

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

August 30–September 1, 2015, Chautauqua Institution

Edited by Mark David Agrast and David M. Crane



American Society
of International Law

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

*August 31 – September 1, 2015
at Chautauqua Institution*

Edited by

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Ninth International Humanitarian Law Dialogs

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ASIL is a volunteer-led organization governed by a sixty-member Executive Council elected by its membership. In partnership with the elected leadership, ASIL is led by an executive director and supported by a professional staff of fifteen.



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This volume is dedicated to

Sergei Magnitsky
*2015 Recipient of the Joshua Heintz Award
for Humanitarian Achievement*

Table of Contents

Introduction

<i>David M. Crane</i>	1
-----------------------------	---

Lectures

The Fourth Annual Clara Barton Lecture <i>Claudia Paz y Paz</i>	7
--	---

The Fifth Annual Katherine B. Fite Lecture Genocide Gendered: The Srebrenica Cases <i>Patricia Sellers</i>	17
--	----

Keynote Address <i>Patricia Wald</i>	33
---	----

Kaleidoscopic Conflict: A Summary of Comments <i>David M. Crane</i>	49
--	----

Commentary

International Criminal Law: Year in Review 2014–2015 <i>Mark A. Drumbl</i>	55
---	----

A Complementarity Challenge Gone Awry: The ICC and the Libya Warrants <i>Jennifer Trahan</i>	69
--	----

Learning About International Justice on the Ground: The Balkans and War Crimes <i>Jennifer Trahan and Belinda Cooper</i>	73
--	----

Transcripts and Panels

Reflections by the Current Prosecutors.....85
Roundtable: The Srebrenica Massacre.....121

Impunity Watch Essay Contest Winner

Katherine Mills.....147

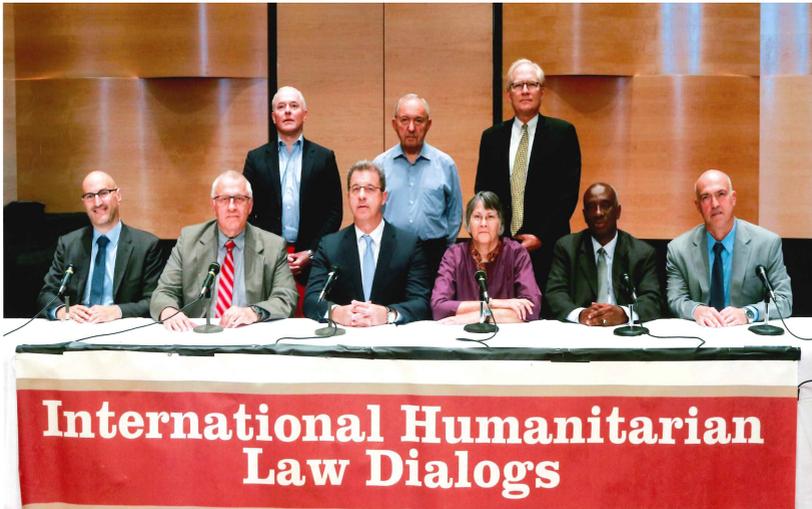
Conclusion

Concluding Observations: Out of the Bitter Legacy of Srebrenica
Mark David Agrast.....157

Appendices

I. Agenda of the Ninth International Humanitarian
Law Dialogs.....165
II. The Ninth Chautauqua Declaration.....169
III. Biographies of the Prosecutors and Participants.....173

Prosecutors at the Ninth International Humanitarian Law Dialogs



*Back row (left to right): Andrew Cayley, Richard Goldstone,
David Crane*

*First row (left to right): David Kinnecome (for Norman Farrell),
James K. Stewart (for Fatou Bensouda), Serge Brammertz,
Brenda J. Hollis, Hassan B. Jallow, Nicholas Koumjian*

Introduction

Introduction

David M. Crane*

As the world tries to come to grips with the challenges in an age of extremes with the very fabric of international norms being challenged, the rule of law assailed, and a weakening of the international criminal law structures, it is appropriate to ask the question: What is next? It seems like the very legacy of Nuremberg is being assailed. Have we lost our focus as it seemed at Srebrenica twenty years ago or is there a path toward a brighter future for international justice?

