests the ICC might take some of its hearings out of The Hague and go on site—to the places where the violations occurred so the affected communities can see for themselves the merger of crime and punishment. In the same vein, more concentration on media coverage—web sites included—is warranted. As it is often, the media comes to the first and last days of a trial and in between only if the defendant is putting up a raucous. Community efforts need to be mounted to explain to people what is happening in the trials daily and how it relates to what has happened to them. What little research we have suggests that people in parts of the Balkans, for instance, do not really understand what the courts are trying to do, why one defendant is convicted and another acquitted; many think the punishments are on the whole too lenient—less than ten years for running a camp where hundreds were tortured or abused and starved. Professor Orentlicher's report on Serbia revealed that a strong anti-ICTY campaign mounted by that Government was never adequately countered by robust enough outreach by the Tribunal so that two-thirds of Serbians in one poll thought the ICTY was biased against their country. (There were no Serbian translations of ICTY judgments, or Serbian press releases until six to seven years after the ICTY began operations.)

Finally, and this is the toughest challenge of all, I believe women want international law and the tribunals to make a difference in their daily lives. If the tribunals do their work well and women's wrongs are recognized



as serious war crimes, crimes against humanity, and tools of genocide, and if enough women can infuse their own sensitivities into the process and if the tribunals' achievements are truly accessible to ordinary women, will all that really help women in states where old ways survive and women are treated in peacetime as well as in wartime as property and their sexual and physical integrity impugned at will? It is unfortunately the case that even in countries that have ratified CEDAW and other human rights treaties, customary law and local norms executed by tribal and religious courts often conform to, and approve, practices that oppress and diminish women—deny them on a gender-discriminatory basis rights to work, to hold property, to custody of their children, to be educated, to inherit money, or to obtain divorces however maltreated they may be.

The situation is so bad for women in some of these countries that four tough, hardened political writers in just the past few weeks have devoted columns and articles in major papers to their plight. Michael Gerson, a former Bush speechwriter, notes that foreign extremists who start wars seem to take particular interest in the intimidation, humiliation, and repression of women. In the case of Afghanistan, he sees the way out in educating girls in the progressive facets of their own culture and religion so as to make them agents of progressive reform. No reconstruction of that country, he points out, can come without the support of 52 percent of the population (the women). “They represent a chance for Afghan politics to start anew.” “Why,” he concludes, “should America... care about the rights of Afghan women?” Because “Afghanistan, without the

participation of women, will remain a failed and dangerous state, prone to endless conflict.” Thomas Friedman agrees: the war on terror, he says, is essentially a war of ideas between religious zealots and moderates who want to open Islam up to new ideas and empower women. The American Joint Chief of Staff Chairman Mike Mullen sees a strong assist in future war prevention in the 130 schools for girls being opened in Pakistan and the forty-eight in Afghanistan. The author Greg Mortensen, a school-builder in Afghanistan, says:

“When a girl gets educated here and then becomes a mother, she will be much less likely to let her son become a militant or insurgent.” The Taliban has demolished 640 schools since 2006 in Afghanistan, 50 percent of them for girls. Muslim militants recruit most successfully among the illiterate and impoverished. Jim Hoagland speaks of “the brutal subjugation of poor, uneducated women in rural Pakistan and Afghanistan” as a “driving force too often neglected or minimized in assessing the strategy of dealing with the extremists in those countries.”

The desire of Pakistani and Afghani men to be left in peace to deal with their women-folk as they “see fit” is an important recruiting tool for the Taliban and other Islamic extremist organizations. Nicholas Kristof, who has a forthcoming book on the subject, writes that “the paramount moral challenge” of the twenty-first century

is “the brutality inflicted on so many women and girls around the globe” and elaborates that “the number of victims of routine gendercide (killing of girls solely on the basis of their sex) far exceeds the number of people who were slaughtered in all the genocides of the 20<sup>th</sup> century.” In Asia alone, a million children live in sexual slavery, locked in brothels, beaten, underfed, and sedated by drugs. Still another New York Times piece quotes the Afghanistan Minister of Women’s Affairs: “Women are the property of men. This is tradition.” Beatings, mutilations, widespread trafficking in child brides as young as eight, domestic violence, are all endemic in a “culture of silence.” In these benighted lands, there are only a few embryonic organizations and even fewer shelters for oppressed women.

What, you may ask, does all this have to do with the tribunals. And now I do enter into the realm of the speculative, though I hope not the incredible. I do see an entry point whereby the advances of international humanitarian law and tribunal jurisprudence could help the plight of the women and girls I have talked about. It could lie in the future development of the crimes against humanity doctrine. Unlike genocide which limits its protection to racial, religious, and ethnic groups, or war crimes which require a nexus to armed conflict, crimes against humanity by definition can include a state-ordered or perhaps even a state-tolerated regime of discrimination against women affecting their fundamental rights. Such regimes exist in many countries which do nothing to protect women from the violent acts of either their own soldiers or officials, as in Burma, or from the acts of other civilians as in many societies dominated by religious extremists. Surely the

conditions I have described in extreme cases could amount to the discriminatory treatment which is the vital element in the underlying crime of persecution which can qualify as a crime against humanity. Indeed, Article 7(h) of the Rome Statute specifies gender as a recognized ground on which a claim for persecution can be based. A crime against humanity specifies that prohibited conduct be part of an “attack” against “any civilian population” that involves “the multiple commissions of specified acts pursuant to or in furtherance of a state or organizational body” and that the violations be systematic or widespread. Article 7(g) sets out the full list of sexual crimes—rape, slavery, forced pregnancy, et cetera—that may anchor a crime against humanity designation.

The sixty-four thousand dollar question, of course, is whether a state tolerated regime of gender oppression enforced by private parties or clerical or tribal authorities would ever meet the test. It is certainly not beyond contemplation, for instance, that the discriminatory legislation exemplified by the Shiite law on mandated intercourse and travel bans for married women passed by the Afghanistan parliament might qualify or that regimes that allowed women to be stoned to death for adultery without any formal trial might as well. I note a recent action taken by U.S. immigration authorities granting asylum for women who show that the rigid discriminatory codes of conduct pertaining to women in their native countries were officially approved or enabled by the government. The European Court of Human Rights recently ruled that the failure of Turkey to protect a woman who had sought help from the

authorities from domestic violence amounted to gender discrimination in violation of its obligations under CEDAW. The Court's ruling referred to the "jus cogen nature of the right to freedom from torture and the right to life which requires exemplary diligence on the part of the State with respect to the investigation and protection of such rights." There is finally the embryonic R2P doctrine embraced by the UN whose reach is not yet clear but which seeks to further delineate the obligations of a country to keep its residents safe from predatory attacks by non-government groups.

Now I fully realize I am deep in the realm of speculation: there are formidable real life obstacles to humanitarian law, with its big gun weapon of criminal prosecution, entering a field that UN conventions and treaties and resolutions as well as diplomatic endeavors have failed to effectively police. I do not speak in an advocacy mode nor am I sanguine that crimes against humanity will proceed along this route. But, nonetheless, I persist in thinking that the very existence of a universally accepted criminal norm that so neatly fits the situation, that so pervasively stifles the very life and spirit of so many women in so many parts of the world, could serve a purpose. An extreme case could arise where the degree of violence or slavery-like conditions systematically imposed on civilian women would produce an international cry for humanitarian intervention, including criminal accountability of the persons responsible. Or following Justice Jackson's more conservative example in Nuremberg, where he insisted that the crimes against humanity committed by the Nazis against the Jews in pre-war Germany could be charged as such if it was shown that they were part of

preparation for war. Thus, a prosecutor might in the context of a wartime case against leaders of these regimes add a count based on the continuing abuses perpetrated against women at all times. On a personal note, I have often wondered how a judge from such a country could rule on wartime atrocities against women and not be troubled by equally abhorrent acts committed in peacetime against those same women.

Similarly, there is the hope and some evidence that tribunal decisions on gender crimes will work their way eventually into domestic jurisprudence. The recognition of crimes against humanity extending systematic oppression of women would be a useful talking point in diplomatic negotiations seeking compliance with more traditionally enforceable treaties or convention obligations. Third, in some of these countries, i.e., Kuwait, Egypt, even Iran, where the women are themselves beginning to organize against gender discrimination and to affirmatively seek rights to education, custody, and property rights, the crime against humanity designation for persistent denial of their pleas might add to their powers of persuasion. This potential would also come into play when countries sought to join the ICC and in preparation thereof needed to conform their own laws with the jurisdiction of the ICC in order to meet complementarity standards.

A final word about the complementarity doctrine's potential for helping women. The ICC Prosecutor has told us he has been "monitoring" situations in several countries where outside groups have urged him to open formal investigations but as to which he has not yet

taken any official action. He has said publicly that he is encouraged by the improvements that have been made in critical areas as a result of negotiation and informal discussions. It would indeed be salutary if that kind of “Dutch uncle” supervision could be mobilized on behalf of some of the worst abuses against women. Again, the elephant in the room is the conflict between international humanitarian law norms that condemn these practices and the cultures and/or religious sects that support or condone them and the governments that do not have the will or the power to oppose them. So I entreat you to at least think about possible ways in which the tribunals can alleviate the misery of women in situations where the commission of serious crimes against humanity is virtually indisputable so that if, and when, the right situation comes along, you will be ready. With that audacity of hope, I conclude. Thank you for being so indulgent an audience. Lucy, I’m sorry I went over the magic fifteen minute mark.

**Seeking Accountability:  
Lessons from East Timor & Norway**

**Siri Frigaard\***

First of all, I would like to thank you for inviting me to this workshop in this fantastic place. For me, it has been a great adventure to participate, and it has also turned out to be an inspiration for me to go back to Norway with enthusiasm to fight impunity for the core international crimes.

In my twenty minutes, during this luncheon, I would like to give you some input from East Timor, but I would also like to tell you a little about the challenges we are facing in Norway today.

These third annual International Humanitarian Law Dialogs are focused on women in international criminal law. Let me, therefore, start with a few words about myself, being a female prosecutor working in the field of international criminal law.

I have been a prosecutor for more than twenty years, working in a male dominated environment most of the time, but I must admit that I have not thought of myself as a female prosecutor, but as a prosecutor, and taken it for granted that I would be treated as such and met with the same respect as the males. And I have never felt that it was a disadvantage; on the contrary, sometimes I even felt that it was an advantage.

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\* Chief Public Prosecutor and Director, Norwegian National Authority for Prosecution of Organized and Other Serious Crime.



When I was a law student, there was no lecture of international law at the faculty. This subject was implemented much later. My specialization as a lawyer is a subject called “Women’s law,” not to be understood as women’s rights. The core of this subject was to study the different Norwegian regulations from the female perspective, and to analyze if the effects of the regulations were different on the two groups. The experience from these studies is that I am always trying to be conscious about the female angle, especially when it comes to victims, including the situations where rape is used as a weapon to terrorize women in conflicts.

My first encounter with international criminal law was when I decided to go and work as a prosecutor in Albania, but especially when I took the position as Deputy General Prosecutor for Serious Crime in East Timor in January 2002.

When I was listening to the “Prosecutors Panel” yesterday, it struck me that the prosecutors from two different tribunals were missing, Cambodia and East Timor. Cambodia was supposed be present, but as we know, in the last minute Robert Petit was prevented from participating. East Timor, however, was not present for obvious reasons: the Special Panels and the Prosecution unit have been closed down.

The Hybrid Court of East Timor with the Serious Crime Prosecution and Investigation Unit, was the smallest, the cheapest, but also the first tribunal to close down (in 2005). Thus, for me, East Timor and the international tribunals that are closing down represent

the past, while national jurisdiction, including the countries where the offenses have been committed and third countries, together with the ICC, represent the future.

When I arrived in East Timor in January 2002, I was surprised to find that the Unit was lacking resources, both human and logistical. The mandate of the Unit was to bring to justice “those responsible for such violence” prior to October 25, 1999, the date the Security Council established the United Nations Transition Administration in East Timor (UNTAET) according to Resolution 1272. To be able to fulfill such a mandate, it is essential to have the proper staffing and logistics in order to work efficiently within the timeframes that always will be set and to deliver work of high quality.

As an example, the Unit had twelve positions for investigators, but not enough vehicles to send all of them out in the district to take statements. In a country like East Timor, you cannot sit in your office and expect the witnesses to come to you—you have to go and find them, often in far remote places with no electricity, no proper roads, and no telephone. You also had to investigate to find their whereabouts as the country had no official register telling you where a person was staying. We were also lacking cameras to take pictures of the witnesses and the accused and had to use our private ones. And, without the proper logistics, you are not able to do your work in an effective and expeditious manner.

When it came to staffing, we did not only have an insufficient number of investigators, but we were also

lacking adequate support staff. As an example, the Unit had one forensic anthropologist and no forensic pathologist. However, after some months, I was told by the Special Representative of the Secretary General's office in Dili to make a staffing list for the Unit in order to continue the investigations and prosecutions after independence. But to my great surprise, some months later, and before the positions were filled up, I was told to start downsizing.

At the same time, there was pressure on the Unit to come up with results, and when explaining that investigations take time if you want to build a case that can be presented in court, and to be able to investigate you need investigators that are able to go out and find the witnesses, my impression was that this was not understood, or taken seriously.

Additionally, the Unit was criticized for only prosecuting the so-called "small fish," mostly East Timorese perpetrators within the militia that had killed, raped, or destroyed property or cattle, etc., and not the most responsible: the militia leaders or the Indonesian police or military. The problem for the Unit was that the alleged East Timorese perpetrators that had fled to West Timor in 1999, started to come back and were arrested by the police when crossing the boarder to East Timor. After having been arrested by the police, they were handed over to the Unit, and we had the dilemma that if we refused to investigate and prosecute the charges against them, we had to release them from the prison detention. We had the fear that if we did that, it could result in victims taking justice in their own hands. Also,

it could deteriorate the respect for the justice system in the country.

Because of this criticism, and also because we were of the opinion that it was more important, we decided to focus the investigation on the most responsible perpetrators, the persons responsible for training, funding, and organizing the crimes. The investigation in the Unit was organized in teams, each team lead by a prosecutor, and each team responsible for the investigation of a certain region. Each team consisted of the necessary staff and had vehicles at their disposal as they also had to stay in the region where they were working. In addition to these regional teams, we then decided to establish a so-called “National Team,” situated in Dili, and its only task was to focus on finding evidence against the most responsible persons. This team was prioritized when a question about resources arose.

During the events in 1999, many females were raped. To investigate these crimes, we had three female investigators with experience in this type of crime—one UN investigator and two uniformed police investigators that were allocated to us from the Commissioner of the UN police. We issued indictments charging for rape, but when it came to the one indictment against the most responsible, including General Wiranto and seven other Indonesian high officials, police, and military, rape was not included. The reason for this decision was that we had the same problem as Fatou Bensouda described earlier: we were not able to link the rapes to the people indicted. I am not satisfied with this, but some times one has to make decisions that one does not like. In this case, we decided that it was not likely within reasonable

time that we would succeed in finding evidence linking these persons to the crime of rape, and, for the people of East Timor, it was important that we demonstrated that we tried to bring to court those most responsible. Also, in East Timor, as in many other countries, these cases were difficult to investigate because it is difficult for some women to stand up in court and give evidence about having been raped.

In the documentary “Reckoning” that we saw yesterday, Luis Moreno-Ocampo was talking about the importance of political will. I am of the opinion that if political will is not present, it is difficult to fight impunity and to hold those responsible accountable. In East Timor, when we published the indictment charging among others, General Wiranto, former Minister of Defense in Indonesia, with crimes against humanity, we discovered that there was no political will to follow up the indictment, neither in East Timor nor in Indonesia, and even the UN did not support the indictment officially. Neither has there been any political pressure from the international society on Indonesia to cooperate.

In connection with the decision to establish the Ad Hoc Human Rights Tribunal in Indonesia and the Serious Crime Process in East Timor, Kofi Annan said; “...the main thing is to send a message that crimes against humanity and such gross violations against human rights will not be allowed to stand and that those responsible will be held accountable.” My question is: are we sending the message to future perpetrators through the process in East Timor that they will be held

accountable? And, also, have we given justice to the victims in East Timor?

The different tribunals are closing down, and in the future, the task of fighting impunity and holding perpetrators accountable when it comes to the core international crimes will be the task of the International Criminal Court (ICC). But the ICC cannot do this alone. The complementarity principle on which the ICC is based provides that the ICC can only investigate and prosecute core international crimes when national jurisdictions are unable or unwilling to do so genuinely. The principle reflects a realization that it is preferable that such crimes are investigated and prosecuted in the country where they occurred. Additionally, many perpetrators, or alleged perpetrators, have left their country of origin and are asylum seekers in third countries. As many countries are lacking regulations or unwilling to extradite, it is also important that these third countries are willing to investigate and prosecute these crimes in order to prevent impunity. So, one can say that the future lies with the ICC and national jurisdictions, both country of origin and third countries.

One of these third countries is Norway. In August 2005, a national prosecution authority with national jurisdiction for combating organized and other serious crime, including crimes against humanity, genocide, and war crimes, was established. When it comes to the core international crimes, the office has exclusive jurisdiction. At the same time, an investigation unit also was established. Similar units have been established in many countries, for instance, Denmark, Sweden, The Netherlands, and Canada. The main reason for

establishing this office was political fear that Norway was going to be a safe haven for war criminals. In my view, it is correct to say that, in Norway, the political will to fight impunity, and to hold those responsible for the core international crimes accountable, is present.

In my unit, there are five prosecutors including myself. We are not only dealing with the core international crimes, but also organized crime, computer crime, sexual abuses of children on the Internet, and terrorism. As you may understand, the human resources we have are not impressive compared to the tasks. But we have already prosecuted one case in the first instance court, and are handling cases where persons residing in Norway, mostly asylum seekers, have been accused of having committed core international crimes in countries like the Balkans, Sri Lanka, Afghanistan, and Rwanda, just to mention a few. We are also looking into a complaint against ten named high officials in Israel for committing crimes against humanity in Gaza in the beginning of 2009.

To be able to deal with these cases in a third country, it is absolutely essential to have proper regulation. When we started our work in 2005, Norway did not have regulations concerning genocide, crimes against humanity, or war crimes. But there was political will to do something with this problem, and as of March 7, 2008, we have regulations criminalizing these offenses, and under certain circumstances, they will have retroactive effect.

The basic principle in Norwegian law is that the criminal legislation in force at the time an offense is committed applies. When it comes to the new regulation of war crimes, crimes against humanity, and genocide, they apply to acts committed prior to their entry into force if the act itself (for instance murder, rape, etc.) was punishable at the time it was committed under the criminal legislation in force at the time, and was regarded as genocide, a crime against humanity, or a war crime under international law. The penalty may nevertheless not exceed the penalty that would have been imposed pursuant to the criminal legislation in force at the time the act was committed.

In the first case we brought before the court, we used this new regulation, with retroactive effect, when it came to charges for war crimes and crimes against humanity. A Bosnian prison guard was indicted with war crimes and crimes against humanity as he was accused of complicity in rapes of Serbian women and other offenses. He was convicted in the first instance court for war crimes, but he was acquitted for the charges of crimes against humanity because the court ruled that it was against the constitution to use the regulation of crimes against humanity retroactively, but strangely enough, not the regulation of war crimes. We disagree with these deliberations, and the decision has been appealed. His judgment was given in December 2008, and, unfortunately, the Court of Appeal had no time for the new hearing before January 2010.

I would also like to mention the complaint that we have received from several Norwegian lawyers against ten Israelis, all high officials, some former ministers, and



all of them living in Israel. The question we are dealing with for the time being is whether or not we are going to open an investigation into this complaint. This decision is complex and we have been looking into different questions and had many discussions in this connection. Of course, the most important question is whether or not we have jurisdiction. Our decision has not yet been taken, but we are hoping to finish it by mid-November. For lawyers interested in international criminal law, a complaint like this is both interesting and challenging, especially since it is not only theoretical but linked to a situation like the one in question.

Let me close by saying that it was a fantastic challenge to work with the core international crimes in East Timor, but also I would say that it is a challenge to work with the same crimes in Norway. This is partly because international criminal law is evolving and there are always new things to learn and to read, and partly because the offenses have taken place in places far away, where you are exposed to new conflicts and new cultures, fighting impunity involves many difficulties. For example, how to select the correct cases? Given a lack of resources, it is impossible to investigate all the cases that are at hand.

## Reaching Out to the World

Sarah Owen\*

During World War Two, the German people were led astray by a man named Hitler, and his idea of an ideal world. When he came to power in 1933, he used Anti-Semitism, scapegoats, propaganda, fascism, and outright lies in an attempt to create the perfect Aryan society, leading to what we know today as the Holocaust.