The Ninth Annual International Humanitarian Law Dialogs (IHL Dialogs) took the seventieth anniversary of the opening of the trials at Nuremberg and the solemn commemoration of the twentieth anniversary of the genocide at Srebrenica to address these issues. Colleagues and friends from around the world met with ten of the current and former chief prosecutors of the international courts and tribunals at the Chautauqua Institution on the pristine shores of Lake Chautauqua in upstate New York to consider the past and reflect upon the future.

The Ninth IHL Dialogs began its considerations as they always do at the Robert H. Jackson Center in Jamestown, New York with a welcoming reception and to award the Joshua Heintz Humanitarian Award posthumously to Sergei Magnitsky for his brave stand against the Russian regime and that regime's cynical criminal tax schemes. Sergei's mother, wife, and son were present and accepted the award from our good friend Joshua Heintz.

What follows in this volume of the proceedings of the Ninth IHL Dialogs is a compilation of speeches, lectures, and discussions on the legacy of Nuremberg, the impact of Srebrenica on the international

* Professor of Practice, Syracuse University College of Law and Founding Chief Prosecutor, Special Court for Sierra Leone, 2002–2005.

community and how the law sought out justice for the victims, and the brutal reality of a kaleidoscopic future.

Our various keynote speakers then expanded on all of this in exceptional ways. From the Katherine Fite Lecture given by Patricia Sellers to the Clara Barton Lecture given by Claudia Pas y Pas, as well as Judge Patricia Wald, each gave participants pause with their new insights. The International Law Year in Review ably covered by Professor Mark Drumbl tied many of these issue together in an understandable and considerate manner.

The ten current and former chief prosecutors who participated in the Ninth IHL Dialogs added their considerable experience by highlighting key events of the past year and called upon the world to continue the fight against impunity by signing and publicly issuing the Ninth Chautauqua Declaration. The declarations have become an important voice calling upon the international community to address the many and varied issues and challenges this age of extremes presents regarding impunity.

Professor David Crane presented a new evaluative model for legal experts and policy makers to consider in trying to understand this age of extremes. His lecture on kaleidoscopic conflict theory was cutting-edge thinking widely appreciated by the audience and participants. After this provocative lecture the participants assembled on the porches of the Athenaeum Hotel to consider the more challenging aspects of international humanitarian law. The issues this year that were led by distinguished scholars and practitioners were on the legacy of the International Military Tribunal at Nuremberg; the Role of the International Criminal Court in the Middle East; and the United Nations Security Council as a possible impasse to justice. There was a robust dialog on the porches that morning to be sure.

This amazing and historic event ended with a relaxed dinner cruise hosted by Dean Michael Scharf and Case Western Reserve University School of Law. As the sun settled over Lake Chautauqua, the participants resolved to continue the struggle to advance the legacy of Robert H. Jackson and the Nuremberg Principles.

Of course the IHL Dialogs could not happen without the hard work of many persons and organizations, particularly our long term and dedicated sponsors. A heartfelt thank you to the staff of the Robert H. Jackson Center and to the Chautauqua Institution and the Athenaeum Hotel, the American Bar Association, the American Red Cross, the American Society for International Law, the International Bar Association, Impunity Watch of Syracuse University College of Law, the Public International Law and Policy Group, New York University Center for Global Affairs, the Whitney R. Harris World Law Institute of Washington University School of Law, the Fred K. Cox Center, Case Western Reserve University School of Law, the Planethood Foundation, and in association with the United States Holocaust Memorial Museum.

Lectures

The Fourth Annual Clara Barton Lecture

Claudia Paz y Paz*

Good afternoon to everybody. First, I want to thank the Robert Jackson Center and the Red Cross for inviting me to the Ninth International Humanitarian Law Dialogs and for giving me the opportunity to share with you our experience in Guatemala in the prosecution of gross human rights violations.

Today, I want to focus, as Federico Barillas Schwank said, on the trial against the former head of state Efraín Ríos Montt on the charges of genocide.

Guatemala, my country, has suffered internal armed conflict that has lasted more than three decades and which ended with the signing of the Peace Accords in 1996. The Truth Commission, sponsored by the United Nations, documented more than 40,000 victims, including men, women, and children. Of these victims, 83 percent were Mayan, 70 percent were mestizo, and by combining the data from their testimonies with other databases, the Truth Commission stated that the total number of deaths for this period during the conflict came to more than 200,000 victims. The Truth Commission also concluded that between the years of 1981 and 1990, eighty-three acts of genocide were carried out in certain areas of the country. One of the goals of the peace process was to reform the Guatemalan justice system from one that had covered the most grave human rights violations to one that would comply with its key function of protecting citizens and guaranteeing them access to justice.

In order to achieve this goal, several institutions were created—the Public Prosecutor’s Office, the National Civil Police—and more

* Georgetown University Institute for Women, Peace, and Security. This publication is based on an address delivered on August 31, 2015, at the Ninth International Humanitarian Law Dialogs held in Chautauqua, New York.

courts and judges were added throughout the country, but, ten years after the Peace Accords were signed, the promise to guarantee access to justice for all seemed a distant reality. As Federico just said, on the one hand, we had high levels of impunity, and on the other we had high levels of violence and insecurity. Guatemala, El Salvador, and Honduras have the highest rates of homicide in the whole world. In 2009, we had 46 homicides per 100,000 inhabitants.

Equally absent was justice for war crimes. Only a few cases had made some progress. We had more than 6,000 bodies that were exhumed, but none of them led to a conviction in court. Citizens in Guatemala did not trust the justice system because it had never demonstrated independence. But despite this, the demands of the victims for justice were constant. The first cases of genocide and crimes against humanity were presented in 2000 and 2001, but there were very few advances because neither the courts, nor the Prosecutor's Office, had real political will to push them on.

One of these cases was presented in Spain under the principle of universal jurisdiction—Nobel Prize winner Rigoberta Menchú Tum filed this case—and two former head of states were indicted by the Spanish courts, but the Constitutional Court in Guatemala rejected this tradition. The Center for Justice and Accountability was one of the representatives of the victims.

So there was this situation. The cases in Guatemala did not move forward. We had a case in Spain under universal jurisdiction, but we had no one arrested for the crimes. There were several rulings inside the country that paved the way for the cases to go to court. One of them was a ruling from the Constitutional Court that said that the military documents were not secret and that they should be presented to the Court. Another was a ruling by the Inter-American Human Rights Court saying that the authorities in Guatemala should remove any *de jure* or *de facto* impediments for these cases to advance.

There were also some institutional changes in Guatemala. Because of the climate of impunity and insecurity, and the violence in the country, the Guatemalan state asked the United Nations to put in place a commission—the Commission Against Impunity, known as CICIG. This Commission did not have jurisdiction over the gross human rights violations committed during the war, but its presence in the country led to new authorities being nominated. I was elected after the then commissioner Carlos Castresana protested the appointment of an attorney general with alleged links to organized crime, and the Constitutional Court annulled the whole process. So we have new authorities in the Supreme Court, we have new authorities in the Prosecutor’s Office, and there were new courts created—the Courts for High Risk Crimes that have jurisdiction over the whole country—and these judges were nominated with a better process that could guarantee their independence. In other words, in 2011 we had better conditions to judge the genocide in a national tribunal.

But how do we build a strong case for genocide against a former head of state? First, it was the demand of the victims for justice, and then there was a team of national lawyers and a team of international lawyers that for years built this case.

We only had one opportunity, so we had to build a very strong case. So we narrowed that first case and we focused it on only one region in the country, the region where the cruelest acts were committed, the Ixil region in the northern part of Guatemala. The violence there was against a specific ethnic group: the Mayan Ixil people. So first we had a national case, and then we narrowed it to a case that was against a specific ethnic group within the Mayan population in Guatemala.

It is estimated that during the war, in three municipalities that comprise the Ixil region—Nebaj, Chajul, and Cotzal—there were 5,000 deaths out of a population of 40,000 inhabitants. During the tenure of former head of state Efraín Ríos Montt, there were

1,771 fully identified and documented victims in eighteen months. Regarding these deaths, we have documents, we have forensic evidence, and we also have witnesses—the relatives that saw how they were killed. We have the proof—the evidence—that all these fatalities were civilians. Anthropological forensic examinations were also useful in demonstrating that these deaths did not occur during confrontations. Many of these victims were blindfolded or their hands were tied or they had been shot in the back of the head. In other words, this demonstrated the first element of the crime of genocide; the killing of group members.