Nazi-controlled Europe was a terrible time, filled with hatred, confusion, and murder. When the world discovered the evils that the Germans had been practicing; it jumped to its feet, promising 'Never Again!' Unfortunately though—as well meaning as this was—genocide still continues in our world today. In the country of Sudan lies a place called Darfur, where the government is committing mass atrocities on its people, raping their women and girls, killing men, women, and children, and ignoring their desperate cries for help.

This connection was made more personal to me through doing further research about the Holocaust, its survivors, and its victims. In doing so, I came across Rutka Laskier, a fourteen-year-old Polish Jew, and the story of her diary. In an instant, the full impact of the Holocaust finally hit me: my heart felt heavy and hurt. With my newfound Rutka and her story, I asked myself

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\* Winner of the Impunity Watch Essay Contest. Sarah Owen is a student at Springville-GI High School, Springville, New York.

what I could do in the world today... and I was surprised with what I came up with.

Being a teenager in a small town angered me at first—I'm just a regular kid—how can my input change the world? But, suddenly, as if Rutka told me herself, I realized I was wrong—for I realized that arming a fourteen-year-old with a laptop, or pencil and paper, or even the same determination and care that I have right now, can oftentimes do a lot more than an adult giving a speech.

In fact, there are so many little things students can do to help—starting with submitting articles to local papers, starting up websites, posting on blogs, making YouTube videos, using Twitter, Facebook, MySpace, or simply spreading the word. On a larger scale, we can help build schools in Africa and the developing world, as my school has done in Sierra Leone. Education prevents violence, disease, and helps so many minds to grow and prosper that may otherwise never get the chance!

Darfur desperately needs our help—they've been reaching out, and now it's time for us to grasp their hands and help them to their feet again. After all, as citizens of the world, by standing by and watching evil unfold, doesn't that make us guilty as well? It is my hope that every American—no matter of their age, race, gender, or class—can reach out and end the prejudices and discrimination we have in our world. In doing so, Rutka wouldn't have died in complete vain; her legacy will live on, and her words may continue to touch the world.

# Prosecutor Sessions

## **Update from the Current Prosecutors**

This roundtable was convened at 11:00 a.m., Monday, August 31, by its moderator, Leila Nadya Sadat of the Washington University School of Law, who introduced the panelists: Norman Farrell of the International Criminal Tribunal for the former Yugoslavia; Alphonse Van of the International Criminal Tribunal for Rwanda; Joseph Kamara of the Special Court for Sierra Leone; and Fatou Bensouda of the International Criminal Court. A transcript of their remarks follows.

**SADAT:** Watching the footage of Whitney Harris was obviously a very emotional moment. Whitney couldn't be with you all here in Chautauqua this time. He is not feeling terribly well right now, but he sends his regards, and it is a great honor to be representing the institute that bears his name.

Well, first of all, thank you so much to everybody that's put this on—to Greg Peterson and the Jackson Center, to David Crane, Impunity Watch, and Syracuse University, and, of course, to the Chautauqua Institution. Thanks also to Betsy Andersen and Lucy Reed from the American Society of International Law and to all of the other co-sponsors, including Case Western and Washington University, my institution.

It's wonderful to be back here in Chautauqua for the Third International Humanitarian Law Dialogs, and I was very honored, I have to say, to have been invited here this summer to give one of the 10:45 lectures. The Chautauquans are a fabulous audience, and it was great

fun. It's wonderful to be back here to engage in these conversations.

One of the things that's really special about Chautauqua is its willingness to engage in conversations about difficult issues, and difficult issues come in all genres and all shapes and sizes. One of the difficult issues that arose, as Diane Amann noted, when we did our first International Humanitarian Law Dialogs, was that we hadn't been able to get the female prosecutors here, and women felt, perhaps, either underrepresented or not as present. It is just such a credit to David and to Greg and to the Chautauqua Institution and to ASIL who said, "Well, let's talk about it," and we had two superb presentations this morning on that subject. I have to say I learned a lot, and I was really enriched by this.

Now for the update from the prosecutors. These are men and women who really are the engine of international criminal justice. Obviously, all the organs of the various courts and tribunals are vital to their success: the judiciary, the office of the prosecutor, defense lawyers, the registry, in their own ways the victims groups, and international civil society who play a critical or supportive role as the need arises.

But I think it really is the prosecutors that are driving, to a large extent, the endeavor as they work, and they do so working often to a chorus of criticism. If they indict government leaders, like Charles Taylor or Omar al-Bashir, they are criticized for overstepping their authority and ruining the possibilities of peace, but if they indict the followers, then they're accused of going

after the small fish and not the leaders. If they go after too many defendants, they're scattering resources and wasting efficiencies. If they go after too few defendants, they're not being aggressive enough and they're leaving stones unturned. If they bring broad indictments, they are criticized for their sweeping language and the fact that they've made the case too complicated and it's going to take too long. And if the indictments are narrow, then the criticism is, well, they never covered the really important stuff, why didn't they go after Mr. or Ms. X for this crime, which was really the heart of the conflict.

They are constantly in the public eye, often dispatched to war zones and gruesome crime scenes, far from their homes, poring through cases that run hundreds and hundreds of pages long to understand the legal elements of the case, and painstakingly trying to prove beyond a reasonable doubt that a particular accused was responsible for a particular crime—crimes that may have spanned years and entire states. They certainly have some of the most interesting, but some of the most difficult and legally challenging, jobs in the world.

So, I am personally very grateful that, in spite of all these difficulties, they have come here to the Chautauqua Institution as part of this program today to update us on the situations before their courts.

Before turning the podium over to them, let me just say a brief word of introduction about each of the prosecutors and which courts they come from, because, for the uninitiated, sometimes international criminal justice looks pretty chaotic, given that there are so many

different courts, and the question arises why do we have several international criminal courts and tribunals and not just one. And the answer is history and other things.

So, our first prosecutor who we'll hear from early on will be Norman Farrell, who is from the International Criminal Tribunal for Yugoslavia. We'll then skip over to Alphonse Van, who is from the International Criminal Tribunal for Rwanda, then to—and I will explain why the order in a moment—Joseph Kamara, who is from the Special Court for Sierra Leone, and finally, Fatou Bensouda from the International Criminal Court (ICC).

Now, the first two courts that I mentioned are what we call "ad hoc tribunals" that were created by the Security Council for particular situations to respond to the war in the former Yugoslavia in the case of the "ICTY," as it is sometimes called, and to the genocide in Rwanda in the case of the ICTR. Those courts have limited jurisdiction. They can only hear cases that are covered by their temporal and geographic and, in some cases, even nationality jurisdiction with respect to the ICTR, and in that way, they are sort of like the Nuremberg Tribunal itself, the IMT, in that they are created for a specific purpose to deal with the perpetrators of a specific set or series of atrocities.

The Special Court for Sierra Leone is also an ad hoc tribunal that responded to the terrible war in Sierra Leone, but unlike the other two, it was not created by the Security Council but by a treaty between the United Nations and the Government of Sierra Leone. That's



very interesting, and maybe Joseph will tell us a little bit more about his court.

Fatou Bensouda is the Deputy Prosecutor for the International Criminal Court, and that is the first-ever permanent standing international criminal court, meaning that it is a court that was created to respond to atrocities that would happen in the future. It is a standing court with a permanent judiciary and a permanent prosecutorial staff and one we'll hope will be enduring for many decades. It is, in a sense, the culmination of the Nuremberg legacy, but it's important to note that the ad hocs are doing very, very important work, and we don't think there really would have ever been an ICC had it not been proven by the ad hoc tribunals themselves that international justice could work, that we could do it.

So, without further ado, I am going to turn this over to the prosecutors, and let's hear from Norman Farrell. Each one will speak for about ten to twelve minutes on their particular institutions, some of the challenging issues they are facing and their mandates, and then we will open it up to questions from you, the audience. Thank you.

Norman?

**FARRELL\***: Good morning to all of you. Thank you very much to Professor Sadat for the introduction, and thank you to the organizers and the institution for kindly inviting me to attend on behalf of the Prosecutor, who was unable.

I work at the International Criminal Tribunal for the former Yugoslavia, and for many of you, you will remember the conflict in the former Yugoslavia in 1991, beginning in the end of 1990, 1991 through 1995, and the conflict in Kosovo in 1999 where there were NATO airstrikes into Serbia.

The Security Council in 1993, in the midst of the conflict, decided to pass a resolution which created, under Chapter VII of the Charter, an international criminal tribunal. Now, this was quite unique, and it very soon was followed, in 1994, by an international criminal tribunal for the events that occurred in Rwanda, but it was the beginning of a very unique opportunity, some say one that was doomed to fail and which had some difficulties in gaining support at the beginning.

Now we have the opposite problem. We are in full scale, and they are asking us to close down. We find ourselves essentially in a position where we're the busiest that we've ever been in prosecuting cases, and we are in the middle of closing down our institution.

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\* The views expressed by Mr. Farrell, Deputy Prosecutor of the ICTY, are in his personal capacity and do not necessarily reflect the views of the United Nations or the International Criminal Tribunal for the Former Yugoslavia.

Since 1993, there have been 161 persons who have been indicted. There are approximately twenty-six remaining to be prosecuted: some in trial, some in pre-trial, and we have two fugitives that are still at large that we're attempting to take capture through the assistance of a number of states.

There are seven cases in trial, and for those of you who are not familiar with the tribunals, these are big cases. The teams are made up of prosecutors, investigators, analysts, language assistants, specialists in the area, leadership research teams, military analysts, lead counsel, policy advisors, and for quite a long time, we had a sexual assault team when we were carrying out our investigations.

The seven remaining trials are expected to take another two to three years, and then after that, of course, they will have the right to appeal.

There are three cases that are in the pre-trial stage, and one is the case of Karadžić. You may have heard of Radovan Karadžić, who was at large for thirteen years. He was recently arrested about a year ago in Serbia, practicing as an alternative medical doctor under the name "Dr. Dabič" and was arrested by the Serbian authorities and brought to The Hague.

He raises one of the issues that we face, which seems to be a bit prevalent in international criminal justice, which is self-represented accused. Mr. Karadžić—or Dr. Karadžić, as he is a psychiatrist—has indicated his desire to represent himself. The same

occurred with Milošević. The same occurs with the accused gentleman by the name of Šešelj.

Let me just back up, I am a Canadian lawyer. In Canada, self-representation is essentially a right and can only be removed in very limited circumstances, and knowing full well the jurisprudence of the United States on this, I know that in the United States, the accused, except for on appeal, generally have a right to represent themselves.

Now, I have become a bit of a convert to the civil law system, no offense, of course, to the great system in the United States and Canada, Britain, Australia, and the commonwealth countries. But in the type of cases that we deal with—the size, the magnitude, the difficulty, where the victims come forward and have to testify in front of people who are the accused—it is extremely difficult to meet deadlines, to try and actually enter into negotiations with the defense counsel, to see whether they'll admit any facts.

It's a little difficult, as you can imagine, to sit down in a room with Dr. Karadžić and ask him whether he'd admit that there was ethnic cleansing in the region over which he had political control. So far, we haven't had too much luck in negotiating with the defense counsel on the other side, being self-represented accused, focusing the case on the issues that we think—and we would think that a defense counsel would agree—are the most important issues.

That leads us to the point where the cases remain large. The Karadžić case is expected to take two and a half to three years, and we are doing that in a time where, unfortunately, we're losing staff.

Also, in the context of our cases, there was something mentioned earlier by Professor Sadat that I think is extremely relevant. It makes one wonder a lot about the work that we do. On the one hand, you are required to investigate and prosecute only the most senior persons responsible for crimes, and you're required to do it in a relatively limited period of time. Now, the United Nations, the Security Council, and the judges have all been very accommodating. They recognize the difficulty in doing these cases. But you have, on the other hand, the pressure and sometimes even the guilt that you are not prosecuting all those persons who commit the crimes. You have to prosecute, the most high ranking, the most visible—the Karadžićs and the Mladićs for our criminal tribunal—but you have to do that in the context of a recognition that the victims that you bring forward may not even know of, or have heard of in some circumstances, the person against whom they are testifying.

It reminds me of an incident when I was prosecuting a case about eight years ago. Before becoming the Deputy Prosecutor, I was actually prosecuting cases. I remember one case where a victim came in and was speaking to one of our investigators, and the investigator came to me and said, "What do I tell the victim? She's asked me a very difficult question." I said, "Well, let's talk about the question and figure out a strategy."

She said, "We interviewed the victim for a long time, she told us about how her family was killed in front of her, and she escaped. After the interview, she said she'd be willing to come and testify. She said, 'Who will I be testifying against?' and we named the high-ranking senior commander of the area who was charged. And the witness said, 'I've never heard of him. I don't know what you're talking about. I don't really feel any need to come and speak.'" For us, it's very important for the crime-based witness to speak about what happened and then to later call the linkage evidence.

And the witness said, "Why don't you prosecute Mr. X?" The investigator said, "I didn't know who Mr. X was." And, quite frankly, I didn't know who Mr. X was either.

So we asked the witness who Mr. X was, and she said, "Well, he's the guy who lived in the village next door and who was present when my family was killed in front of me and who I see every second weekend at the market. I have to go to the same market with the adjoining village, which has people from the other group during the war, and I have to confront him every day and relive the circumstances. And I wanted to come to the Tribunal to testify because I thought that would help, but it's not helping me because I'm not being able to speak about my experience vis-à-vis the perpetrators I know."

So, the only reason for mentioning this is that when we're talking about sexual assault—putting it in context of some of the issues that were raised today—you have a real tension between wanting to bring in the people who

commit the physical crimes and, of course, many of the people who suffered from physical crimes. Actually, sexual assault victims sometimes don't want to come and testify. Others very much want to come and confront the persons who commit the crime with intention to ensure that you only prosecute the most high-ranking.

Now, at this stage of the Tribunal, when we're about two or three years away from closing, we have no choice but to stay with the prosecutions of the most high ranking and the people that have already been indicted. We have to do so in an expeditious period of time with the resources we have, and in many cases, we don't even bring the victims or witnesses anymore because the system has now moved into a system where you can actually bring written testimony and file the written testimony.

It's a very interesting stage that we're at as we're merging civil law concepts, common law concepts, criminal law from various jurisdictions, and doing so when many of our staff members are leaving because they have to think of their lives and have to find another place to work when we close down. But what we do have is a very dedicated staff, I think, that will get us through the next three or four years. The Tribunal started in 1993—so justice is slow, as you can see, but, hopefully, by the end of our mandate, which may be in about another three or four years, we will have accounted for a number of the crimes that took place in the former Yugoslavia and developed some of the law.

Just a few final comments about sexual violence, and we'll talk a bit more about it this afternoon, but in

terms of the cases that we have, about half of the cases that remain in our Tribunal include crimes of sexual violence. As you may very well be aware, there's no specific articulation in many of the documents as to what sexual violence is.

There's rape, of course, and then there's other crimes, cruel and inhumane treatment, outrages upon personal dignity. Where we feel there's been some positive development over the last number of years is the recognition of sexual violence through the crimes that are listed in the Statute. There's lots of room for improvement, in my view, but, certainly, there has been a recognition of sexual violence as a crime committed in war. In the approximately sixteen or fifteen cases that remain, half of the persons charged were charged with sexual violence, and these are the senior high-ranking officials—it is not thought of as a crime committed only by persons who are the physical perpetrators, the ones who commit the crime. Crimes of sexual violence are leadership crimes, and they are attributable to the persons at the highest level, even if they are not involved or not present.

Secondly, sexual violence crimes have now been recognized, and are charged in the remaining cases that we have, as part of an integral criminal campaign. They are not separate, isolated incidents. They are actually events and crimes that are committed for the purposes of achieving particular criminal goals.

The Yugoslavia Tribunal will be finishing its trials probably within the next two to three years. It may be



certainly after my dear colleague from Sierra Leone finishes, and we may even take longer than our dear colleagues from the Rwanda Tribunal, but, hopefully, we'll be finished sooner than the ICC.

**SADAT:** Thank you so much. Alphonse?

**VAN:** Thank you. Thank you very much.

My name is Alphonse Van. I am Senior Appeals Counsel in the Office of the Prosecutor in Arusha, Tanzania. I have the privilege to speak before this assembly on behalf of Mr. Hassan Bubacar Jallow, Prosecutor of the International Criminal Tribunal for Rwanda. Mr. Jallow could not come here today and told me to ask you to accept his apology and his friendly regards.

I am here with my colleague, Madam Renifa Madenga. She is Appeals Counsel in the Office of the Prosecutor.

The International Criminal Tribunal for Rwanda, ICTR, is an ad hoc tribunal with the mandate to adjudicate violations of international humanitarian law and known international conflict. The ICTR Statute empowers the Prosecutor to prosecute three categories of offenses: genocide, crimes against humanity, and violations of Article 3 common to the Geneva Convention and of Additional Protocol II. However, according to the Statute, the Prosecutor may prosecute rape only as a crime against humanity and war crime. There is no provision in the ICTR Statute to prosecute rape as genocide, and yet rape and other sexual violence

have been punished by the ICTR Chambers as act of genocide.

The *Akayesu* case is the very first case in international criminal law history where an accused was convicted of not only genocide, but also rape and other violence of sexual nature, as an instrument of that genocide. It was also the first conviction ever for rape as a crime against humanity.

So the *Akayesu* case is precedent for international humanitarian law, humanitarian criminal law. The prosecution of sexual rape, of sexual violence, is a key component to stopping the global violence against women, but how did we get to prosecuting rape at the ICTR?

Our first indictment in the *Akayesu* case did not initially contain any charge of rape. During the trial, two witnesses by themselves testified about rape. The first testified that her six-year-old daughter was raped by the militia men. The second witness, also a woman, was raped by the same militia men.

So the Prosecutor asked that further investigation be conducted, and the trial was suspended. More investigation was conducted. More evidence was found, and more witnesses came to court to testify. And what we heard from those witnesses was audible.

The accused was the mayor of the commune of Taba; he did things against women that no one could understand. They testified that the accused ordered the

militia men to rape Tutsi women; and, of course, many, many Tutsi women were raped in the Taba commune.

The same accused ordered the Tutsi women and girls to march—to perform gymnastics—naked before a crowd of Hutu who were laughing at them.

So, from there, we realized that it was now very important to conduct further investigation in the rest of the cases. So the Prosecutor now investigated, in all cases, the crime of rape, and we found that the crime of rape was perpetrated in Rwanda at a very large level. About five-hundred women were raped, but that figure is an estimate. More, in reality, were raped.

So, when we were investigating, we faced challenges. You know, it is good to be the first, but it is also demanding. It is challenging to be the first. There was no precedent in the international criminal law history of investigation of rape. There was no example. So we had to establish a strategy of investigation because the Rwandan society is a very complex one. Rwandans never speak openly to people. The witnesses did not agree to speak to our investigators because most of these investigators were men and foreigners. They did not know anything about this culture.

Once we did get evidence and witness testimony, however, we faced another challenge. The witnesses were not familiar with the courtroom environment, with judges dressed in red robes. The cross-examination by common law defense lawyers was tedious, even offensive, and some witnesses broke down.

That was very difficult for us, but we overcame all the difficulties, and now we have been able to indict about thirty-six suspects of rape. Of this number, nineteen cases have been completed, and seven accused were convicted of rape and sexual violence. The very last decision was rendered on July 14th, this year.

We are no longer investigating because in 2004, the Security Council asked us to stop investigations and finish the pending cases. We have thirteen fugitives, thirteen suspects who are still at large. We are still looking for them because some of them were very prominent figures in the Rwandan Government or society.

So we are, unfortunately, closing down our tribunal, but we think that the tribunals in the future, starting with the ICC, will focus on investigating and prosecuting sexual violence because it is a great offense against women.

I would like to end by saluting the memory of Alison Des Forges, who was the main prosecution expert witness in Arusha.

**SADAT:** Thank you—that was wonderful. Thanks also for staying within the allotted time. I promised Fatou that we would have plenty of time for the ICC.

So, Joseph, can you talk about the Special Court for Sierra Leone, please?

**KAMARA:** Yes, thank you very much. I want to express my gratitude to the Robert Jackson Center for giving us the opportunity to participate in this forum, and I bring you greetings from Stephen Rapp, the Prosecutor of the Special Court. As you may be aware, he has been appointed by President Obama as the Ambassador-at-Large for War Crimes, and he is slated to leave us on the 7th of September.

Let me preface my remarks by giving you a brief background on our status as a “special court.” I represent the Special Court for Sierra Leone, and it was a court set up jointly by the Government of Sierra Leone and the United Nations in 2002, pursuant to Resolution 1315. And it is mandated to try those that bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.

It is a small court, but it has taken giant strides in international criminal law. It is at the heart of international criminal law jurisprudence, and I say that because it is a court that is known for prosecuting and securing convictions, for the first time, for the recruitment of child soldiers. It is also the court that is known for the prosecution and conviction, for the first time, of the offense of forced marriage. It is also the court that is known to date for the prosecution and securing of convictions for the offense of attacking peacekeepers during conflict.

In the course of its eight years, we have been able to try five cases. To start off with is the *Armed Forces*

*Revolutionary Council* case, the AFRC. These were renegade soldiers from the regular army. I am pleased to note that amongst those present here today, we have one of the senior trial attorneys in that case, Lesley Taylor. One of the reasons I point that out is to show that we, at the Special Court, are gender-sensitive. And even as I speak, in the *Taylor* trial, our principal attorney is Brenda Hollis. We are very proud of the work that she is doing in The Hague.

The case of the AFRC is completed. We secured convictions for three accused persons; one of the accused persons was sentenced to fifty years imprisonment, another to forty-five years imprisonment, and another to forty years. We are known for giving heavier sentences because of the gravity of the offenses that were committed. It is, indeed, a small court, but the offenses were grave.

We are known for amputations where girls, boys, women had their limbs cut off, their hands cut off. We are also known for the short and long sleeve. Those were moments when victims would be asked the question, "Do you want a short sleeve or a long sleeve?" If you wanted a long sleeve, your hand would be cut off at the wrist. If you wanted a short sleeve, it would be cut off along the elbow. So we are known for those types of mutilations.

We are also known for victims having the words/letters RUF, AFRC, or CDF engraved on them. We marched all those victims in front of the Court.

We are also known for the recruitment of child soldiers. Many children were used in hostilities, and many children were under the use of hard substances. They were forced to rape their mothers and family members.

So, when I say the crimes were grave, I know what I speak about. Just by its size, the Court's work has been voluminous, and it has made significant contributions. We have been able to seek convictions.

The *AFRC* case is particularly known for the notoriety of its rape. These were, like I said, renegade soldiers. "Rape" was the watch word. It was done so much that even when they occupied the State House, the equivalent of the White House in the United States, women were raped in the offices of the former President. We secured convictions for that.

And in the case of the CDF, these were government-supported militia, CDF meaning Civil Defense Forces. They teamed up with the Government to fight the rebels, who were the Revolutionary United Front.

To show the objectivity and fairness of the prosecutorial team then, again, I want to acknowledge the presence of David Crane, who was the first Prosecutor of the Special Court, and you all are familiar with him. I want to personally and publicly thank him for his mentorship.

As an aside, I do recall that when working with Mr. Crane, we had only one building. We called it

"Seaview," which used to be the living quarters and offices of the prosecution, and while working hard to do the opening statement in the first case in the CDF, he walked up to me and said, "Joseph, how about you joining me to do the opening?" I said, "You're kidding me?" He said, "Yes, I'm serious," and, indeed, we worked together on that, and we did the opening for the first case of the Special Court. And I want to thank you again for giving me that opportunity.

And, in that case, we were able to indict the former Deputy Minister of Defense who was a very, very powerful individual in the political system. The Minister of Defense was the President himself, but the functional operative of the minister of defense was the deputy minister of defense who himself was a former soldier in the person of Chief Hinga Norman.

Chief Hinga Norman is an interesting character, and he played a significant role in the organization of the CDF. He was believed to be a hero because he fought against the rebels, but in spite of the side you fight on, if crimes were committed against innocent civilians, you are to face the crucibles of the law. Like we always say, no one is above the law, and we care less which side you are fighting on. So he was indicted.

And like, I think Professor Sadat mentioned, we have been heavily criticized by some quarters in the Sierra Leone population. This man is a hero. He was fighting in defense of property, and it was even argued in court that he was fighting in defense of democracy. These were all arguments that were brought up before



the Court—we challenged those arguments and we have been quite successful.

In that case, unfortunately, Chief Hinga Norman died before we concluded the case. He died after the close of the presentation of evidence but before judgment was delivered. So we did not get the opportunity for the public to hear the verdict on this case because, under common law, it terminates on the death of the accused.

So it was only Moinina Fofana and Allieu Kondewa, the other two accused persons in that case, that got convicted and received judgment; Fofana was convicted to fifteen years imprisonment and Allieu Kondewa to twenty years imprisonment.

After the *CDF* case, we also have the RUF, the main guys themselves. The Revolutionary United Front started sometime in 1990 in Libya, together with Charles Taylor, while Charles Taylor was sojourned in Libya. In the early '90s or late '80s, there was this Pan-African Crusade in Libya training revolutionaries to come and invade the entire sub-region.

And in 1991, he launched his revolution into Sierra Leone through the Liberian border; that is, former leader of the RUF, Foday Sankoh. And it was a brutal war at the least. The amputations I was telling you about were the signature of the RUF and the AFRC, and it continued for eleven years.

By the end of the eleven years, they were able to capture about two-thirds of the country, including the

diamond areas. They were able to fuel the crises and gain and acquire weapons through the sale and mining of diamonds, and that brings in forced labor. And what happens in these mining fields, as prosecutors, that is why sometimes we go through psychological treatment. You wouldn't believe.

For example, there is what we call the "Savage Pit." Savage Pit was a mining pit where hundreds of people were killed, and they were all thrown into that pit, the Savage Pit. And just past the Savage Pit was this house where about fifty people were thrown into the house and set on fire. When one of them attempted to run out of the house through the window, he was captured and thrown back into the fire. This is the kind of evidence that we had to deal with. That is the case of the AFRC, and that case was recently decided, I think it was in February of this year, in 2009. We secured convictions for the three accused persons in that case.

On Wednesday, we will be doing our oral submissions on appeal. We filed our appeal submissions. We have completed the filings, and on Wednesday, we will be doing the oral arguments before the Appellate Chamber in the case of the RUF, and we hope to vigorously argue our positions, particularly in the areas of forced marriage and attacks on peacekeepers, which are novel in international criminal law.

And this is just to whet your appetite with regards to the law on women and international criminal law. The role of the Special Court is very outstanding when it

comes to protection of the rights of the child and protection of the rights of women, and as we look back, we have legacy, what have the courts done, because we are not only looking at securing convictions but also participating in the healing process.

We have been there. We have conducted educational programs. We teach at the law school. We teach at the university, and we have also had training sessions, and, of course, the jewel in the crown is our outreach. We have done so much to let the people be aware and understand the proceedings of the Special Court.

We held town hall meetings. We have had village meetings. We do video showings. Over 3,000 meetings, we have held, and even the prosecution participates in these meetings. We listen. We receive questions from the audience, and that is what has really made the Court outstanding—the people appreciating the workings of the Court and understanding the concept of the rule of law, and that we are there to put an end to impunity.

And also, when you look back by way of legacy, what will we have left behind? Today, we have seen new legislation from parliament on gender. Now it is illegal for a girl child to be given to marriage under sixteen years. Yes, we claim credit to that because we brought women's issues to the forefront. We have also seen the introduction of the Customary Law Marriage Act that has given rights to women in terms of acquisition of property.

So not to lay claim to everything, the presence of the Special Court, even immediately after the most recently held elections, ensured peace through its mere presence in the country. There was barely any post-election violence, for the first time in the history of Sierra Leone. When people were asked, they always said, "Well, the Special Court is here. I don't want to be indicted."

So, again, not only have we secured convictions, but we have also contributed to the stability of Sierra Leone. And I will leave you with this for the moment until later in the afternoon. I thank you very much.

**BENSOUDA:** Thank you.

I want to update you on the various situations and cases before the International Criminal Court. Currently, there are four active cases, and by that, I mean cases where persons have been transferred to the Court and are awaiting trial or whose trials have already started.

I start with the case of the Democratic Republic of Congo in which Thomas Lubanga Dyilo has been indicted for conscripting and enlisting and using children to actively participate in hostilities.

Like Joseph has said, this is not the first time that someone has been indicted for these crimes, but this is the first time that a person has been brought before an international criminal court solely on these charges.

Thomas Lubanga's trial started on the 26th of January 2009, and on the 14<sup>th</sup> of July of the same year,

the prosecution was able to wrap up its case. We have presented thirty witnesses, twenty-eight of whom have been called by the prosecution, and two of whom were called by the Chamber itself.

A major challenge that we faced in the first trial—this is actually the first trial of the International Criminal Court—was the issue of protection of witnesses. As you may know, the ICC is operating in conflicts that are still ongoing in the Democratic Republic of Congo. I am sure you hear it now and again on the news.

And with respect to the twenty-eight witnesses that we have called, nineteen of them were included in the ICC PP, which is the ICC Protection Program. We had about eight vulnerable witnesses who testified with court protective measures, such as using a pseudonym, voice distortion, face distortion, partial closed sessions, and so on. By vulnerable witnesses, I mean former child soldiers, children who have been abducted and conscripted and have been made to actively participate in hostilities, who were called as the first witnesses before the ICC, and it was crucial that these protective measures were taken for them.

There were four witnesses, however, who testified in full view, publicly, and while some of them were shielded from the public as protection, the accused and the defense, of course, will see and know these witnesses and also know their identities. The defense was also able to cross-examine all the witnesses that have been called by the prosecution.

We also have the *DRC 2* case. In this case, Germain Katanga and Mathieu Ngudjolo, two former leaders of Congolese rebel groups, have been indicted for an indiscriminate attack that they made against the village of Bogoro, which is found in the DRC in the Ituri District.

The Chamber has confirmed seven counts of war crimes; that is, willful killing, using children to participate actively in hostilities, sexual slavery, rape, attacking civilians, pillaging, and destroying the enemy's property. They have also confirmed three charges of crimes against humanity of murder, sexual slavery, and rape. The Chamber has declined to confirm two counts of war crimes—cruel and inhumane treatment and outrages upon personal dignity—as well as one count of crimes against humanity that we have presented.

Mr. Katanga, that is one of the accused persons in the second DRC case, has challenged the admissibility of the case before the ICC saying that he was already tried for these offenses in the Democratic Republic of the Congo. A hearing was held in which even the Minister of Justice of the Congo participated, as well as all parties and participants, and on the 12th of June 2009, the Chamber dismissed the challenge that Mr. Katanga has posed, finding that the national authorities had not, in fact, opened any investigations into the attack for which Mr. Katanga was brought to the International Criminal Court.

And regarding this case, we are ready to go to trial. The beginning of the trial was scheduled for the 24th of

September 2009. Last week, however, we received information from the Chamber saying that the beginning of the trial will be postponed. We will present the prosecution's case in less than six months, just as we have done in the *Lubanga* trial, and we will be presenting about twenty-five witnesses in the *Katanga-Ngudjolo* case.

You may also know that an arrest warrant was issued against a fourth person called Bosco Ntaganda. Bosco is still at large. He has not been arrested. He was the second in command for Lubanga and later transferred to Laurent Nkunda's group in the Kivus, who was recently arrested by Rwanda. We are talking with the authorities of the Democratic Republic of Congo to ensure that Bosco Ntaganda is soon surrendered to the Court.

We have a third investigation that is going on in the Democratic Republic of Congo, and this time, we are shifting focus to the Kivus. That is another part of the DRC, and in this third case of the DRC, we are hoping to do a coordinated approach in which we will work very closely with the DRC authorities to ensure that as many people as possible will be investigated and prosecuted.

Of course, one huge challenge that we will face is the protection of witnesses, as well as of the local judiciary. As I said before, this is a region in which the conflict is still raging, and protection of witnesses and victims is still a very challenging aspect of our work.

Let me turn to Northern Uganda. Lord's Resistance Army crimes against the civilians unfortunately have

also resumed with the same cruelty and intensity in that area of Northern Democratic Republic of Congo as Southern Sudan.

Five years ago, we issued arrest warrants against the top commanders of the Lord's Resistance Army and the warrants, unfortunately, have not yet been executed. The leadership of the Lord's Resistance Army, Joseph Kony and others, are still out there. The result is that more than 100,000 people are still displaced by the Lord's Resistance Army activity in the Democratic Republic of Congo, and over 50,000 persons in Southern Sudan, including over 18,000 persons across the border from the Democratic Republic of Congo. These statistics are based on the reports we have received from UNOCHA (United Nations Office for the Coordination of Humanitarian Affairs). What is clear, what is crucial, is that outstanding warrants must be executed. I think this has become very clear.

In October of 2008, the Pre-Trial Chamber initiated proceedings on the admissibility of the *Uganda* case. The Chamber noted that Uganda and the Lord's Resistance Army had concluded an agreement. They have not yet signed it, but an excerpt to that agreement provides for the establishment of a special division of the High Court with a mandate to try individuals who are alleged to have committed very serious crimes during the conflict in Uganda. This is demanded of this court. The Chamber appointed counsel for the defense, and invited investigations from Uganda, the Prosecutor, the counsel for the defense, and victims, on the admissibility of this case.



On the 3rd of March 2009, the Chamber considered the various submissions that have been made by the various parties on this admissibility hearing, reaffirming that it is the Court which has the responsibility for determining if the case is inadmissible. The Chamber has concluded that the scenario against which the admissibility of the case had to be determined remained the same as at the time when the warrants were issued against the top command of the Lord's Resistance Army, and the Chamber, therefore, has found that the case is still admissible.

Let me turn to the Central African Republic. This situation was also referred to the Prosecutor of the ICC in 2004. From October 2002 to at least March of 2003, there was armed conflict in the Central African Republic, between the armed group supporting Bozize and the armed group supporting the former president, Patasse, including the movement for the liberation of Congo in which Jean-Pierre Bemba was the president and commander-in-chief.

In fact, currently, with regard to our investigation, we have Jean-Pierre Bemba, who was transferred to the Court as a result of the crimes that were committed during this period, and this is the only situation so far before the ICC in which the rapes that were committed during this period outnumber the killings.

The Pre-Trial Chamber in March 2009 requested the prosecution to consider submitting an amended document containing the charges, addressing Article 28 of the Rome Statute on command responsibility. We have responded by submitting another amended

document containing the charges, but in this case, we are also saying that his responsibility with regards to this crime was both of superior and command responsibility as well as individual criminal responsibility.

The Chamber has so far confirmed the charges against Bemba in his capacity as a military commander but not as originally charged as a co-perpetrator of these crimes. The Chamber has decided not to confirm some of the charges, such as torture, as a war crime, and also crimes against humanity and the war crime of outrages upon personal dignity. We have, of course, appealed this decision.

Apart from the activities that we have before the Court, the investigations are also going on in the Central African Republic, and we have been conducting forensic activities in Bangui, including exhumation and autopsy. We are cooperating extensively with the Central African Republic authorities and a number of partners. We are monitoring the allegations of crimes committed since the end of 2005, and we have to decide whether any investigation and prosecution has been, or is being, conducted with respect to the crimes potentially falling within the jurisdiction of the Court.

We also have the situation in Darfur, Sudan. You will recall that this case was referred to the ICC by the United Nations Security Council under Resolution 1593, and so far, we have three Darfur cases: Darfur 1, Darfur 2, and Darfur 3.

In *Darfur 1*, we indicted Ahmad Harun and Ali Kushayb. Harun is a former minister, currently also a minister, and Ali Kushayb is a militia Janjaweed leader. We have also indicted President Omar al-Bashir, the sitting head of state of Sudan, and in the third Darfur case, we are alleging that three commanders of Darfur rebel movements were responsible for committing crimes against African Union peacekeepers in Haskanita. These crimes are alleged to have happened on the 29th of September 2007.

The Pre-Trial Chamber following our application has issued the warrant against Bahar Idriss Abu Garda for crimes allegedly committed in that attack. He was one of the commanders. And the Chamber has found that there are reasonable grounds to believe that he committed crimes within the jurisdiction of the Court; more specifically, three counts of war crimes of murder, attacking personnel or objects involved in humanitarian assistance or peacekeeping mission, and pillaging. I think apart from the Sierra Leone Special Court, this would be the second time that persons are charged with this crime.

Bahar Idriss Abu Garda voluntarily appeared in the Court on the 18th of May 2009, in response to the summons, and this is the first time that this has happened. He is scheduled to appear again on the 12th of October for the confirmation proceedings to start in respect of the charges brought against him.

The Prosecutor has said that voluntary appearance is always an option under the Statute including, of course, for President Omar al-Bashir, if he should elect to

cooperate with the Court, but this initial appearance of Abu Garda is also an occasion, I think, to pay tribute to the peacekeepers targeted in Haskanita. The Prosecutor has said that by killing peacekeepers, the perpetrators attacked the millions of civilians who those soldiers came to protect. They came from various countries, including Senegal, Mali, Nigeria, Botswana, and Gambia. They came to serve and to protect the civilians in Darfur, but they were murdered, and we have to note that attacking peacekeepers is a very serious offense, which we shall prosecute.

Now, regarding the case of Omar al-Bashir, the president of Sudan, the obligation rests on Sudan to arrest al-Bashir, to execute the warrant that is outstanding against him, and if Sudan does not enforce this warrant, the United Nations Security Council, which referred the case to the ICC, will need to ensure that there is compliance.

What the Prosecutor has done is to report that there is noncompliance by the Sudanese Government, and he did that on the 5th of June, this year, in his biannual report to the UN Security Council.

We continue to be in constant contact with the African Union Panel that has been set up, the high-level panel which is headed by the former president of South Africa, Thabo Mbeki. We recognize the importance of this panel, but we also recognize that the mandate of the ICC has to be implemented at the same time.

On the 4th of March 2009, the Chamber, if I may just recall the *Bashir* case, issued a warrant of arrest against Mr. Omar al-Bashir, the president of Sudan, in relation to the situation in Darfur. The Chamber determined that there were reasonable grounds to believe that he had committed crimes within the jurisdiction of the Court and namely the five counts of crimes against humanity of murder, of extermination, forcible transfer, torture, and of rape, and two crimes of war crimes, attacking civilians and pillaging.

The Chamber has also found that there was not sufficient evidence to charge for genocide, which we had applied for; and for the charges we confirmed, the Chamber determined that Mr. Bashir's status as head of state of a non-party to the Rome Statute did not affect the Court's exercise of its jurisdiction. We have appealed against the decision of the Court for not issuing a warrant of arrest for the charges of genocide, and we are confident that we will be able to get the genocide charges back.

We also have ongoing preliminary examinations for other situations that are outside of the African continent, including Colombia, Georgia, Cote d'Ivoire, and Afghanistan. On the 22nd of January 2009, the Palestinian National Authority launched a declaration accepting the jurisdiction of the ICC in accordance with Article 12 of the Rome Statute, and between the 28th of December of last year and this year, we have received about 358 Article 15 communications relating to the situation of Israel and Palestinian territories. We have begun to look at these issues—all the issues that relate to our jurisdiction, including whether the declaration that

has been made by the Palestinian Authority accepting the exercise of the jurisdiction of the ICC meets the statutory requirements.

As you know, the jurisdiction of the ICC is complementary, and when the states who have primary jurisdiction to investigate and prosecute are doing so, the ICC will not intervene. So, all of these issues are being considered. We recently received a report from the Secretary-General of the Arab League, Mr. Amr Moussa, giving us information about the conflict between Palestine and Israel.

With regard to Cote d'Ivoire, we have made a recent visit. They are taking national steps to investigate and prosecute, and we need to monitor that, as well as in Colombia. Colombia is working very closely with the ICC Prosecutor, and they are ensuring that crimes are also being investigated and prosecuted. And, currently, we are collecting information on Afghanistan, which is also a state party—and where we know that crimes, which may fall within the jurisdiction of the ICC, are taking place.

Thank you.

**SADAT:** Thank you so much.

I couldn't stop you. The ICC, as you can see, spans the globe, and so given the number of situations and the complexity of what's going on there, I think we really needed to hear Ms. Bensouda's presentation. So thank you, Fatou. That was fantastic.

Thank you so much, and please give a round of applause to all the prosecutors.

## **Gender Crimes at the International Level**

This roundtable was convened at 2:30 p.m., Monday, August 31, by its moderator, Susana SáCouto of the War Crimes Research Office at American University's Washington College of Law, who introduced the panelists: David Crane of the Special Court for Sierra Leone and Syracuse University Law School; Fatou Bensouda of the International Criminal Court; Joseph Kamara of the Special Court for Sierra Leone; Norman Farrell of the International Criminal Tribunal for the former Yugoslavia; and Alphonse Van of the International Criminal Tribunal for Rwanda. A transcript of their remarks follows.

**SáCOUTO:** Good afternoon. I want to first thank David Crane and the Jackson Center, the American Society of International Law, and the other sponsors of the conference and, of course, the Chautauqua Institution for inviting me to participate and for holding such a fascinating series of discussions. It is truly an honor to be here and to, hopefully, continue what has been a very interesting series of discussions this morning.