This level of violence also displaced 90 percent of the population of the Ixil group. They went—they ran—into the mountains. Some remained there for weeks, some remained there for months, and some for years until the signing of the Peace Accords. The population that decided to go back was resettled in what was called “model villages,” where they lived under a strict moratorium from the military forces. The population that did not want to come back was called the Communities of Population in Resistance, *en español, es Comunidades de Población en Resistencia*. And for many years, they were besieged and bombed by the military forces, and many of them died from starvation and diseases. In other words, these facts framed the third element of the crime of genocide; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

As many of you know, the hardest part to document was sexual violence. From the testimonies of the survivors and from the testimonies of the perpetrators, we knew that sexual violence, that rape, was part of the war strategy. There were individual rapes and massive rapes during the massacres, but the silence around this issue made it very difficult to identify the victims and to obtain their testimony. Patricia was in Guatemala helping us to build this case, to identify the victims, and to give them psychological support so they could give their testimonies.

Finally we found ten testimonies, and these were presented to the court for the second element of the crime of genocide; serious bodily or mental harm to the members of the group.

But we still need to prove intent, and this, in the case of genocide, is a really hard element to prove. It was argued in my country that these people were murdered and displaced and the women were raped because of political reasons, not for ethnic reasons. They said that the murders happened because they were supporting the guerrilla groups, so they were injured as individuals, not as a group. But we knew that they were targeted as a group as a whole. The victim of the genocide was the Mayan Ixil group. They have a unique language, for example, which is one of the characteristics of an ethnic group.

And how do we prove it? We had three years of war, 5,000 people killed, 90 percent of the people displaced, but for us, that was not enough. So we found the military documents that clearly said that the Ixil people were perceived by the perpetrators as the internal enemy. And the military documents, under the National Security Police, also said that the way to combat the enemy was extermination, annihilation. These were literally the words used in the military documents. And one of them, Operation Sofía, describes how the army looked to the Ixil people. It says, “These subversive groups, which have operated in the area of the Ixil triangle managing to carry out a complete job of ideological awareness in the whole population, have reached 100 percent support.” They believed that 100 percent of the Ixil people supported the guerrillas, so they were part of the internal domestic enemy and had to be exterminated or annihilated. The massive attacks against the Mayan Ixil people, the military doctrine, and the perception itself of the perpetrator regarding the victims were the elements we used to demonstrate intent.

We captured two high military officials in 2011, and in January of 2012, Ríos Montt lost his immunity. Since he was no longer a

representative, he stood by himself before the judges. Perhaps he did so believing that he would not be judged, but the process began. In January 2013, Miguel Ángel Gálves, the judge that had also sent former Vice President Miguel Ángel Gálves to jail, ordered the trial and criminal prosecution of Ríos Montt for the crimes of genocide and crimes against humanity to take place, and this trial began in March.

Perhaps the most emotional moment was when ten survivors of sexual violence gave their testimony. We, the prosecutors, requested that the testimonies of sexual violence be given behind closed doors. In some cases, their husbands, families, sons, daughters, and communities did not know that these women were raped. Our greatest concern was how to produce this extremely important evidence without revictimizing the women. We were arguing the whole night, and one of my colleagues said, “Let’s ask them. You don’t know the strength of the women.” And so it was. They decided that they would give their testimony. They would do it covering their heads with their shawls, and the first rows of the courtroom would be filled by other women so they would not feel alone when they came in front of the judge. They were very strong. They gave their testimony.

Something changed from that day onward. The media could no longer remain silent on the case. Previously they had been trying to cover it up. From that moment on, it was impossible for all the Guatemalan citizens who listened to those testimonies and witnessed those women not to empathize with their pain and their courage. They and other trial witnesses who came from the remotest parts of the country down from the mountains arrived at the hearing room of the Supreme Court. They testified in front of the perpetrator, face-to-face with the former head of state, who had ordered that these human rights violations be committed, who had commanded the army, and who at one moment exercised all the power in Guatemala, and they told him that what he had done to them was not right, that they were human beings, that they were not animals. This trial enabled the victims, for once, to be on par

with the perpetrator. The trial also broke the silence that had reigned regarding the human rights violations, but above all, regarding the violence, the sexual violence. This trial allowed the guilty to leave the women's bodies and their lives and be placed where it should be, on the shoulders of the perpetrators.

On May 10, 2013, a High Risk Court issued a verdict that the former General Efraín Ríos Montt was guilty of the crime of genocide and crimes against humanity.

I was happy when I heard the verdict, but it only lasted for nine days. He was only in jail for nine days. The Constitutional Court annulled the verdict because they said that the judges had violated his right to a defense. I will not go on trying to explain that. It was a political ruling. It was really not a juridical one.

And what I want to share with you in some last reflections is that the annulment of the trial led to several consequences. One of them was a huge effort to deny what happened. After serious human rights violations that were carried out in Guatemala and labeled as genocide became the center of public debate, when Guatemalan society had to face up to what they had tried to hide or downplay, many powerful groups tried to act as if it has never happened. For example, we have a decree, a decision, made by the Guatemalan Congress denying that genocide has taken place. But paradoxically, the trial impacted society in a very significant way. 80 percent of the people have made a decision on whether or not there was a genocide. Most of the people believe that there was genocide, and some 30 percent believe that there was no genocide.

Another consequence was that citizens and public servants who were involved in the trial were subject to the judges' new campaign. Our families, myself, we were accused of belonging to the guerrilla group, of being terrorists, when all we were doing was complying

with our duty according to Guatemalan law. So in the last two years, I have asked myself, was it worth it? I am sure that it was worth it for the victims. Even though the ruling was annulled, they said that it is heritage for their children. And I think that the justice system in Guatemala demonstrates that you can have a very strong case against an ex-head of state and that the judges can rule independently and say that he is guilty.

And today in Guatemala, as Federico was saying, unprecedented historical moments are happening. Thousands of people are now in the streets, and I believe—I am convinced—that the genocide trial had an effect on these changes.

Thank you very much.

[Applause.]

JAMES C. JOHNSON: Thank you very, very much. That was wonderful. Before we break, I would just like to take a moment to introduce you to two new sponsors and a sponsor that has been around from perhaps the very beginning.

I would like to introduce you to the International Peace and Security Institute. The Institute was founded on the core belief that education can mitigate violent conflict. The International Peace and Security Institute facilitates the transfer of knowledge and skills to a global audience from the world's premier political leaders, academic experts, practitioners, and advocates. The International Peace and Security Institute empowers the next generation of peacemakers.

I would also like to introduce you—well most of you know this one, but they have joined us this year in a more substantial way—to the Public International Law and Policy Group. The Public International Law and Policy Group is a global pro bono law firm that provides

legal assistance to states and governments with the negotiation and implementation of peace agreements, the drafting of post-conflict constitutions, and the creation and operation of war crimes tribunals.

I think most of you know Paul Williams. Paul Williams is not new to the Dialogs, but we could not be more thrilled that the Public International Law and Policy Group has joined us for the first time in a more substantial way as a sponsor of the Dialogs.

And, lastly, I would just like to recognize at this time a sponsor who has been around for a long time, and, in fact, produces the publication from the Dialogs—Mark Agrast of the American Society of International Law.

MARK DAVID AGRAST: Thanks very much. It is always a great honor for the American Society of International Law to participate in these annual events. I did want to let you know that we have the proceedings of the Eighth International Humanitarian Law Dialogs hot off the presses; they are right outside.

And in particular, I want to introduce the person who produced this for us, who is also here, Emily Schneider, our new editor of the Dialogs.

The Fifth Annual Katherine B. Fite Lecture

Genocide Gendered: The Srebrenica Cases

Patricia Viseur Sellers*

Thank you Beth Van Schaack for that wonderful introduction, and thank you Int. Law Girls for the gracious invitation. I also extend my appreciation to David Crane and to the Jackson Center. It is an honor to present the Katherine B. Fite Lecture¹ at this, the Ninth International Humanitarian Law Dialogs.

I dedicate this presentation to the late Nancy Patterson, who was a prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY). Nancy, a Manhattan district attorney, was a member of the UN Commission of Experts,² whose work spurred the creation of the ICTY. Nancy was integral to the sexual assault investigations conducted by the Commission, whose groundbreaking findings were detailed in Annex 9 of the Expert Report.³ Annex 9 in

* Patricia Viseur Sellers is the Special Advisor for Prosecution Strategies for the Office of the Prosecutor at the International Criminal Court. She is a Visiting Fellow at Kellogg College, Oxford University. She is the former Legal Advisor and Acting Senior-Trial Attorney at the International Criminal Tribunal for the Former Yugoslavia.