Over the next hour or so, we will have the distinct privilege of hearing directly again from the prosecutors who are with us about their approach to solving the challenges they face in the prosecution and investigation of gender crimes at the international level. Before we start in what I hope will be a fruitful discussion about the challenges involved in prosecuting these crimes, we should take a moment to recognize some of the incredible advances that have been made in this area of the law over the last fifteen years or so.



Prior to the mid 1990s, crimes committed exclusively or disproportionately against women and girls in times of conflict or in times of repression were largely either ignored or at most treated as secondary to other crimes. However, overwhelming evidence and reporting of the systematic raping of women in conflicts over the last fifteen, twenty years has helped to really create unprecedented levels of awareness of rape and sexual violence. As a result, great strides have been made in the investigation and prosecution of sexual violence, in particular, at the ad hoc tribunals for the former Yugoslavia and Rwanda.

In a departure from the statutes governing the international military tribunals established in the wake of World War II that we heard about yesterday and today, the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) expressly include the crime against humanity of rape. Moreover, in practice, these tribunals have recognized that sexual violence may constitute a number of additional crimes, including the war crimes of torture and outrages upon personal dignity, the crimes against humanity of not only rape but enslavement and persecution, and sexual violence as an act of genocide.

Additional strides were made in the drafting of the Rome Statute establishing the International Criminal Court, which incorporates many of the advances developed through the jurisprudence of the ICTY and the ICTR. So, for example, the Rome Statute includes specific gender-based crimes, including rape, sexual

slavery, and forced prostitution, forced pregnancy, and enforced sterilization under both the war crimes and crimes against humanity provisions.

In addition, the Court's document laying out the elements of crimes recognizes that although rape is not listed as a form of genocide under the Rome Statute, genocide committed by acts causing serious bodily or mental harm may include acts of torture, rape, sexual violence, or inhumane or degrading treatment.

More significantly—and I think we will hear more about this from Fatou Bensouda, the Deputy Prosecutor of the ICC—the history of the ICC thus far with respect to the investigation of gender crimes is encouraging. Two of the four persons pursued so far in the Congo, the DRC situation, have been charged with sexual slavery and rape, both as a war crime and a crime against humanity. Rape allegations have been brought forward against three of the four individuals pursued by the Court in the Darfur situation, including the sitting head of state, Bashir. Rape and sexual enslavement allegations have been included in the arrest warrants against Joseph Kony and Vincent Otti in the Uganda situation, and, finally, rape as a war crime and a crime against humanity charges have been levied against the only suspect identified so far in the Central African Republic situation, Jean-Pierre Bemba.

The Statute of the Special Court for Sierra Leone also recognizes a range of sexual violence-based war crimes and crimes against humanity, including rape, sexual slavery, and forced prostitution and forced pregnancy, and as we heard earlier today, the Special

Court has held that a "forced marriage" in the context in which it occurred in Sierra Leone constitutes the crime against humanity of an other inhumane act under its Statute.

Despite the great progress and great strides, significant challenges in the investigation and prosecution of these crimes remain. Today, we have a remarkable opportunity to have a discussion with the prosecutors who are with us, who are on the front lines doing this work on the ground about these challenges and about what it takes to bring to life the great advances that we have seen over the last ten or fifteen years.

So, before we begin, I want to thank each of you again for agreeing to participate in this very important dialogue. Since all of the prosecutors were eloquently introduced by Leila Sadat this morning, I won't repeat that, but I will say a word about how we will proceed with the session.

I will be presenting a series of questions about the investigation and prosecution of gender crimes and will then give each of the prosecutors an opportunity to respond and share their insights with us. We will then, hopefully, have a few minutes toward the end to open up the discussion and invite questions from the audience.

So, let's get started. The first question is about evidence. As we heard this morning, gender-based crimes often present particular challenges in terms of getting victims to come forward. Many women and men who survived gender-based violence do not want to

report these crimes for a variety of reasons. Because of the stigma attached to crimes of sexual violence in many cultures, some victims feel terrified they will be shunned by their own society if they were to report what happened to them.

Some women victims of rape fear that they themselves may be subject to criminal charges because a reference to adultery in the definition of rape in some countries' criminal codes exposes them to the risk of prosecution for the crime of adultery if they were to come forward. Some victims fear that their attackers may still be at large and could retaliate against them or their families if they come forward.

On the other hand, recognizing the difficulty in prosecuting these crimes, human rights groups and others have been critical of instances when the prosecutors have failed to include charges of gender-based violence in their case against the accused. For instance, in the case against Lubanga that we were talking about earlier, the first person arrested and tried by the ICC, human rights groups criticized the Prosecutor for failing to include sexual violence charges against Lubanga, despite allegations that girls had been kidnapped into Lubanga's militia and often raped and/or kept as sex slaves.

So the question is how certain as a prosecutor do you need to feel about the evidence before bringing charges of gender-based crimes. Do different considerations arise for you in these kinds of cases than others where gender-based violence is not an issue?

We'll just go down the line and turn to David for initial comments.

**CRANE:** That is an excellent question, and it's a great question to lead off our discussion this afternoon.

Of course, when I arrived in Sierra Leone with three suitcases and a good friend named Mike Pan and my chief of investigations, Al White, we knew already that the cornerstone of our indictments against those individuals who bore the greatest responsibility in Sierra Leone were gender crimes, and I was bound and determined to do that. And along with a wonderful team from around the world, we began to sort all of that out and began to look at the various crimes perpetrated against women and, of course, certainly children, which really cried out to you when you began to look at the evidence.

But the cornerstone of when we began drafting the indictments and beginning our investigations was gender crimes. I won't go through that because most of the crimes listed in the Statute were the ones that you would expect: rape, sexual slavery, terrorism, intimidation, and so on.

But as we were going through, about thirteen months into the process, we had already indicted all thirteen of the individuals we felt bore the greatest responsibility. I remember bringing my senior staff together, and we were trying to puzzle out what do we do with the bush wives, the tens of thousands of women who were driven into the bush and basically treated like

cattle—traded, branded, forced to reproduce, carry ammunition, wash, what have you—and many of them stayed in the bush for many, many years. And we couldn't figure out where to put that crime because it was a gravamen of the offense against the women of Sierra Leone.

I recall we were just chatting about it, and a wonderful young Ghanaian barrister said, "Why don't we call it 'forced marriage'?" And there's this pause. Someone said, "In times of armed conflict." You could just see it. You know, even my wheels were turning, and smoke was coming out of my ears, I'm told. And it was really kind of a moment of revelation.

And then, of course, we tossed it back: well, there's lots of forced marriage around the world; women are forced to marry. I said, "No, no, no. This is different. This is different. This is armed conflict-based," and so we tossed that around. Long story short, we amended the indictments against the Revolutionary United Front and the Armed Forces Revolutionary Council and hooked it under the Statute. Under many statutes, you see crimes against humanity, and it lists all of those, but in our particular Statute, if I recall, it was paragraph J that said "and other inhumane acts."

And everybody looked at each other and said, "Well, that's another inhumane act." So we actually used the Statute as a force of law versus just a subject-matter jurisdictional element, and we amended the indictments and kind of held our breath because this was a first-ever.

I remember when we filed the motion to amend and we were thinking, oh, my gosh, and sure enough, the motions were granted. Of course, you still have to prove it. So throughout the trial process, we stood up, and we had some challenges, particularly with some of the judges, but that's another story. But we prevailed, and I think that that's something that we all are collectively very proud of because, again, I would just say that crimes against women are more than just what you think that they would be. We need to always be looking culturally and practically as to what took place in a particular region of the world, and we may find out that the crimes that the international community has fashioned together are not really the crimes that actually took place (i.e., forced marriage in times of armed conflict).

And I would highlight Professor Michael Scharf's excellent Law Review article within six months, which is usually what Michael does, saying that this is really something that should be studied and thought about. In four corners, he really captured the idea of forced marriage in times of armed conflict—and he said it a lot better than I could ever say.

So, I will just leave the initial comments to that.

**BENSOUDA:** I think it needs to be said that as a result of the work that has been done by the ad hoc tribunals, the tribunals that were established before the International Criminal Court, there is particular focus that has been made in the Rome Statute to gender crimes and sexual violence.

And if you look, for example, at Article 54 of the Rome Statute, it says that the Prosecutor, in doing an effective investigation and prosecution, has to take into account the nature of the crime, particularly where it involves sexual violence, gender violence, or violence against children. And this obligation is not only placed on the Prosecutor alone because, if you look also at Article 68 of the Rome Statute, it talks about how the Court itself shall have regard to all the relevant factors, including gender and the nature of the crime, in particular where the crime involves sexual or gender violence or violence against children.

I think this is largely a result of the precedence that we have so far and, in this case, making particular reference to cases like the *Akayesu* judgment that was referred to this morning by my colleague from the ICTR.

In the Office of the Prosecutor, we also pay particular attention to this. If you look at our prosecutorial strategy, we emphasize crimes that are committed against women and crimes that are committed against children—the sexual and gender crimes.

Additionally, Article 42(9) places a specific requirement on the Prosecutor to appoint advisers with expertise on specific gender and sexual violence. So we have tried in the OTP to have experts and focal points that will assist the teams to deal with this and give specific training to investigators before they are deployed to the field or before they are conducting these types of interviews with the victims of gender and sexual crimes.



We have also set up the Gender and Children Unit, which is composed of legal advisers and psychosocial experts who will advise the investigators, and they themselves often take part in these interviews to ensure that we do not re-traumatize the victims—that we do not re-traumatize those who have suffered the crimes committed against them.

Just last year in November, the Prosecutor appointed Professor Catharine MacKinnon as Special Adviser on Gender Issues. In addition to assisting the Prosecutor and myself, she serves as the focal point for gender issues within the Office of the Prosecutor and the Gender and Children Unit.

Coming to your specific question about how certain we need to be before we charge for these kinds of crimes, in the *Lubanga* case, which is the first trial of the ICC, we have been—as you have said—criticized for bringing very focused charges on child conscription and enlisting children, child soldiers, and not charging for gender crimes, even though we had evidence, according to those who criticized.

Yes, we have investigated, I have to admit. We have investigated because, as I said, the Office of the Prosecutor lays particular importance on this, not only because this is a statutory obligation but because I think it is the right thing to do. Gender crimes have been neglected for too long.

At the time we were in a position to bring charges against Lubanga, who was then going to be released by

the Democratic Republic of Congo authorities, we had very good evidence. We were certain of the evidence that he was enlisting and conscripting children and using them to actively participate in hostilities.

We also had evidence that children were being used as sex slaves. We know that there was sexual violence that was committed against these children because we investigated them. What we lacked at that particular moment was how to link those crimes that were being committed at the lower level—how would we link them to Lubanga—and we did not have that evidence at that particular time.

We thought that it was crucial also to give importance to the crime of conscripting children into the armies and using them to fight wars and battles that they did not know anything about, that they were completely innocent of. We thought it was time to raise the awareness, at least for the international community, of these serious crimes that were being committed. A whole generation is affected by this crime, but it was taken as just normal, and for the first time, based on these sole charges, we decided to bring the case against Lubanga.

Of course, this has not stopped us from, during the trial, bringing out the life of a child soldier when they were abducted, especially the girls. If you have been following the *Lubanga* trial, you will find that girls were abducted. They were used as slaves. They were used as wives in the camps, and the evidence was clear, because we got the girls themselves to come forward and to give this evidence.

This has also not stopped us from the second case, the *DRC 2* case, to charge the two perpetrators of these crimes of sexual and gender crimes, but what I always say is it is important to be quite certain of your evidence before you go to trial to be able to present it and ensure that you get a conviction. I think the worst thing that can happen is to bring these charges and have the perpetrators of these crimes not convicted and released by the Court. I think this will be double traumatization for the victims.

**KAMARA:** Like Professor Crane said, at the Special Court we had unique challenges, unique in the sense that the Special Court is one of the ad hoc tribunals where it was created and operated in the country of the conflict. So there is a high sensitivity level because of that.

In the case of Sierra Leone, the Court is where the conflict took place, and when you are talking of investigating rape cases, for example, it is a totally different ball game.

From a practical point of view, accompanying gender violence there comes cultural sensitivities—deep cultural sensitivities—and from my prosecutorial experience over the last twenty years, men don't mind being prosecuted for murder, but they really do mind being prosecuted for rape. They really do. That is an aspect most people don't know.

And even in the case of the CDF and the RUF, the defense fought bitterly with those charges that are gender

related, far more than they fought for murder and physical violence, the amputations. When it came to amending the indictment in the *CDF* case to introduce gender violence charges, for example, it was a huge fight.

And also, talking about the cultural sensitivity aspect, in that case where we charged Chief Hinga Norman, he was a well-respected individual in society. So it was a huge fight. This cultural sensitivity makes us, the prosecutors, very wary of how we approach these issues, and don't forget in operating in the country where the conflict was gives us this extra challenge of witnesses, where people want to come forward and give evidence against these persons, but they have no protection against the accused persons. The accused person sees them, listens to them, and, of course, it is their right.

In one of the cases, Chief Hinga Norman, when he was cross-examining for himself, told one of the witnesses, "I know you, and you know me." Those were enough words: "I know you, and you know me."

So, when it comes to prosecuting, and even in the course of investigating these rape offenses or other offenses relating to sexual violence, the heightened challenges are there, and coming to the practical and technical aspect of it all is that, for example, in one of our indictments, we charged for sexual slavery and other inhumane acts in one count: sexual slavery as a crime against humanity and other inhumane acts for forced marriage. The judges—and I think I agree with them, in hindsight—say you cannot do that because it is

duplicitous. So, as we go through this learning process, we realize that when you put those two offenses together, the judges treat sexual slavery as different from forced marriage, and that you cannot charge the two in one count.

So, cleverly enough, they let go of the sexual slavery charge, which we have in another count, and then dealt with the issue of forced marriage as other inhumane act. And like David mentioned earlier, when we looked at the situation and we looked at the facts on the ground, we agreed that we would take a chance with forced marriage and that the evidence was there. As all lawyers will agree—and like it is said in Latin, “*ubi jus ibi remedium*”—where there is an infraction of law, there has to be a remedy.

Now, looking at the evidence as presented, there has been an infraction of law. There has been a violation of women's rights. So, what do we do about that? Do we sit quiet and say no, the law does not provide for it? We looked to the law, and then we saw that under Article 2(i) of the Statute of the Special Court, covering “Other Inhumane Acts,” could best suit our situation.

The Appeals Chamber in the *AFRC* case agreed with the Prosecution that the notion of “Other Inhumane Acts” contained in Article 2.i of the Statute forms part of customary international law. As earlier noted, it serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity

provided these acts or omissions meet the following requirements:

- (i) inflict great suffering, or serious injury to body or to mental or physical health;
- (ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and
- (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act.

The acts must also satisfy the general *chapeau* requirements of crimes against humanity.

We succeeded in the case of the AFRC. The Appellate Chamber agreed with us, but, as you know, with all lawyers, excited as we were, we pressed further. We brought the charge of forced marriage under “War Crimes.” So far, we have succeeded at the trial level in the case of the RUF.

And coming now to the sensitivity of these issues, it comes also with a mentality of the war infractions. There was a slogan in the conflict in Sierra Leone, and what was it? “Women are rations of war.” Women are rations of war. When the rebels invade a town or a village, they will capture the civilians, and they will divide them into two lines, women and children in one line and then the men in the other. If they decide to kill the men, they’ll just kill the men, or they can conscript them or enlist them, but with the women—they

distribute them and share them, starting off with the commanders. The commanders will have the first choice. He will choose the most beautiful or the youngest, and at the end of the day, each and every one will have his own allocation of the women. That is what was meant by "women are the rations of war."

And now looking at the elements of proof in prosecution, the perpetrator has to know about the facts surrounding the issue of this forced marriage. Forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim.

So, the challenge was how to prove that these commanders or these foot soldiers had the requisite *mens rea* for this unique type of offense—how to prove that that perpetrator knew that those circumstances were illegal? Like in any of our other cases, we identified the criminal intent contemporaneous with the physical act to the satisfaction of the arbiters.

We were able to present supporting evidence, especially from the victims themselves, when they come forward to say that, "I was assigned to him. I refused, and he comes in at night, compels me with the use of force or threat to sleep with him, and there is an issue from this relationship, and I continued to perform daily chores for him." They do the laundry. They do the cooking. This is what is referred to as the "Bush Wives" Syndrome.

So, like I said, there are so many challenges, but with experience, we have been able to maneuver through them, and we have been successful with the two trials that are complete; that is, the *CDF* trial and the *AFRC* trial. And come Wednesday and Thursday, we will be arguing on appeal also this issue of forced marriage.

**FARRELL\***: The issue of investigating and prosecuting crimes of sexual violence is one that I think required a lot of thought at the beginning, at least of the ICTY, and there are people here who have worked in the field; Kelly Askin, who is one of the people here who also knows as much about this and worked in the area; Judge Wald knows of it from the case that she did.

But the reality, I think, is that when you first start an investigation, you don't start an investigation based on a theme. You don't generally start an investigation based on a particular thematic line. You start an investigation usually based on what the evidence presents that you are able to obtain, and that can lead you in either the right direction or the wrong direction. For sexual violence crimes, I think at times it could lead us in the wrong direction because the first crimes that we often started investigating—that we saw—were murders.

When you think now about the former Yugoslavia and understand the patriarchal society, you actually understand better that the men were targeted for murder

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\* The views expressed by Mr. Farrell, Deputy Prosecutor of the ICTY, are in his personal capacity and do not necessarily reflect the views of the United Nations or the International Criminal Tribunal for the Former Yugoslavia.



and the women weren't. So, by focusing on the murders as the most important crime, you don't recognize the different experiences in the community and in the crimes for women and men.

By focusing then on the mass killings, because of time, because of investigative resources, you hear stories from victims and you may even hear stories from women victims who weren't murdered, and what is your first question to them? "Can you tell me about what you know about the murders?" Where does that lead you? In your investigation, it leads you in the direction of the murders and not in the direction of the sexual violence that was committed.

So, just to get back to the starting point of how do we get to the point where we need to be before we charge sexual violence, I think it starts, for us now, a long time ago. It starts back in '93, '94. We had a legal advisor for gender issues, but I think we needed more.

We now see it much more in the context of the experience of those who suffer. In a particular community that you are investigating, there are certain fundamental rights which, if violated, would constitute the crime of persecution. If you look at who you are investigating and you want to prove persecution through, for example, all members of Ethnic Group A, first thing, they lost their job; then they lost their positions of authority in the community; then they were rounded up and put in detention centers; and then they were expelled.

What type of community has most of the jobs which are women, most of the leadership positions which are women, and who are rounded up and put in detention because they are women? Quite frankly, not that many because, in patriarchal societies, like in the former Yugoslavia, the persons who had the jobs, the persons in positions of authority, and the persons who could be the military opponent, were men. What does that lead to? A non-investigation or the possibility of a non-investigation into the other experiences of women.

So the question which related to how certain do we need to be before charging sexual violence, that is the final question, and that standard is the same for—I know this wasn't the purpose of the question—but that standard is the same for the question of how much evidence do you need to charge a crime. You have to have a reasonable basis to believe that the person did it and to meet the standard necessary for indicting them. What comes before that is how to obtain the evidence, how to understand the evidence, and how to fit that evidence into the context of the other crimes.

One word of caution, though, is that it must be based on evidence, not on perceptions. There was material provided to us sometime ago when we were amending the Karadžić indictment after his arrest and a large amount of writing on a particular topic which related to gender violence, and it didn't reflect the evidence on the ground. When we approached victims and others, that wasn't what their stories were. Their stories were similar but then had been extrapolated to create a larger story which wasn't reflected in what they said.

Secondly, of course, one has to consider whether to bring forward the victims and often take into consideration whether they are willing to come forward. And I couldn't agree more strongly with Fatou on this point, which is that to bring forward cases of sexual violence which have not been properly investigated or have not got the proper collection of evidence in a hurry—to indict someone because of the larger pressures or the other crimes that you have—it is not only a disservice to justice, a disservice to the accused, but it is clearly a disservice to the victims if there is not at least a reasonable basis for conviction.

You have to consider your legal case theory, and you'll probably hear more of this, so I won't speak too much on this, but there was only one crime, at least in our statute, that on its face addressed sexual violence, and it was the crime of rape as a crime against humanity.

Well, rape—for those of you who are nonlawyers—it is obvious that rape is something different than sexual assault or other forms of sexual violence or, in one of our cases, sexual enslavement, where there was a recognition of control over a woman's sexuality. So you have to look at your evidence and think of it in terms of the way that you can charge, the types of crimes that you have: persecutions, crimes, outrages upon personal dignity, enslavement, things that are broader.

We as lawyers tend to like to look at the law and think we're creative, but, in fact, you'd have to be really thoughtful to try and make the facts fit within a law without going outside of the confines of the law.

Lastly, in deciding—or at least in the steps taken for charging crimes of sexual violence—much time and energy needs to be put into the investigation of the linkage to leaders. At least in our more recent cases and in some of the convictions where crimes of sexual violence are not just isolated single acts done by soldiers on the ground, they are often used as tools and means of combat, not legitimate combat obviously, and you have heard it from my colleagues and you will hear it from others, that it clearly is a means of combat.

The terrible, absolutely terrible events that we have heard about in Sierra Leone or Congo tell you that they are used. They are used as a means of terror, quite frankly, and should be charged as terror, but doing so, you have to think of how they get there, who allows this to happen, did someone order it, is it explicitly or implicitly permitted by leaders? Do they use it as a tool themselves, or do they allow it to happen and not stop their troops from doing it because they see the benefit to it?

And that's the last comment I'll make, which is simply that before getting to the point of charging, you have to know what your linkage evidence is that raises it to the level of the most serious perpetrators. If you're going to charge those perpetrators, those most serious and high-ranking officials, with crimes of sexual violence, which I think in many cases we have been able to prove and will be able to prove, you need to have linkage evidence. And I think it's a step forward because it takes it out of the houses, the bedrooms, the camps in which these crimes take place—it brings it out into the

light of the evidence and allows it to be presented as crimes perpetrated by leaders.

VAN: As I sit here, I recall how we faced a lot of challenges at the investigation level. The first one was how to know that a given person, a given lady was a victim of rape. So the issue is identification of the victim and the potential witness.

As I said this morning, Rwandans don't like to talk much, and sometimes it is only a neighbor who tells us this lady was raped, but our informant refuses to testify himself. So you have to find, to go to that lady, to know if really she was a victim of this crime.

Of course, that is another challenge because she will not accept immediately to speak, and, once again, the problem of language, of communication, will arise because our investigators, as I said this morning, are not Rwandans, do not speak the local or the national language. We have to go to the victims with interpreters.

But, at that level, there is another problem, because the victims of rape are all Tutsis, and our interpreters are Hutus. When a lady, a Tutsi lady, sees a Hutu interpreter, she will hesitate. She will not feel comfortable to speak. To solve that problem, we have to do everything, so that the lady, the victim speaks.

And when she accepts to talk, to speak, she will never use dark language. She will never say a man came and penetrated me—never. She will say “you have that man, he married me, you know. He married me.” How

could we understand that kind of language? But, through experience, we come to understand the witness.

So, after the investigation, there were really a lot of challenges, and at the legal level now, there was another problem: the crime of rape is not defined in the Statute. The Statute says only rape. What is rape? In national jurisdictions, in the civil law system, for example, there is rape when there is absence of consent, but how to prove in the context for Rwanda, the absence of consent, given the chaotic situation.

So, in the *Akayesu* case, for example, the Chamber says the circumstances at that time were coercive. So a woman could not talk about accepting or refusing when a militia man went to her. She had nothing to say, and she got raped.

ICTY, however, disagreed with *Akayesu* in the *Kunarac* case. The Chamber disagreed with the *Akayesu* position where it was not necessary to find the absence of consent to determine whether or not there was rape, and recently, in the *Gacumbitsi* case, the Appellate Chamber agreed somehow with the *Akayesu* Trial Chamber to say that if the Prosecutor is able to prove that rape occurred in the particular situation, in particular circumstances, it's enough. It's enough.

Now, how to be sure that the evidence we are bringing before the judges is credible, because Rule 96 of the Rules of Procedure and Evidence of ICTR says there is no need to corroborate the testimony or the evidence given by a victim. But sometimes the victims lie. They want revenge because they are Tutsis. So how

can we trust only one witness to overcome this situation? We say that now, even those who were not victims of rape, including men, could testify.

And in the *Bagosora* case, General Dallaire, who was commanding the UN forces in Rwanda, testified and said that he saw at a roadblock, militia men raping Tutsi women and soldiers raping Tutsi women, and the Chamber linked it, that fact, to the accused because the accused should intervene to stop the rape, but he failed to do so. He was held responsible for that crime.

So that is what we are doing in the ICTR. We still have challenges. We still are facing problems, but we are now glad because we have been able to lead Chambers to take positions that are in favor of the prosecution.

Of course, everything is not perfect, but we have been able to gain the conviction of about seven accused persons for rape and other sexual violence, and even torture has been considered, and has been regarded as rape in the context of Rwanda.

**SáCOUTO:** Thank you so much for these insightful comments. There are so many questions that I would like to ask, and I want to give the audience an opportunity to ask questions, too. So what I'll do in the interest of time is ask two questions and then allow you to respond to either or both in the time we have remaining.

The first question is related to charging. Some of this was already touched on by some of you, and I appreciate, in particular, Norman Farrell's comment about asking the right questions on the front end before you even get to the charging decisions, but one of the questions that has come up related to charging in all of these tribunals and most recently in a case against one of the accused now before the ICC charged with sexual violence crimes, Jean-Pierre Bemba, is the question of which mode of responsibility most appropriately encompasses the accused's role in the crime.

As we heard from Fatou Bensouda this morning, the prosecution initially charged Jean-Pierre Bemba as individually criminally responsible for war crimes and crimes against humanity. However, the Pre-Trial Chamber decided that the evidence submitted by the Prosecutor appeared to establish a different mode of responsibility, namely criminal liability as a commander or a superior.

As Fatou mentioned in her remarks, eventually the Office of the Prosecutor submitted an amended document containing superior responsibility as an alternative to individual criminal responsibility, and the Pre-Trial Chamber then confirmed the indictment against Bemba but, again, only on the basis that he would be tried as a commander pursuant to command responsibility and not individually.

So the question relating to charging is how does each of your offices make decisions about which mode of responsibility should be used to charge the accused, particularly in cases involving gender-based violence,



and, again, do different considerations arise for you in these kinds of cases than others where gender-based violence is not an issue?

The second question relates to challenges involved in proving your case, in proving gender-based crimes once you have them in your indictment, and the issue I want to raise is, again, somewhat unique to the ICC, but I would be curious as to the reactions of the prosecutors at the other tribunals as well.

In the first case, the case against Lubanga, the prosecution requested permission to conduct proofing of its witnesses prior to trial, which would involve allowing witnesses to read their statements and refresh their memories regarding the evidence they would give, putting questions to witnesses that the examining lawyer intends to ask at trial, and inquiring about possible additional information of both potentially incriminatory and exculpatory nature.

This kind of witness proofing has consistently been conducted by the prosecution and defense at the other tribunals, the *ad hocs* and the Special Court, but at the ICC, the Pre-Trial Chamber and the Trial Chamber overseeing the Lubanga case held that witness proofing cannot be conducted at the ICC at least for lay witnesses, though they didn't have the same concern with respect to expert witnesses.

So the question, maybe starting with Fatou, is what impact the ICC's bar against witness proofing had on witnesses before the Court, particularly on victims of

sexual violence and other "vulnerable witnesses." What impact has this had on the ability of the prosecution to prove its case? And, certainly, for the other prosecutors, to what extent do prosecutors rely on witness proofing in preparing their case?

So, again, in the interest of time, there's a whole series of other questions I wanted to lay out, but let's perhaps take on those two.

I know Fatou wanted to add one comment to the last series of comments. If you want to start?

**BENSOUDA:** Okay. I know we are running out of time, but when Van was talking about the challenges that we face in investigating crimes of gender and sexual violence and gave an example of the Hutu interpreter and the male investigators, it reminded me of an important point.

Prior to my current role at the ICC, I had the privilege of working for the ICTR and working with the investigators closely to advise them on what to do. In one particular instance, we were directed to a lady who was a victim of sexual violence, but who apparently had never spoken about it. We are talking about ten years down the line, this is a woman who was kept as a sex slave during the Rwanda genocide for at least three months and raped every day and night by at least seven men, at a minimum. And she has never spoken about this. I think she just wanted it to go away.

Eventually, we got to her, and this time, we decided to change tactics. I went to an interpreter who was a

Tutsi female and the investigator was also a female. Even the driver was a female, and we went and we sat together and we talked. She, for the first time in ten years, spoke about what happened to her and her mother. Both of them were sexually enslaved, and she cried so much that day. She cried her soul out. We all ended up in the room, all crying together. This is just to show what the victims go through, why they don't want to speak.

But, also, I gave that example to show that it is not all the time that these women of sexual violence want to only speak to women. Some of them do not want other women to know what they have gone through, and they would prefer to have a man. So I think, to a large extent, it depends on the circumstances, maybe the cultural as well as many other instances that you have. So, most of the time, you need to take it on a case-by-case basis and to see really what is best for the victim, for them not to go through this. I just wanted to give that example.

Coming to the issue of proofing, as Susana has said, in other ad hoc tribunals, other international tribunals, in most national jurisdictions, this is what happens. You meet your witnesses. You go over the statement. It is not to tell the witness what to say but just to refresh and make sure that you lead the evidence before the court as they had given it to you, but in the ICC, this doesn't happen. This doesn't happen, and it is only with expert witnesses that you can meet with.

In the *Lubanga* case, this is what the Pre-Trial Chamber and the Trial Chamber had decided, and this is

how we had to go through with presenting evidence. Of course, it has presented challenges, and maybe I will just give you the example of the first witness who we had come to give evidence. I was leading that witness—a former child soldier who was abducted at age nine—and somewhere in the middle of the evidence, he suddenly said that he wasn't abducted, none of these things happened, and that he sort of just wanted out.

I mean, in normal criminal proceedings, this happens all the time. We have those incidents, but at that time, when he said this, of course, we were all taken aback, but I thought it would not be wise to declare the child hostile, to impeach the child, and then to cross-examine him because, normally, this is what you would do as a lawyer. You impeach, and then you go on to the next step and cross-examine him and try to take it from him.

Because I realized that perhaps all the protective measures that were supposed to be in place were probably not in place, I was able to make the Chamber stop the proceedings, at least for that particular witness, to make investigations as to whether there were any issues that we needed to know about him, and why was he changing, because he initially said, “Yes, I was abducted. I was going to school, and they stopped me, and they arrested all of us. They took us in a van, and we went to the camp.” It was there that he said, “No, I was not abducted.”

When we made the investigations later on through the Victims and Witnesses Unit—the Court ordered that that be done—he eventually came back to say that he

was just angry. He just felt angry with everybody that he had to come here, and then he said everything was alien to him. He was coming from Ituri, and at that time, maybe the temperature was about 96 degrees. He was brought to The Hague in the middle of winter. And even the way he was dressed, you know, everything was strange.

Also, I think we maybe underestimated the change that we created for this child, not only from the prosecution side, but also with respect to the Victims and Witnesses Unit, the registry, the Court, everybody. I think this was a lesson that we had to learn.

Eventually, he came back. He gave evidence, very good evidence, of everything that had happened, and finally told us that, "I was just angry. I felt mad, and I didn't want to say anything. So I just thought that if I said I wasn't abducted, they would let me go, and I would go back."

I think that, if we were able to proof our witnesses before they came into the box, we would have learned about all these things that may surprise us in court. Then we would be able to go to the Chamber and say, "Look, this is the situation with respect to this witness. Either we withdraw the witness, or we give up the witness for cross-examination without leading him," or something, but we would at least be warned that something is coming up instead of learning about it when the witness is in the box.

So these are the challenges that we have faced. However, I think that we just have to adjust and be able to deal with them as best as we can under the circumstances.

**SáCOUTO:** Joseph, please.

**KAMARA:** Yes. Just to add to that, I am one of the strongest supporters for having women prosecutors at all levels, and it comes with experience, and that is, men feel and respond differently to crimes of rape or gender violence-related offenses, and that is the truth.

And even as prosecutors, there is always that danger. Given the opportunity, they will always find an excuse. It comes with strength of character and purpose for men to be as engaging in the prosecution of those offenses, and I am speaking from experience.

I am a victim myself. When I started practicing in 1990, I prosecuted. I worked for the law office's department, the attorney general's office in Sierra Leone. I prosecuted rape and other gender-related offenses. They were just like any other offense, fraudulent conversion, larceny, and all, with no sentimentality until one day I had a case of armed robbery that accompanied rape.

It was an elderly lady, seventy years old, and the accused was a teen. So, in the course of the armed robbery, he decided to change his mind and rape this elderly lady. While I was leading her in court—at the common law level we don't do proofing, I was leading in court—she blurted out for the first time, "When he

decided to rape me, I pleaded with him, kill me instead." I was shocked. She said, "Kill me instead. Do not touch me."

At the end of the trial, we secured a conviction, and I went home, but that statement re-echoed in my head. What? She preferred to die? It was an awakening. It was a shock awakening for me to realize the importance of that offense of rape. I've been referring to that as a conversion of Joseph, like soul converted on the road to Damascus.

Honestly, that is the time I realized that for certain people, but clearly women, rape is more important than murder, and let me bring you back now to our own scenario at the Special Court, why I am saying this.

In the case of the CDF, we were prevented from amending the indictment to introduce the rape charges, and the judges forbade us from proceeding with evidence of gender violence, and how are you to do that, if you had to proceed and lead evidence on physical violence?

Let me give you an example. A lady was testifying about physical violence. She was beaten. Then the commander, one of the accused, came to the scene and said, "Leave her alone." Indeed, they left her. He grabbed her and took her inside the room, and the moment she said he took me into the room, the judges said, "Stop there. That is forbidden territory." I said, "My Lord, how can we stop? We all know what happened inside the room, and we have ruled against that in this Court." Yes, it happened.

So, some of these examples that I am giving are not like they are theoretical, but these are factual incidents, and I think that is why we had to learn and share experiences about these issues. Some may be hard facts to accept, but we were forbidden from proceeding with evidence that such as concerned gender violence because we had been prohibited from doing that by way of an amendment.

But then another question that came out of that courtroom was there were three judges, all of whom were men.... Because we filed an interlocutory appeal before the end of the case, we proceeded to the Appellate Chambers. At the appellate level, all the men agreed with the defense; the woman agreed with the prosecution.

So I have always been asking myself, was it because she is a woman? But, now, when I look at the successes of the Special Court, we have women heading almost all the sections. Is that why we are successful? Except for the Prosecutor....

The Chief of Legal Operations is a woman. The Chief of Administration is a woman. The Acting Registrar is a woman. The Chief of Personnel is a woman. But let us not mislead ourselves. Men think differently from women, be they prosecutors or not, when it comes to these issues, and it comes with deep training.

And I am happy to state today that it is highly essential for women to participate in these processes because they feel far different from how we feel as men



when it comes to these types of offenses, and even in the course of our dialogues and everything—Professor Crane will tell you more about it—it was not easy, but we all came on board. We got the feeling. We got the passion. When you heard the evidence at that level from the conflict, you had no choice but to take up the fight to the highest level.

**SÁCOUTO:** Thank you so much for your comments. Okay, so a couple of concluding remarks from Norman and Alphonse, and then I'm so sorry, we are going to have to close this session for lack of time.

**FARRELL:** Just two points. One of the questions that was asked was related to a concept called "proofing." For those of you who are not involved in this field, proofing is when you speak to the witness just before their testimony. So you sit down, and you explain to them what is going to happen, and you discuss their testimony.

In some of the tribunals, we are allowed to do that. In the ICC, they are not allowed to do that. The general feeling is that you somehow influence the witness, and if you speak to the witness the night before or the morning before they go in to testify, the fear is that you somehow influence their testimony. If you simply take a statement months and months before and they come in and tell what's in their statement, there is no chance for their evidence to be in any way interfered with. That is what the underlying question is about proofing.

I didn't do proofing in my home jurisdiction very much. When it comes to crimes of sexual violence, I am a strong proponent of proofing. I think that it is very important that persons that come in understand the process, they understand what you are going to ask them, and they understand who is going to ask them those questions.

In many of the examples given by my colleagues, the question about who victims of sexual violence will speak to has been raised, and, in my experience and the experience of the lawyers who are much more versed than I am, there often is some type of trust that is developed between the victim who tells their story for the first time and the person to whom that story is told.

And in situations where there are stereotypes, lack of trust, community bias, societal bias, and the fear to tell anyone because it might get back to their family, for them not to have the opportunity to at least see the person they are going to get questioned by, to have some type of relationship, for that person just to explain to them what is going to happen the next day, I think it creates an unnecessary burden on the victims of sexual violence, and if the lawyers do their job properly, they shouldn't be influencing them anyway.

In relation to your question about charging modes of responsibility, the issue relates to—once again for those of you who aren't aware—the issues relate to people who are not directly involved in sexual violence crimes and are removed from it; in other words, the people that are higher up, the commanders or the political superiors. And if that is the case, the question related to how we

capture their criminal conduct and how are we able to say that they are guilty if they are so far removed. Crimes are committed in a town in Bosnia, and we have charged certain senior leaders for the crimes of sexual violence that were a three-hour drive away where the commander was in a completely different zone of responsibility at the time.

So those questions take a lot longer to answer, but I think it relates to whether or not there is sufficient evidence to directly link the crimes on the ground, obviously, to the commander and perpetrator.

Anyway, because of time, thank you.

**SáCOUTO:** Thank you. Alphonse, the last word, if you would like.

**VAN:** Very, very briefly. One of the problems is that sometimes we call the witness a very, very long time after a statement has been given to the investigators. So, when time comes to testify, she has forgotten greater details of her statement, which is why we have to prepare the witness.

And sometimes when she tries to remember a statement, she adds more details that are not in the statement, and yet the statement has been disclosed already to the defense. So we cannot tell her to give the new details in court. It will be a problem.

We just try to help her remember. We read some passages of the statement to her, and then she confirms,

or sometimes she says, "No, no, no. That is not true." She may have stated it five years ago, but today she may deny it. This is a very, very big problem.

With respect to modes of responsibility, I remember a specific example regarding the difficulties. In the last case I conducted, one of the witnesses alleged that she had been raped and, as a result, infected with the AIDS virus. We met her medical doctor, and it was confirmed that she had that virus. We produced the medical certificate in court, but the defense says, "No. There is no link between the alleged rape and our client." And she was really confident. She said, "No. The soldiers raped me, and they gave me the HIV virus. I did not have that before. How can they say there is no link between the soldiers and my situation?" And because the accused himself did not rape her—his subordinates, his soldiers raped her—we tried to establish a link with what the subordinates did against that lady. We are waiting for judgment, but we are not sure that the Chamber will follow us in this regard.

**SáCOUTO:** Thank you. Again, please join me in thanking the panel for their insights. Thank you again.

## **Roundtable with Current Female Trial Attorneys**

This roundtable was convened at 11:00 a.m., Tuesday, September 1, by its moderator, Kelly Askin of the Open Society Justice Initiative, who introduced the panelists: Lesley Taylor of the Special Court for Sierra Leone; Christine Chung of the International Criminal Court and the Schell Center for International Human Rights at Yale Law School; and Renifa Madenga of the International Criminal Tribunal for Rwanda. A transcript of their remarks follows.

**ASKIN:** Good morning. I am going to be, I guess, rude. I was just introduced, but I am not going to take the time to introduce my colleagues. Their impressive bios are in your packet, and I encourage you to read them. I will simply say that Christine was at the International Criminal Court for three and a half years, Lesley was at the Special Court for Sierra Leone for two years, and Renifa has been at the Rwanda Tribunal for eight years.

We have been talking a lot the last day and a half about the presence or the absence of women in international tribunals. We only have about an hour, if we want to leave time for questions and answers. So I am just going to jump in and ask questions, some to all panelists, others to individuals. We have three very talented, experienced women prosecutors here with us.

Just sort of right off the cuff to all prosecutors, and please respond very briefly, what's it like to be a woman prosecutor these days? I'm assuming things have changed since Nuremberg.

**TAYLOR:** One thing that hasn't changed is the sporting of bikinis on the beach. By both lawyers and secretaries, I might say.

I don't know that at the time I was in Sierra Leone, I was particularly aware that I was a female prosecutor as opposed to a prosecutor, and I suppose that that in itself speaks volumes. I would hope that that becomes the norm.

**CHUNG:** I think that there are more role models and examples out there, and that's wonderful. And I think there is a generation of, now, sisters in international criminal law, and I think that's a really positive thing.

I do think this was brought up yesterday during our gender crimes discussion. I think that having female prosecutors and judges—and I would encourage everybody in the room to think about this—it really changes things because women bring something new to every aspect of judging and prosecuting and investigating crimes. In addition to the “woman's perspective,” when you're interviewing child soldiers, women will get different answers and have different questions than men will, or if you're talking to a witness about coming to appear at trial and they have concerns about who is going to take care of the family or other sort of knock-on effects of being a witness, a woman may have a slightly different perspective than some of the men in the room.

One of the reasons that it continues to be important is I just think, like everything else in life, women have expertise and experiences that come to bear, and spreading that out amongst all the other experiences remains very important.

Even though I was last at the Court in 2007, which sounds very recent, women still have a very special perspective and viewpoint to bring—especially in the field when you are operating in cultures that are different from yours and maybe not as politically correct or not as up to date in terms of gender rules.

**MADENGA:** The road from Nuremberg to the International Criminal Court (ICC) has been a very challenging road for women, but the mere fact that dynamic women have contributed to the gains made within the international criminal justice system is inspiring. We have prosecuted and investigated rape. It defines you as a woman because it's not like you are making history—you are actually taking history to a certain level, a very significant level. It's like those women have started a revolution at different stages. I don't know how they started, but what I do know is that no one can stop such a revolution. We have dynamic women who are making a difference at all levels, despite their level of education or status.

We have judges who have actually made a difference. We are talking about cases like the *Akayesu* case. The effect of that day was the female judge who listened to the evidence of Witness JJ and Witness H among other witnesses and said, "Hold on. We are talking of rape. Mr. Prosecutor, where are the charges of

rape? We are hearing evidence of rape yet the Indictment does not mention rape." You know, for women to be making a difference at that level, to me it is just amazing.

Stereotypically, women were supposed to be invisible. Where they were naturally and physically visible, they were not given the space to be heard. But for women to be directing international criminal proceedings and making groundbreaking judgments, to me it's amazing. I agree women are the soul and heart of true leadership, and they will take international criminal justice to levels no perpetrator can ever imagine.

**ASKIN:** Each of you has been the lead attorney in cases involving prosecuting sexual violence. Can you explain how the sex crimes in the respective Uganda, DRC, Rwanda, and Sierra Leone cases you were involved with captured your attention and became critical to your case?

**TAYLOR:** Both David Crane and Joseph Kamara spoke a little about the importance of the gender-based violence, the crimes of sexual violence that were included in the indictments in Sierra Leone and the difficulty and, ultimately, the failure to have that included in the *CDF* trial, but the Special Court did achieve, I think, very good things in relation to the two rebel trials, the *RUF* trial and the *AFRC* trial, and the most controversial aspect of all of that has always been the charges of forced marriage that you've heard a little about.



And even though it is now seen as a good thing and it's being celebrated, at the time there was actually a great deal of controversy about the delaying of those charges. Michael this morning spoke about how Case Western was always supportive of us, and that's true, and we were very grateful for it at the time. We had, as is appropriate, a string of academics and other interested people coming through the Special Court to review what we were doing, to advise us, and to offer constructive criticism about what we were doing. And we were most often criticized, constructively, about the forced marriage charges, and because they were in the trials that I was doing, I was often wheeled out to defend the policy of the Special Court and the Office of the Prosecutor.

David spoke a little about this yesterday, about how these came about, and when we were reviewing the evidence of sexual violence that occurred in Sierra Leone, how appalled we were. It is not possible to find words to describe how awful the things that happened in Sierra Leone were.

When the rebels were sent from Freetown and went north into the country, regrouped through the winter months and then came back towards Freetown, which they invaded in January 1999, the women particularly in Bombali District were just subjected to the most appalling treatment.

And while people knew about this concept of bush wives, some questions that arose included: where does it fit and is it sexual slavery or is it something different? A Ghanaian lawyer ultimately suggested that this be called "forced marriage"—one of the things that was really,

really important to us is that the women themselves who had been subjected to this and who survived it made the discrimination themselves.

One would not say "I was a sex slave," but would describe the situation in terms of being other than a "wife"; others would explicitly say, "I was a wife." So a lot of this was not only about us trying to impose legal categories on what had happened but also trying to find a way to honor and tell the truth about women's experiences.

One of the really difficult things and the thing that we were most often criticized for about laying the forced marriage charge is that it is subsumed within the concept of sexual slavery, and by separating it, what you are actually doing is imposing a status, and a status offense on women has a history of being problematic. You are stigmatizing the women because the reality is that there are still women who were abducted, who are living with their rebel husbands now, as we speak, that cannot leave. They have children, and what do you do?

There were these echoes, unspoken sometimes, of women with shaved heads being marched through the streets of France following the Second World War. We tried to think through the consequences for these women because one of the complicating factors was if you were a kidnapped woman, there was no way you could consent to anything that happened to you. Within that rubric, women would often want to be "wives." They'd choose, if they could, to be the wife of a rebel as opposed to a sexual slave for the very simple reason that

it meant that you were raped by one man and not many. It also gave you a little power. It meant that you got food. It meant that you could sometimes have other people go and fetch the water.

So, there was this difficulty about not wanting to stigmatize the women but wanting to reflect the truth of what went on—and that was an incredibly difficult thing to do. Legally, we were criticized because by relying on the “other” category [of crimes against humanity], we somehow said that the crime was less than items that have their own byline, so to speak.

That was an incredibly difficult decision and one that we spent hours and hours and hours dealing with, and, ultimately, we succeeded partly because we had very bright young lawyers who were willing to look at all of this, and David Crane and others willing to take these risks. But, more importantly, we actually had the women themselves come forward and come to Freetown and risk everything to testify in court. I believe Fatou Bensouda made the point yesterday about a child soldier being taken from Ituri to winter in The Hague. On a similar scale, we had women come from the country in Sierra Leone to Freetown for the first time in their lives. They had never seen electricity. They had never seen an air-conditioned room. We actually, constantly had people giving evidence wrapped in a sleeping bag because they were just too cold.

There were all of these difficulties, and these wonderful, brave women came forward. The sexual violence was a very, very important part of what we did, and it pleases me to no end that now we are very much

towards the end of that road—that the Sierra Leone Court has achieved so much in the sexual violence arena.

**CHUNG:** I guess I will choose to talk about Uganda because that was the first case we worked on, and I think that one thing that was new in that case, in terms of gender crimes, was that there really was no option, except to investigate sex crimes equally, because the Lord's Resistance Army (LRA) is an equal opportunity destroyer. The LRA exists only through kidnapping; people don't join the LRA—they aren't recruited, they don't sign up or enlist.

The LRA exists by kidnapping children, and it kidnaps girls and boys equally. The girls go down one path, which is sexual slavery, and the boys go down another path, which is to become fighters.

Yesterday, when Norman was saying you have to know what questions to ask at the beginning, in this case I think it was probably one of the first cases in the international tribunals where, when you started out, there was just no question that you were going to have to investigate. So, in a way, our choice was easier at the beginning.

I remember interviewing one woman, sort of mid ranking. She reached a mid rank in the LRA, and she was maybe thirty-two or so when we spoke to her. I saw her repeatedly, and at the beginning, it was kind of a mystery to us because she was a fighter. She had a weapon, and she was always sent into battle. And that

was very atypical for someone to reach the age of twenty in the LRA and still be fighting as a woman.

And through further questioning, it became apparent—and some of you are probably guessing the punch line here—that she was infertile. She was unable to have children, and so the reason that she was being sent to fight was because she couldn't perform that other function in the LRA, which was to be a sex slave and to bear children for the next generation of the LRA. So, she is an example to me of how ingrained the criminality is and how you're just switched from one victim role to another, and as a woman, you kind of get to experience them all. You aren't protected from any of the victim roles.

I want to talk about what it meant for the team to investigate these crimes because this became a very important point to me as prosecutor and as somebody who was working on the investigation. It meant that all the members of the team, not just the women, had to work on sex crimes, had to learn to ask questions about sex crimes. Absolutely, if victims wanted to meet with women and they felt more comfortable doing that, they had the ability to choose that.

But you also need to ask the boy soldiers what happened to the girls, what were the practices that the men had with respect to the girls, and you know what, for those questions, generally, the boys would rather talk to other boys about that. So you would send them in, doing their routine questionnaires of the military practices, "Okay. Well, when you were off doing your drills, what were the girls doing?" And you would just

turn up a wealth of information about how they were being used as porters or as cooks, carrying things from place to place, until their feet bled, you know, what happened when they turned thirteen and they had their first period. And it is a part of your job to get everybody to talk about that, not just the girls, and to get everybody on the team to work on that, not just the women.

It's really too bad that the case has not progressed and no one has been arrested because it would be a fascinating trial in terms of gender crimes. And I think one of the things that I learned as a prosecutor in that investigation was how important it is to incorporate men. I think this is sort of the next generation of international criminal law in gender crimes—they cannot be ghetto-ized to the women.

The women created a beachhead, which is so important, but now it really needs to be that everyone on the team—the analysts, the military guys who are the experts in what it takes to become a captain—learns to ask those other questions that have to do with gender crimes. And I think we made a little bit of progress on that in our team.

**MADENGA:** I have similarities with what Christine and Lesley have said, but what attracted my attention to Rwanda—what was very outstanding about sex crimes—was the documentation relating to both the widespread nature of the gender violence and its brutality.

I came to the ICTR Tribunal from the NGO world where my work also involved exploring issues related to gender violence. I came in as a case manager. That point of entry involves, among other things, reading since the work consists of preparing documents for trial cases. There is documentation about statistics relating to rape and sexual violence. Almost 200,000 to 500,000 women and girls raped. By who? By the militia, by the policemen. It seemed then, on the face of it, everyone who was not a victim was raping or incited to rape. I mean from the prevalence as reflected by the documents I was reading. It was so systematic, so widespread. It seemed it was happening everywhere and could not be missed—even happening at places of respect, near the mosque, in the church. The pastor is also raping, the soldiers are raping. It was so overwhelming because there was so much evidence in the documents I read.

Notably, I am coming at a stage where there has been a momentous celebration of *Akayesu*. *Musema* has also been convicted, but nothing else seemed to be happening on the ground to consolidate the *Akayesu* gains. Then this case I am handling—as the case manager, you are like a glorified legal clerk, supposed to be photocopying the witness statements, and there are massive witness statements. Almost every witness statement I read is talking about rape, how people were raped, how women were raped, how some women were disemboweled because the perpetrators want to see how a Tutsi embryo looks like.

And then I'm saying to myself, I'm also a lawyer, but the indictment does not even talk about rape. Mikaeli Muhimana is supposed to have specialized in

raping and supposed to have ordered the militia to rape. So, that is where the interaction with the team starts because my main team is actually in trial, busy with another case. I have so many questions, and though still new, I know we have to act quickly. This is also the first time I am working for the UN—I don't know how it works.

So, within days, I approach some of my team members and raise concerns: "Look, what I am supposed to be doing? I am photocopying and shredding as part of my duties but what disturbs me is in the *Muhimana* Indictment, we are not charging with rape." One says, "Yeah. But we are going to trial with the case." I respond, "I feel strongly we need to act. I am going to analyze all the statements and see where they lead us to."

Then I find there is evidence of rape as a crime against humanity. Rape as genocide, as already defined in *Akayesu*. There are killings but these were preceded by rape. There is also grievous bodily harm through rape—instruments are being forced into private parts and genitals are being cut.

So I really reflect and say, "What are we doing here? We are supposed to prosecute rape. Rape is being investigated. It is actually in the statements." So, that is like the fifth stage because the team comes back from court. I speak to the team members through the female trial attorney. Then we sit down as a team and say, "So what do we do?" We just had to act and act quickly.



Then we argue between ourselves before the decision is unanimous. We amended the charge. Now the witnesses will have to be presented in court. Their statements reflect their testimonies, some statements taken as early as 1996/1999. The statements were properly taken.

As much as I have been told that women in Rwanda don't want to speak, at least these ones had spoken, for one reason or another. So at least we have evidence of crimes against humanity. We have evidence of gender crimes. Time is of the essence. We have to do things quickly. So we quickly amend the charge, and the Chamber actually sees that the defense has been notified because these statements were disclosed in 1999. Although the indictment had not reflected that, they are on adequate notice. So you can actually amend and go to trial.

Now the problem starts. The first group that goes to talk to the witnesses comes back and says six of them are still much too traumatized and would rather just move on with their lives.

I asked for permission to go and see those witnesses who are not opening up, but the problem is I have just had a baby and some of my team members are sitting at trial. I made the conscious decision that I really want to go and see the witnesses and talk to them. So I take my baby in the United Nations beach craft. That's the transport to Rwanda. I discover when I am in the beach craft and in that particular one there were no washroom facilities and I start to worry about the well being of those witnesses.

Anyway, I am now there in Rwanda. I go to see my witnesses. I was disillusioned because I think most of them, at this stage, did not expect to see a lawyer from Zimbabwe with an elephant briefcase and their statements. Most of them were sick. They were very sick and we needed medicine and counseling which had to be provided.

And I am starting to talk to them. Some say, "From the time the statements were taken to now, this is like the third time we are seeing someone from the Tribunal. We have not forgotten what we have said because you cannot forget, but because of what we went through, we keep on going through a lot of process. So we have to keep going through the things we have endured."

I have six witnesses to look after and a baby, and some of the witnesses have also brought their own babies. So I begin talking to them, but then a colleague from Rwanda says when you talk to them about babies, you have to be very careful because, in Rwandan culture, a woman is identified by children. Yet, for some, the only children left might be products of genocidal rape. So this is a child the woman cherishes because the child identifies a woman, but, at the same time, this is a child the woman hates because it reminds them of the brutality and triggers a mental journey—of what happened in 1994.

So even the process is very, very slow, but we are getting there. We are talking about it, and there is one witness I remember called AU. AU explained that after all the parents have been killed, the two children she had,

had been killed, and then they started raping her, and she cried so much that she could not cry any more. During the proofing session, she's just doing like—"hmm"—groaning, no tears coming, and she is explaining that, "I cried and cried, and I don't think I can cry anymore."

When we're in court, I realized after she gave evidence—and the judgment in *Mikaeli Muhimana* actually reflected the aggravatory features—that as she was being raped, her head was also being bumped against the wall. After giving testimony, I followed her to the safe house and saw that she cried—that she could not stop crying.

Then after the trial judgment was out—I have this habit of following up on my witnesses—I heard that Witness AU had actually died. I reflected on the international criminal justice system and said, "What have we done to her? Was it part of the healing process?" Before that, she could not cry because she said she had cried too much, but when she saw the accused person, there was something about the way she looked at him—there was even a change in her body language. That was true for most witnesses, except for one witness called BJ who was raped when she was seventeen years old. When BJ looked at the accused person, she exhibited trauma by laughing and also noted how well Muhimana looked. In my view this gives the contrast of how the international criminal justice system looks after different stake holders. As a female attorney, one is left with a number of questions after going through the different stages of preparing witnesses for trial and seeing their reactions in court.

What is the notion of the international criminal justice system? Whose justice are we talking about? When some of the witnesses looked around in the courtroom I got the impression they found many things rather strange. We have explained the process to them, but do they really understand? Do they identify with the justice we are talking about? How do witnesses feel about the whole process? One of the witnesses in *Muhimana*, Witness BC, wanted to ask a couple of questions of Mikaeli Muhimana. She had lost her arm. They said before the family was killed, the children were killed, and something happened to her. I don't know how she survived after bleeding profusely, but she was there, and she also wanted to know how Muhimana expected her to do the house chores given her injuries.

And I remember when I was proofing her that she now also had a child, and that she tried to hold the child with one hand and that was pathetic. Maybe she really wanted a one-to-one questioning, so that the judges would actually know how she felt, but time is of the essence in court and the rules do not permit such interactions. There are rules and there are time limitations. You don't want the defense counsel to feel that you are taking all the time, while working within the parameters of international criminal law justice.

These are some of the issues which attracted my attention and impacted me when I was part of the team which prosecuted the *Muhimana* case.

**ASKIN:** Wow, thanks for that fascinating glance inside a case. Chris, you were the senior trial attorney, as

we just discussed, in the *Uganda* case, although there have been no arrests yet, and Kony is still wreaking havoc throughout Eastern Africa.

Can you describe the peace and justice debate that often overshadows the crimes, and discuss the impact that the charges alone have already had in Uganda?

**CHUNG:** Well, every practitioner in the room has experienced this peace and justice question. For those of you in the room who are less familiar, anytime that prosecutors get involved and bring charges, inevitably what happens is people come forward and say, "Oh, we can't prosecute people now. It is going to cause all kinds of problems in terms of reconciliation and moving on to the next stage."

This was said at the time that Milošević was prosecuted. There were peace accords that were being made at Lomé places in relation to Sierra Leone. Peace and justice is sort of an internal question in international justice. How do you achieve peace and still bring accountability? Because many people see those two ends as being opposed.

In Uganda, it played out in exactly that way. There had been twenty years of war, with no progress toward peace, and as soon as justice gets involved, justice becomes kind of a scapegoat. So then people have something to look at and say, "Oh, the reason the peace process is failing is because you guys are here as prosecutors."

In Uganda, for that reason, the ICC became extremely controversial. The ICC was invited there by the Ugandan Government, and we carried out an investigation. We brought charges, but it was in the context of a large portion of the population being polled and saying, "We're against this idea, we think we can solve this problem our own way."

This was back in 2004 when we were working on the case, and in five years—five years in our field is an eternity—you can actually gain some perspective. I think what happened is as we international justice practitioners believe, justice is a part of peace. You can harmonize the two things, and you need to find a way to harmonize the two things.

In Uganda, immediately after the warrants were returned, Joseph Kony suddenly got a very strong interest in negotiating peace, and he came to the peace table in a way that he had not. He went to the BBC. I mean, there was like an LRA media campaign to have peace talks. And, unfortunately, what happened in the wake of that, he came to the table. They negotiated. It was a very long, drawn-out, almost-two-year peace process, which ultimately failed, and the ICC, the Prosecutor, Luis Moreno-Ocampo, was one of the sole people out there who, throughout the peace process, was saying, "This could be a big mistake. This could be a big game that's being played by Joseph Kony to gain time, to move his army to a safer place, to collect food from the UN," because during the peace process, what the UN does is they drop off tons of food, which then goes to maintaining the LRA.

And if I sound a little bit cynical about the process, it's because in this particular case, I am. Ultimately, the peace process did fail. Joseph Kony has now relocated to a very, very remote and difficult piece of Congo from which he is launching new attacks, enslaving more children, which I can't emphasize enough how sad this is.

I mean, the children who were abducted in Uganda were at least within their own culture and within their own language, and if they escaped, they could walk home. Now the LRA is abducting Congolese and Sudanese children who have no common language and so on. It's really extraordinary that we're in year twenty-five of the LRA.

And I think the latest strategy by AFRICOM and others is just to kill them. I think that, finally, the international community has had enough with the LRA, but they missed the opportunity for justice. Maybe between the bombing and the peace talks, there is an opportunity to bring accountability, and you find a different way to end this whole situation. And, so far, I think that opportunity has been missed in Uganda.

So I think the ICC story, in a nutshell, is it played a role. It was not *the* role, but it played a role in making serious peace talks possible, so that people now know that that road has been explored. You at least have the certainty of knowing, okay, we tried for one last time to make peace with the LRA.

The problem is that I think people ignored one of the lessons of history, which is that, many times, when you

get so preoccupied with peace, you are missing the fact that it was just never a possibility to begin with. You cannot make peace with somebody who is not interested in negotiating, and this came up with Lomé. It's not like we haven't had a hundred opportunities to learn this lesson, but it just seems that one of the things that remains an eternal obstacle in this field is this seduction of thinking that peace is possible, and there are some people who just cannot be dealt with that way. They don't become world criminals because they have this burning desire to make peace.

**ASKIN:** Lesley, the Special Court for Sierra Leone is considered by many to have the most effective outreach program of any tribunal. In four minutes or less, can you explain this outreach program and venture an opinion about why it hasn't been replicated at other courts?

**TAYLOR:** Sure. One of the really important, distinguishing characteristics of the Special Court is the fact that it sits in Freetown. It sits in the country where all of those atrocities occurred, and that is unlike every other tribunal. The only difference, of course, is that Charles Taylor is being tried in The Hague for security concerns, but, nonetheless, the seat of the Court remains in Freetown, and all of the trials, other than the Taylor trial, took place in Freetown.

So the Special Court was incredibly visible in Freetown. Freetown, as you can imagine, being in West Africa, being the capital city of a country that had experienced a decade of war, being twice occupied by



rebels, being burnt by rebels in January of '99, is somewhat chaotic—charming and wonderful—but chaotic.

So the UN was there on a mission, but then the Special Court, which is not really UN—it's kind of friends with the UN—arrived, and there is this huge compound. Walls are built, and men in blue helmets come with AK-47s to guard people, and this extraordinary building is built, and there are sheds, or demountable offices. And, suddenly, everyone is just visible.

And one of the real issues that's always in play in international justice is the amount of money that is spent on it. At the time that I was at the Court, which was 2004, 2005, Sierra Leone was statistically the poorest country on earth. There was no electricity, no running water. There is no garbage collection, no paved roads, no postage system. People died regularly from malaria and typhoid. It had the highest infant mortality rate in the world, which consequently affected the average life expectancy, which at the time was thirty-seven. So there are millions and millions and millions of dollars being spent on the Special Court, and you're surrounded by people dying on the street.

So what do you do, and how do you explain how important it is, the work that the Court does? And all organs of the Court were incredibly involved in the outreach program, and outreach was to explain what was going on but also to hear feedback about what the Sierra Leoneans thought about what was going on.

Radio remains the most important medium in Africa. When you don't have electricity, you can have a battery-operated radio. The television doesn't exist. So radio programs were created in the various languages. There are about fourteen different languages in Sierra Leone. English is the official language of the country, but Krio is the most commonly spoken dialect. There are also a number of regional languages, and court proceedings were often taped and then explained in Krio. Every single organ of the Court also had town halls. So the Prosecutor, the Registrar, the head of the defense office would go out into all corners of Sierra Leone and sit under trees and sit in school buildings and say this is who we are, this is what we are doing, this is what we are trying to achieve for Sierra Leone, this is why it's important.

And it was a very, very interesting and very, very humbling experience to be involved in that, and some of the questions were really interesting. People were very, very connected with what the Special Court was trying to achieve and who had been indicted.

Although he was indicted, Sam Bockarie who was the commander of the RUF, the Revolutionary United Front, was killed in Liberia before he could be brought to the Special Court. His jungle name was "Mosquito" in the local language. And if you said "Mosquito" to people, you could actually see fear pass across their face. He was savage beyond belief, and people were really pleased that Bockarie had been indicted, disappointed that he hadn't lived to see justice, but it was really important to be able to connect with the population to

explain, well, we can't do anything about Bockarie, but this is what we are doing generally.

And so being in country was both a blessing and a really great challenge. One of the prosecutors yesterday was talking about the difficulty of sometimes dealing with people's expectations—he mentioned the woman who constantly saw the man who had murdered her family at the market. I've had a similar experience, and I'd be very surprised if most people who have worked in an international court haven't.

Very soon after I arrived in Freetown, I went on one of these outreach discussions to Makeni, which is in the middle of the country and was an RUF-held town for most of the conflict. A woman came up to me, and she said, "I know the man who raped me. He lives in the next village. What are you going to do about it?" There is no answer to that.

You can explain theories of international justice until you are blue in the face, but it's not going to help that woman, and you have a duty to explain why you're there, and you have a duty to explain the limit of what you can do, and I think, fundamentally, you have a duty to be honest. So I had to say, "I am very, very sorry for your pain, but I can't help you."

So outreach is incredibly important, and I think the Sierra Leonean model will probably be adopted more and more in trying to work with the local population and try and resolve—well, I don't know if it's possible to resolve—but try and deal with some of the difficulties. There is a great juxtaposition between the spaceship of

international justice, which lands from out of nowhere, and engaging people and having the local population understand that the function is very important, but it's limited, and to try and increase capacity.

And it wasn't just dealing in the village level in the country. In the Office of the Prosecutor, we made a lot of attempts to try and capacity-build. You can imagine that in a country where there's been ten years of war, things like the law school fell away—consider the difficulty of retaining Sierra Leonean lawyers, the law school, its standards, and so on. The University of Sierra Leone was once the jewel of West Africa; indeed, people are often reminded that Tony Blair's father taught politics at the University of Sierra Leone.

The lawyers who were from Commonwealth countries—the Australians, the Canadians, the Ghanaians, and so forth—we all shared a very common legal language with Sierra Leone because it is also a Commonwealth country. So we tried to say we can come to the university, we can help teach not international law but the very building blocks of law: contracts, torts, criminal law, constitutional law, and so on. That was a very difficult road, but we seemed to have more success with very young Sierra Leonean lawyers who had just qualified.

We had a legal internship program where for a year we invited four young lawyers to come and work in the Office of the Prosecutor, so that we could give some skills, just basic legal skills that weren't around to be learned anywhere else. And part of the deal was that

they got a laptop computer at the end of it. There were all sorts of ways that the outreach worked—not always perfectly.

**ASKIN:** Renifa, the ICTR has won rave reviews and scathing criticism for its successes and failures in prosecuting gender crimes. It was the first court that recognized rape as an instrument of genocide and rape as a crime against humanity, but now fifteen years later, there's only been, I believe, seven convictions for rape. There's been more acquittals and dropped charges than there have been convictions. Within three minutes, can you suggest ways, from your perspective, that the successes have been maximized and the failures minimized by the Tribunal?

**MADENGA:** Some of the successes have been maximized. For example, if we look at *Akayesu* and the broad definition of rape, the genocide part of it, it has been very influential in terms of the input in advancing gender issues. Indeed, the *Musema* case actually adopted, more or less, the same definition and *Gacumbitsi* clarified and modified it still maintaining that where there are coercive circumstances there cannot be consent.

It seems like the definition has also assisted in the benchmarking definitions we now get in the International Criminal Court Statute, because if you look in terms of the quality of the *Akayesu* judgment, it not only defined rape in a very broad way, but it also highlighted the gender dimension which was lacking previously in international law. When you look at rape during conflicts we are looking also at coercive

circumstances which negate consent as explained by the *Gacumbitsi* judgment. We are talking of crimes against humanity, genocide, and war crimes, all involving aggression, invasion and, in essence, issues of power and control.

The ICTR has made lasting contributions in terms of influencing other tribunals to move the gender agenda and it is hoped that any loopholes will be adequately filled in by the ICC and other tribunals which learn from both our strengths and shortcomings and we have both. The ICTR has put on record progressive legal notions, and specific references have been made in many subsequent cases in different tribunals.

The ICTR has dealt with the issue of rape and command responsibility detailing issues relating to superior subordinate relationship, the effective control, the knowledge and ability to punish.

There has been constructive criticism that more could be done, and I absolutely agree that we can actually do better, and we are trying to do better, but in that context, I want to highlight the position of the prosecutors who have been with the ICTR. Each made a significant contribution to the international criminal justice system.

We started with Prosecutor Richard Goldstone who brought in a rich human rights approach. He was coming from South Africa where he was a very active member in fighting apartheid. When he came, the pronouncements were about pursuing prosecution of

sexual offenses investigation, and afterwards Madam Prosecutor, Louise Arbour, took over. It is befitting that we are celebrating women in international criminal law at these Dialogs. She also had a human and women rights background from her work in Canada. She had done amazing work there. She proceeded to instill confidence by actually going back and trying to amend some of the indictments which did not contain rape.

Taking over from Louise was Prosecutor Carla del Ponte. She also noted the plight of victims and actually made pronouncements, some of them very public, that, in fact, the Office is actually looking at ways of addressing that problem.

And in that view, there were also amendments. With respect to constructive criticism, there was this thing that some of the prosecutors have not been caring enough and I just want to show that, in fact, a lot of work was actually happening, and there were a lot of investigations that were happening. There was a lot of training which was happening within the Office of the Prosecutor. I know Dr. Askin has been one of the legal advisors. Some prominent lawyers who worked in an advisory role included Madam Fatou Bensouda, the current ICC Deputy Prosecutor who is present, and activists like Patricia Sellers. These are dynamic women who advised different prosecutors at different levels.

Coming to the current Prosecutor, Jallow, it will be noted that he also has a human rights background. He is actually also focused on the prosecutions and investigations and also considered that we have not been doing very well. The reason why, in 2007, he actually

set up a committee to investigate obstacles the Office faced in prosecuting sexual offenses and rape. I know we have been prosecuting rape, but the turnout of the convictions are not so many though there has been a lot of judicial activism. If and where we did not charge rape, you will find that the dictates or pronouncements from the judgments sometimes indicated that if we had followed up, we could have ended up with more investigations and prosecutions in cases like *Kayishema* and *Ruzindana*. It has been a learning process.

Much has been done; more can still be done in my view. My consolation is that where we have failed, it can only be a failure if the other tribunals are not going to learn from that. We have learned the lessons. We have shared them with so many of the tribunals during colloquiums. We actually admitted that initially there were difficulties investigating rape. Then we tried to look into the issue to see how we can go about it. Now when people talk of celebrations of what other tribunals are doing, I think its part of the legacy that people have actually learned the lessons from where we may have made unintentional mistakes.

When I came into the Office of the Prosecutor of the ICTR, I realized that people were working very hard. Everyone was trying to do the best they could, but given the complex cases of massive rape and the like, sometimes the best from even the finest practitioners is not enough. The situation demands more than that. The situation demands a lot of collaborative efforts from everywhere. It's not only the Office of the Prosecutor; it is about all stake holders concerned. It's about acting in



a gender sensitive way to make the witnesses feel secure and empowered.

So the Prosecutor came out with a variety of strategies, and people are coming from the witness section, people are coming from security, people are coming from the judiciary, people are coming from the NGOs to see the best way to move forward.

I still remember a process we went through to develop a database through academic collaboration. So I think from the learned lessons, we have tried—we can do better, though.

**ASKIN:** Christine, the ICC prosecutors brought charges against a sitting head of state, Sudanese President Omar al-Bashir, and this has provoked an outcry by many in Africa and a backlash against the Court.

Some states have even discussed unratifying the ICC Statute. In two and a half minutes or less, can you explain the hostility?

**CHUNG:** Well, it's related to what I was discussing before, which is the peace and justice problem.

You know, Sudan is another situation where there were no options. Back in 2004, when the Security Council referred the case to the ICC, it was because they had no cards left to play. Bashir and his military were systematically exterminating, I would say committing genocide against the Darfur population, and there was no

pressure point. So the pressure point they found was the ICC.

Then a couple years down the road, the indictments start coming, and everybody looks around and starts getting very nervous that, oh, well, now we need to make peace with these guys—it looks like it is coming to an end, and maybe it is not so bad. So 200,000 people die, and we have no enforcement of the arrest warrants, and it is a sad, I think, failure to uphold the promise that was made after Rwanda of “never again” because, in fact, it has happened again.

As to the hostility to the Court—you know, it's this strange dynamic where Africa was a huge supporter of the ICC, and I think over half of the African countries belong to the ICC. And now you have certain countries led by certain other countries who are saying, "Well, we don't want the ICC here. We see this as imperialism, and we want the ICC out. We are going to unsign the Rome Statute."

And, listen, there are a lot of things you can say about that, but I think the main thing that I find disappointing about that is that you have leaders in Africa or putative leaders in Africa who are advocating for impunity. There's no way around it. They are not really representing victims or populations. They are representing their own interest.

One interesting evolution is that at the beginning, when the Sudanese were resisting the ICC, they were saying, "We'll do this ourselves." Now, that's okay.

Even under the ICC Statute, that's okay. If you really want to handle your problems at home, that is what everybody agrees, I think, is the best solution. But what it has evolved into is we want the ICC out, we want the UN Security Council out, and we basically intend to do nothing, we are going to ignore the fact that 200,000 people died. And that is not going to be a way forward for Africa. It is not going to be a way forward for the rest of the world, and I think that's really what there has to be a pushback against.

I would love it if there were ICC prosecutions in Darfur against the Sudanese Government, but if there were a true solution to be found, either regionally or domestically, that would also be totally acceptable. I think what we should not accept as a community is a reversion back to the old system of impunity, a nice house, a nice villa in a country where nobody will come and get me. That has to be Africa's past, and it has to be the global community's past.

**ASKIN:** I have several more questions but we're nearly out of time, so I'll just ask one final question of each of you. It is a question I am asked pretty regularly—the sort of "how do you sleep at night" question.

When you have gone to the field to investigate horrific atrocities and you are faced with unspeakable horrors, amputated limbs, mass graves, exterminations, gang rapes, and additionally, of course, enormous poverty and starvation and hardship, how do you manage to face such suffering and misery for days, weeks, even years at a time?

**TAYLOR:** You just do. It can be incredibly confronting and incredibly difficult.

When I was in Sierra Leone, it's almost as though you're just so busy doing things that the privilege of reflection is not one that is given to you. There are very practical mechanisms.

I think one of David Crane's great achievements in the early years of the Court was to establish a sense of your families are all back at home, but while you are here, we are the family. So there was a great deal of emphasis placed on making sure that you look after people on your team, and that's what happened. And some people cope well with certain things; other people cope well with other things.

With respect to my own response to it, I am probably more intense now that I am back in my garden at home. The juxtaposition is far greater, and I know that crimes that I saw the result of are occurring ever minute, and that you're powerless to deal with it.

When I get very, very upset about things—and that does happen sometimes—I'm always reminded of a witness that I called in one trial. He is known to history as Witness TF1074. I know his name, but I cannot tell you what it is. I think of him by his name.

His story was awful, but it wasn't unusual. What was unusual was the dignity with which he told his story. Very briefly—he was with his wife and his four children, they were in the bush. They had been hiding in the bush

from the rebels for some months, as a great many people did. They heard it through people that they met and the grapevine and the bush telegraph that Koidu Town, which was a town that changed hands a lot in the fighting, was now safe, and ECOMOG, which was a good guys force, had retaken Koidu Town.

So they decided to walk towards Koidu Town, and in a village just near Koidu Town, they walked in and too late realized that rebels were still there. And he and his wife were lined up along with other adults. There were three lines. The children were all made to sit on the ground. The first line, which was men and women, were taken and put in a building that had a thatched roof. The door was barred. It was set alight, and everyone was made to stand and listen to the people inside die.

A rebel came. A rebel commander came, and a number of women were chosen, including the wife of this man. They were gang-raped in front of the children and the remaining adults. This man was forced to count out loud the number of men who raped his wife. He got to eight before the last rebel stabbed her and killed her, and he and his children watched her die. Another rebel came with a sack, emptied it on the ground, and there were machetes and knives and so on.

The third line, that is, the rear line, were taken off with people with these machetes and knives. This man was standing in the remaining line, and they were told that they were all to be amputated. He was first, and his arm was stretched out. It was a child who was going to amputate him, as often happened in Sierra Leone. At the last minute, he withdraw his arm, and for this trouble,

the blade was brought down across his shoulders. He still has the scar. His arm was then amputated. He had a short-sleeve amputation, and he stumbled off.

And his children took him away, and miraculously, he survived. And he came to Court, and he told this story. He broke down in tears when he described the gang rape of his wife, so much so that the Court adjourned.

And I walked outside, and I was speaking to the defense counsel for one of the accused, and he and I were both in tears. It was the first time that either of us had ever near-cried in Court and certainly cried outside the door.

We went back inside, and he continued with the story, and after he described his amputation, he stopped, and he said—at that point, he said, "Thanks be to God for this is how he made me to be." And whenever anything is just so difficult, I think about the unspeakable dignity of that man and the courage that he had, and somehow it helps.

**CHUNG:** I think your question is unanswerable for most prosecutors, maybe because we are already a self-selected group of people who, I don't think, lose sleep at night—and it's not that we don't empathize in all the right ways with our victims, but you have some kind of defense mechanism that kicks in. And I don't think that you allow yourself to feel it in that way because, if you did, you wouldn't be able to do your job.

I think what I find about being in the field is that you experience so many things that are really beyond imagining, but I would say that most of us love being in the field and talking to victims. That's what makes the job real. I had the privilege of going to Uganda many times and the Congo many times, and I would ten times rather be there than at my desk in The Hague because, when you're out with the victims, you understand why you do what you do.

And the other thing I think is if you ever wanted an affirmation that human beings all over the world are more the same than they are different, go out and talk to your victims because you will share tears with them. You will share laughter with them. You will find strange and funny things that you have in common that you never would have guessed that you have in common.

And so I think most of us would say that as awful as it is to understand the enormity of what we're confronting, when you're sitting with those human beings, who are your sisters and brothers, I think the most fundamental thing you share is we all want the same thing for the next generation—we all share the same vision. That's what we want. And that part of the job is actually the best part.

**ASKIN:** Thanks Chris and Leslie for sharing your personal insights. Renifa?

**MADENGA:** Having worked as a regional magistrate presiding over rape cases in Zimbabwe, I thought I could professionally detach myself from most of the cases I handled. The Rwandan experience is

different. I was disillusioned because the brutality in Rwanda, especially when it comes to children, is horrific. When I read statements of six or seven year old children being raped and having objects put in their genitals, it became very difficult not to feel the trauma in a significant way. I am not easily shocked, but the brutality and the widespread and systematic nature of the rapes shocked me.

What keeps me going however is the fact that this job also gives hope. When the mother comes and tells me that she has forgiven the perpetrator who gang raped and killed her child, when she actually says I have picked up all the pieces and I am forging ahead with life, I have hope, then I question myself who am I to stand here hopelessly. I am not part of the problem. If I am going to be part of the solution, I should not be helpless because the people directly affected, they have hope.

So what gives me hope in this job is their resilience. Someone has committed genocide. It's not me. I am not part of the problem, but I am here as part of the solution, not that I can do anything. It has already happened, but I think that it is a calling. It is a ministry. I still stay in that job. I am not going to be looking for any other job. To me, that's a contribution. I am simply doing the best I can, nothing less and nothing else.

So I look in the mirror, and I just smile and love my work. I encourage myself and say "You are a very useful woman. You are contributing to humanity." That's how I survive.



**ASKIN:** This has been such a rich and informative session and I'm so grateful for your willingness to share your individual experiences and insights with us. Female prosecutors do make a difference and these three women prosecutors have clearly left their own mark on their cases and on the courts. Thanks so very much.

# Conclusion

## Conclusion

**Elizabeth Andersen\***

Each year, the International Humanitarian Law Dialogs offer a rare and special opportunity to honor efforts at accountability stretching back to Nuremberg and unfolding yet today, to take stock of the international criminal law field, and to chart a course for the future. As reflected in these pages, the 2009 gathering at the Chautauqua Institution in upstate New York was no exception.

The Chautauqua Institution is both beautiful and remote. Cell phones roam hopelessly. Blackberries draw blanks. The tranquil setting gives the prosecutors a break from their demanding work and fosters a tone of frank reflection on the accountability project. It also affords an opportunity to plumb the valuable archives of the nearby Jackson Center, chronicling the remarkable career of Justice Robert H. Jackson, including his seminal contributions to the field of international criminal law at Nuremberg. Indeed, the conscious reflection on a legacy dating back to Nuremberg, and the participation of Nuremberg prosecutors themselves, distinguishes the Dialogs from many other international criminal law conferences. This historical perspective simultaneously highlights the remarkable distance traveled since World War II and renews one's commitment—even impatience—to see that legacy honored and the march of justice drive forward.

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\* Executive Director & Executive Vice President, American Society of International Law.

The theme of the 2009 gathering, “Women in International Criminal Law,” provided a valuable lens through which to assess our field—focusing our attention on its impact on women, who, Judge Wald reminded us, make up the tribunals’ largest group of stakeholders, constituting the vast majority of victims and witnesses in every theater. We cast our eyes back to Nuremberg, remembering the contributions of Nuremberg prosecutors William Caming, Benjamin Ferencz, Whitney Harris, and the late Henry King. With guidance from Professors John Q. Barrett and Diane Marie Amann, we also recalled the impact of Katherine B. Fite and the other women who were on the male-dominated scene at Nuremberg. We learned that at Nuremberg, women were few and far-between, and that while valuable, their contributions did not extend to bringing a gender orientation to the proceedings. The jurisprudence of Nuremberg left rape and sexual violence largely to one side, considered an unfortunate but unavoidable consequence of war for which there was little hope of accountability.

Fast forward to Chautauqua 2009, and the progress detailed was impressive: Prosecutor Alphonse Van of the International Criminal Tribunal for Rwanda described how the unfolding evidence in the *Akayesu* trial compelled amended charges and eventually the first conviction for rape as an element of genocide. David Crane and Joseph Kamara told how the Special Court for Sierra Leone took the cause further, obtaining the first convictions for forced marriage. And all of the prosecutors spoke of the challenges—and successes—they had had in obtaining convictions of superior

responsibility for rape and sexual violence. We learned, too, of the important contributions made by women who today serve on the front lines investigating, prosecuting, and judging these cases—how their particular sensitivity to the victimization of women has strengthened the accountability effort. And Prosecutor Bensouda of the International Criminal Court highlighted the many ways in which the lessons learned at the other tribunals in seeking accountability for women’s victimization have strengthened the Statute of the Court, its staffing, policies, and practices, to better serve its women constituents.

Yet, the 2009 Dialogs and these pages also reflect an urgent pending agenda, work yet to be done. Too often, culture, stigma, and fear prevent women from coming forward and seeking justice for horrible crimes. Joseph Kamara’s chilling account of one defendant’s simple, effective cross examination of a female victim (“You know me, and I know you.”) said it all. Against this backdrop, it is not surprising that the length of time to gather evidence of sex crimes has doomed some charges, and that those against leaders who order the crimes have proven most difficult. And even when the tribunals have been able to hold senior leaders responsible for sexual violence, too often the proceedings and verdicts are rendered in distant courtrooms, misunderstood within victim communities, and do little to change their lives. Significantly, the tribunals lack the capacity to try the foot-soldiers—the individual perpetrators—and a victim can be left living the nightmare of confronting her rapist again and again, on the street, at the market, in the next village. And, as Judge Wald reminded us, before we congratulate ourselves for achieving accountability for

sexual violence committed during an armed conflict, let us not forget the accountability gap that remains for the very same crimes when committed during peacetime. She challenged us to envision a crimes against humanity jurisprudence that could fill this gap and begin to build a rule of law culture that guarantees women security, rights, and opportunity.

It is a tall order, but it is one that the ICC, with its enhanced role for victims, Victims Trust Fund, and complementarity regime, is particularly well suited to meet. These topics were appropriately a focus of the first ICC Review Conference in Kampala. And the post-Kampala agenda for the further development of “positive complementarity” and the strengthening of the Court’s impact in affected communities provides a benchmark against which future Dialogs can measure progress.

In the meantime, we can only be grateful for the heroic work of the many women who either participated in or were honored at the 2009 Dialogs. Day in, day out, they put themselves in harms way to seek accountability, and case by case they make the world a more just place. The world owes a great debt to women like Natasa Kandic, Alison Des Forges, and Sabahate Tolaj, who brave untold dangers to document violence and bring perpetrators to justice, because, as Judge Marilyn Kaman recalled Tolaj explaining, “This is what I do. . . . And it is the right thing to do.” The 2009 Dialogs and this volume are a small token of our gratitude for their contributions.

# Appendices

## **Appendix I**

### **The Third Chautauqua Declaration**

**September 1, 2009**

*In the spirit of humanity and peace the assembled international prosecutors and their representatives here at the Chautauqua Institution...*

Recognizing the continuing need for justice and the rule of law as a cornerstone to international security, and cognizant of the legacy of all those who preceded us at Nuremberg and elsewhere;

Taking note of the 60<sup>th</sup> Anniversary of the Geneva Conventions of 1949 and its principles that maintain the rule of law on the battlefield;

Honor the life of our colleague and friend Henry T. King, Jr. a prosecutor of the International Military Tribunal at Nuremberg who passed away in May of this year;

Commend his drive and force in ensuring that the spirit of Nuremberg continues;

Recognizing the role of women in the history and development of modern international criminal law;

Honor their sacrifice, their leadership and drive over the past fifty years in forging an international system of justice;

Commend the women who labor every day around



the world in relative obscurity upholding the spirit of Nuremberg and the rule of law;

Taking note of the recognition in international criminal law of sexual and gender violence as an instrument of war, which can constitute war crimes, crimes against humanity, and genocide;

Honor the life of Alison Des Forges and recognize her life's work in seeking justice for the victims of the Rwanda Genocide;

Now do solemnly declare and call upon the international community to:

*Keep the spirit of the Nuremberg Principles alive by:*

Ensuring that the laws of armed conflict remain a cornerstone of maintaining protections of combatants, civilians, and non-combatants alike;

Paying particular attention to the plight of women and children found in places of unrest and conflict to ensure that they are especially cared for and kept out of the conflict;

Ensuring that girls and women in conflict areas do not fall victims to rape and other forms of sexual violence;

Investigating, prosecuting, or handing over to an appropriate judicial body those who violate international

criminal law to ensure accountability of all persons including sitting heads of state;

Supporting the various tribunals and courts in their work to maintain the rule of law at both the international and domestic level;

Working with regional political bodies to ensure that the rule of law is maintained and that those who are found to be in violation of international law be handed over for a fair and open trial to the international tribunal or court that seeks their person;

*Signed in Mutual Witness:*

Norman Farrell  
International Criminal  
Tribunal for the former  
Yugoslavia

Henry T. King (in  
absentia/memoriam)  
International Military  
Tribunal, Nuremberg

David M. Crane  
Special Court for Sierra  
Leone

Fatou Bensouda  
International Criminal  
Court

H. William Caming  
International Military  
Tribunal, Nuremberg

Joseph Kamara  
Special Court for Sierra  
Leone

Alphonse Van  
International Criminal  
Tribunal for Rwanda

## **Appendix II**

### **Biographies of the Prosecutors and Participants**

#### **Diane Marie Amann**

Diane Marie Amann is Professor of Law at University of California at Davis School of Law, and Director of the California International Law Center at King Hall. She earned a Dr.h.c. in Law from Universiteit Utrecht, a J.D. from Northwestern University School of Law, an M.A. in Political Science from UCLA, and a B.S. in Journalism from the University of Illinois. She was a law clerk for U.S. District Court Judge Prentice H. Marshall in Chicago and for U.S. Supreme Court Justice John Paul Stevens. Ms Amann has been a Professeur Invitée at the Faculté de droit, Université de Paris, and a Visiting Professor of Law at UCLA, the University of California-Berkeley, and the Irish Centre for Human Rights, National University Ireland-Galway.

#### **Elizabeth Andersen**

Elizabeth Andersen is Executive Director and Executive Vice President of the American Society of International Law. Ms. Andersen first joined the Society in 1995 and became its Executive Director in October 2006. Most recently she has served as the Executive Director of the American Bar Association's Central European and Eurasian Law Initiative (ABA CEELI), where she had worked since 2003. Prior to her position at the ABA CEELI, Andersen was the Executive Director of Human Rights Watch's Europe and Central

Asia Division, where she had also worked as a researcher and director of advocacy for a total of eight years. Before joining Human Rights Watch, she served as Legal Assistant to Judge Georges Abi-Saab of the International Criminal Tribunal for the former Yugoslavia, and as a law clerk to Judge Kimba M. Wood of the U.S. District Court of the Southern District of New York. Andersen is a graduate of Yale Law School, the Woodrow Wilson School of Public and International Affairs at Princeton University, and Williams College.

### **Kelly Askin**

Kelly Dawn Askin is Senior Legal Officer, International Justice, of the Open Society Justice Initiative. She is a legal consultant to the UN and other world agencies in the areas of international humanitarian and criminal law. From 2004 to 2005, she was a Fulbright New Century Scholar on the Global Empowerment of Women and a Fellow at Yale Law School. She was a visiting scholar at the University of Notre Dame, American University's Washington College of Law, Harvard, and Yale. She also served as Executive Director of the International Criminal Justice Institute and American University's War Crimes Research Office and as a legal advisor to the judges of the International Criminal Tribunal for the former Yugoslavia and Rwanda. She is the author of *War Crimes against Women: Prosecution in International War Crimes Tribunals* (1997) and co-editor of the three-volume treatise *Women and International Human Rights Law* (1999, 2001, and 2002).

### **John Q. Barrett**

John Q. Barrett is a Professor of Law at St. John's University in New York City, where he teaches constitutional law, criminal procedure, and legal history. Professor Barrett is the Elizabeth S. Lenna Fellow at the Robert H. Jackson Center in Jamestown, New York. He has in the past been named a "Professor of the Year" by St. John's law students and has received a Faculty Outstanding Achievement Medal from the university. Professor Barrett is a graduate of Georgetown University (1983) and Harvard Law School (1986). Before joining the St. John's faculty, he was counselor during 1994 to 1995 to U.S. Department of Justice Inspector General Michael R. Bromwich. From 1988 to 1993, Barrett was Associate Counsel in the Office of Independent Counsel Lawrence E. Walsh (Iran/Contra). From 1986 to 1988, Barrett served as a law clerk to Judge A. Leon Higginbotham, Jr. of the United States Court of Appeals for the Third Circuit in Philadelphia.

### **Fatou Bensouda**

Fatou Bensouda is a Gambian lawyer and has been a Deputy Prosecutor of the International Criminal Court (ICC) since 2004. Bensouda was a government prosecutor in The Gambia and rose to the level of Solicitor General of The Gambia. In the late 1990s, she became the Attorney General and Minister of Justice of the country. In 2000, Bensouda became a legal advisor and trial lawyer at the International Criminal Tribunal for Rwanda in Arusha, Tanzania. In 2004, she was elected by the ICC's Assembly of States Parties to be the

Deputy Prosecutor in charge of prosecutions at the ICC. She acts under Luis Moreno-Ocampo, the Prosecutor of the ICC. Bensouda had been a member of the delegation from The Gambia that assisted in negotiating the Rome Statute of the ICC in 1998. Bensouda has a master's degree in international maritime law and the law of the sea; she is the first expert in maritime law from The Gambia.

### **H. William Caming**

H. William Caming earned his Bachelor's degree in Arts from New York University, his Master's Degree in Labor Law from New York University Law School, and his Doctorate from Harvard. He then joined the United States Air Force and spent twenty-seven months in China and Berlin and returned home after the surrender of Japan. He was asked by Robert H. Jackson to be a prosecutor in the Nuremberg trials. Caming was assigned to case number 11, the Ministries Case. Caming was the chief prosecutor of the trial, which he described as the "longest and last of the Nuremberg trials...because it incorporated several trials into one."

### **Christine Chung**

Christine Chung spent several years in The Hague, working as a Senior Trial Attorney at the International Criminal Court ("ICC"). She investigated and prosecuted perpetrators of war crimes and crimes against humanity in the Darfur region of Sudan, in Uganda, and

in the Democratic Republic of the Congo. Prior to her ICC appointment, Chung served as a federal prosecutor at the U.S. Attorney's Office in Manhattan, where she prosecuted gangs, organized crime, white-collar fraud, and terrorism cases. She is a visiting lecturer and senior fellow at the Schell Center for International Human Rights at Yale Law School and a Partner in the New York office of Quinn Emanuel LLP. Chung is a graduate of Yale College and Harvard Law School.

### **David M. Crane**

David M. Crane was the Chief Prosecutor of the Special Court for Sierra Leone from April 2002 until July 15, 2005. He was appointed to that position by the Secretary General of the United Nations, Kofi Annan, on April 19, 2002. Crane spent thirty years working for the United States federal government. Posts he has held include Director of the Office of Intelligence Review, Assistant General Counsel of the Defense Intelligence Agency, and the Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate Generals School. Crane has a law degree from Syracuse University College of Law and a MA in African Studies from Ohio University. For his service to humanity, Case Western Reserve University in Ohio awarded him an honorary Doctor of Laws degree in May 2008. Crane was appointed a distinguished professor of practice at Syracuse University College of Law in the summer of 2006. He teaches international criminal law, international law, and national security law as well as the law of armed conflict.

### **Norman Farrell**

Norman Farrell is Deputy Prosecutor of the International Tribunal for the former Yugoslavia (ICTY). Norman Farrell joined the ICTY's Office of the Prosecutor in 1999 as Appeals Counsel for the Offices of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). In 2002, he was appointed Senior Appeals Counsel and Head of the Appeals Section in the Office of the Prosecutor of both Tribunals. In 2005, Farrell was appointed the Principal Legal Officer in ICTY's Office of the Prosecutor. Before joining the Tribunal, Farrell worked for the International Committee of the Red Cross (ICRC). A native of Canada, Farrell holds university degrees from Canada, as well as a Master of Laws degree from Columbia University in New York.

### **Siri Frigaard**

Siri Frigaard has been the chief public prosecutor and director of the Norwegian National Authority for Prosecution of Organized and Other Serious Crime since August 2005. Prior to this appointment, Ms. Frigaard was the deputy director of the National Criminal Investigation Service (NCIS) in Norway. She has been a public prosecutor in Norway since 1985, and chief prosecutor and deputy director for the regional prosecution office in Oslo since 1993. She has also served as acting director of this office. She worked as an assistant Chief of Police and prosecutor with the Oslo Police Department for about six years, primarily in



charge of the investigation of organized drug trafficking. From January 2002 until May 2003 she was deputy general prosecutor for serious crimes in East Timor, in charge of the investigation and prosecution of the crimes committed in 1999. She also served as a prosecutor and special legal adviser to the general prosecutor of Albania from June 1999 to October 2001.

### **Marilyn J. Kaman**

Marilyn Kaman received her law degree from the University of Wisconsin, her graduate degree from the University of Chicago (Master of Arts, Teaching-Russian, French), and her Bachelor of Arts Degree from Vanderbilt University. Since 1990, she has been a judge with the Hennepin County District Court. In November 2002, Judge Kaman was one of the first four American jurists to be selected by the United Nations to serve as an international judge abroad for that organization. Judge Kaman's mission assignment was in Kosovo and involved hearing cases of war crimes, organized crime, ethnically-motivated disputes, and trafficking of human beings. She is a member of the American Bar Association, serves as Vice-Chair of the United Nations International Institutions Committee, and is on the Editorial Board for International Law News.

### **Joseph Kamara**

Mr. Joseph Fitzgerald Kamara was born in Makeni, Bombali District, Sierra Leone. In 1985 he was admitted to the Faculty of Law, Fourah Bay College, University

of Sierra Leone. In January 2004, Mr. J.F. Kamara joined the Special Court and a year later given the task to lead the CDF Prosecution Team. In August of 2008, Mr. J.F. Kamara was appointed by the Government of Sierra Leone and approved by the UN Secretary-General to hold the position of Deputy Prosecutor of the Special Court. He is the first Sierra Leonean to hold that office. Mr. J.F. Kamara is a professor of International Criminal Procedure and Practice at the Sierra Leone Law School.

### **Renifa Madenga**

Renifa Madenga is currently an Appeals Counsel in the Office of the Prosecutor with the United Nations International Criminal Tribunal for Rwanda where she has worked as a Case Manager, Assistant Trial Attorney, Trial Attorney, and Legal advisor. Before that, she was the Executive Director of the Musasa Project, an NGO focusing on gender violence in Zimbabwe. Renifa is a current PhD candidate with the Centre for Women's Law at the University of Zimbabwe and her study focuses on using the voices of survivors of rape during the conflict in Rwanda to interrogate the efficacy of the international criminal justice system. Renifa obtained a Masters in Women's Law, Bachelor in Law (B.L.), and an Honors degree in Law (LLM) from the University of Zimbabwe. She also has a diploma in The Equal Status and Human Rights of Women from the Roul Wallenberg Institute, University of Lund, Sweden and in Women's Law from the University of Zimbabwe.

### **Lucy F. Reed**

Lucy F. Reed, partner at Freshfields Bruckhaus Deringer, LLP, is a specialist in international commercial arbitration, particularly in investment treaty disputes. As an arbitrator, she has served on the Eritrea-Ethiopia Claims Commission and as co-director of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (the Holocaust tribunal). Ms. Reed is one of five attorneys nationwide to be named a tier one international arbitration practitioner by Chambers USA (2006). In 2001, she lectured on private international law at The Hague Academy of International Law. Ms. Reed was the first general counsel of the Korean Peninsula Energy Development Organization and, while with the US State Department, was the U.S. agent to the Iran-US Claims Tribunal and deputy assistant legal adviser for international claims and investment disputes. She received her BA magna cum laude from Brown University and her JD from the University of Chicago Law School (1977), where she was a member of the Law Review.

### **Susana SáCouto**

Susana SáCouto is a Professorial Lecturer-in-Residence at American University's Washington College of Law (WCL). She is also the Director of the War Crimes Research Office (WCRO) and Director of WCL's Summer Law Program in The Hague. In addition, Ms. SáCouto has served as a faculty member at the Summer Program of WCL's Academy on Human Rights and Humanitarian Law, where she co-taught a course on international justice for violations of human

rights and humanitarian law. Prior to joining the WCRO, Ms. SáCouto directed the Legal Services Program at Women Empowered against Violence (WEAVE), clerked for the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY), and worked with the Center for Human Rights Legal Action in Guatemala. She previously served as co-chair of the Women's International Law Interest Group of the American Society for International Law (2006-2009 term), and was recently awarded The Women's Law Center 22nd Annual Dorothy Beatty Memorial Award for her significant contributions to women's rights. From 1999 to 2002, she co-chaired the Immigration and Human Rights Committee of the DC Bar's International Law Section.

### **Leila Nadya Sadat**

Professor Sadat is the Henry H. Oberschelp Professor of Law at the Washington University School of Law and the Director of the Whitney R. Harris World Law Institute. From May 2001 until September 2003, Sadat served on the nine-member U.S. Commission for International Religious Freedom. Sadat teaches international, comparative, and U.S. law courses and directs the Law School's highly successful International Moot Court program. She also founded the Law School's "Summer Institute for Global Justice," which brings together U.S. and foreign law students in a summer course of study held at the University of Utrecht. Sadat received her B.A. from Douglass

College, her J.D. from Tulane Law School, and holds graduate law degrees from Columbia University School of Law and the University of Paris I – Sorbonne. Sadat practiced international business law for several years in Paris, France, prior to entering law teaching, and is admitted to the bar in France and in the United States.

### **Michael P. Scharf**

Michael P. Scharf is Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law and Director of the Summer Institute for Global Justice. Professor Scharf is also co-founder of the Public International Law & Policy Group (PILPG). In February 2005, Scharf and the PILPG were nominated for the Nobel Peace Prize for the work they have done to help in the prosecution of major war criminals. In 2002, Scharf established the War Crimes Research Office at Case Western Reserve University School of Law, which provides research assistance to the Prosecutors of the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the International Criminal Court, the Cambodia Genocide Tribunal, and the Iraqi High Tribunal on issues pending before those international tribunals. During the first Bush and Clinton Administrations, Scharf served in the Office of the Legal Adviser of the U.S. Department of State in the positions of Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations Human Rights Commission. In 2006, he led the first training session for the investigative judges and prosecutors of the newly established Cambodia Tribunal.

### **Lesley Taylor**

Lesley Taylor holds a Bachelor of Laws with Honors from the Australian National University and a Master of Laws from the University of Melbourne. She is a barrister of the Victorian Bar (Australia) specializing in complex criminal prosecutions for the Australian Government. Taylor previously worked as a Senior Trial Attorney with the Office of the Prosecutor, Special Court for Sierra Leone. She was also the Senior Legal Advisor to the Special Independent Commission of Inquiry into Timor-Leste conducted under the auspices of the Office of the High Commissioner for Human Rights. Taylor is a Vincent Fairfax Fellow at the St. James Ethics Centre, a non-for-profit organization which provides a non-judgmental forum for the promotion and exploration of ethics.

### **Alphonse Van**

Alphonse Van is the Senior Appeals Counsel and Chief of Foreign Requests Unit in the Office of the Prosecutor, International Criminal Tribunal for Rwanda. From 2004 to 2008, Mr. Van was the Senior Trial Attorney in the Office of the Prosecutor, and from 1996-2003 was the Legal Adviser in the Office of the Prosecutor. Mr. Van received a Pre-Doctorate diploma in Public Law from the University of Toulouse I, France (International Public Law), and a Master's Degree in Public Law from the National University of Côte d'Ivoire (Abidjan).

**Patricia Wald**

Patricia McGowan Wald served as the chief judge for the United States Court of Appeals for the District of Columbia Circuit and served as a judge on the International Criminal Tribunal for the former Yugoslavia. Wald graduated from Connecticut College in 1948 and earned her law degree from Yale Law School in 1951. Wald returned to the legal profession full-time in 1968, working in the field of public interest law for a decade. In 1977, she was appointed as Assistant Attorney General for Legislative Affairs for the U.S. Department of Justice. In 1979, President Jimmy Carter nominated her to fill a newly created seat on the U.S. Court of Appeals for the District of Columbia Circuit. Wald was the first woman ever to sit on that bench, and served as chief Judge from 1986 until 1991. She was confirmed by the United States Senate on July 24, 1979, and received her commission on July 26, 1979. She remained on the Court until 1999. After retiring from the U.S. courts, Wald was the United States representative to the International Criminal Tribunal for the former Yugoslavia as one of the fourteen member panel of judges in The Hague. She currently chairs the board of directors of the Open Society Justice Initiative and is a member of the board of directors for Mental Disability Rights International. On February 6, 2004, Wald was appointed to the Iraq Intelligence Commission, an independent panel tasked with investigating U.S. intelligence surrounding the United States' 2003 invasion of Iraq and Iraq's weapons of mass destruction.

## About the ASIL

The American Society of International Law (ASIL) is a nonpartisan membership association committed to the study and use of law in international affairs. Organized in 1906, the ASIL is a tax-exempt, nonprofit corporation headquartered in Tillar House on Sheridan Circle in Washington, DC.

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