¹ Katherine Boardman Fite, a senior attorney at the International Military Tribunal in Nuremberg, was one of only three female attorneys on the United States prosecution team. It was not lost on this presenter, or the audience, that “Fite” is pronounced, “fight.” Her pioneering contributions to international criminal law are recounted in John Q. Barrett, *Katherine B. Fite: The Leading Female Lawyer at London and Nuremberg, 1945*, in PROCEEDINGS OF THE THIRD INTERNATIONAL HUMANITARIAN LAW DIALOGS (2010).

² Rep. of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), transmitted by Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, U.N. Doc. S/1994/674 (May 27, 1994).

³ *Id.* at 55–60 (providing a summary of the findings, including the prescient identification of the five patterns of sexual violence, that were prevalent during the armed conflict).

turn became the precursor to several sexual assault investigations that resulted in indictments and convictions at the ICTY, such as the Omarska⁴ and Bosanski Samac⁵ cases. Nancy hailed from upstate New York. So it is especially fitting, as we gather in her beautiful home state, that this lecture would strive to honor Nancy's memory.

My remarks, not surprisingly, concern crimes committed in Srebrenica on this twentieth anniversary of their occurrence. The Srebrenica tragedy came to symbolize the armed conflict in the former Yugoslavia. What remains irrefutable is that from the 12th until late July, 1995, between 6,000 and 8,000 Bosnian Muslim males who had taken refuge in the UN designated safe area of Srebrenica were killed by Bosnian Serb Forces. What is not unanimously accepted is whether the Srebrenica events amount to genocide.⁶ Even when a legal characterization of genocide *is* attributed, it is persistently pegged to a myopic conceptualization of genocide. The Srebrenica atrocity, I would advance, was genocide. Moreover, it exemplifies an intrinsically gendered genocide, meaning that ultimately its contours are revealed only when one understands how the genocide was

⁴ The *Omarska* cases concerned crimes in the Prejidor region of the former Yugoslavia, such as Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) and Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

⁵ The *Bosanski Samac* cases included Prosecutor v. Todorović, Case No. IT-95-9/1-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 13, 2001) and Prosecutor v. Simić, Case No. IT-95-9/2-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2002).

⁶ See *Serb President Denies the Srebrenica Genocide*, AL JAZEERA (June 3, 2012), <http://www.aljazeera.com/news/europe/2012/06/201262161913498413.html>; Ann Garrison, *Denying the Genocide Because its Not True: An Interview with Diana Johnstone*, COUNTER PUNCH (July 16, 2015), <http://www.counterpunch.org/2015/07/16/denying-the-srebrenica-genocide-because-its-not-true-an-interview-with-diana-johnstone/>; David Rohde, *Denying Genocide in the Face of Science*, THE ATLANTIC (July 17, 2015), <http://www.theatlantic.com/international/archive/2015/07/srebrenica-massacre-bosnia-anniversary-denial/398846/>.

perpetrated against males and females, both as children and adults. The Srebrenica trial and appellate proceedings conducted at the ICTY contain overwhelmingly gendered factual patterns. Consequently, the judgments are replete with gender-tethered legal observations that the judiciary constantly wrestled with in arriving at their respective verdicts. #GenocideGendered is an apt hashtag by which to designate the Srebrenica genocide.

The Srebrenica cases comprise a virtual sub-body of jurisprudence. The Srebrenica judgments rendered by the ICTY include the cases of *Erdemovic*,⁷ *Krstic*,⁸ *Obrenovic*,⁹ *Nikolic*,¹⁰ *Blagojevic*,¹¹ *Popovic*,¹² and *Tolimar*,¹³ as well as forthcoming judgments in the leadership

⁷ Prosecutor v. Erdemović, Case No. IT-96-22-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996); Prosecutor v. Erdemović, Case No. IT-96-22-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); Prosecutor v. Erdemović, Case No. IT-96-22-T bis, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998).

⁸ Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

⁹ Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003).

¹⁰ Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003); Prosecutor v. Nikolic, Case No. IT-02-60/1-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 8, 2006).

¹¹ Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007).

¹² Prosecutor v. Popović, Case No. IT-05-88-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010); Prosecutor v. Popović, Case No. IT-05-88-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015).

¹³ Prosecutor v. Tolimar, Case No. IT-05-88/2-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012); Prosecutor v. Tolimar, Case No. IT-05-88/2-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

cases of General Ratko Mladić¹⁴ and former President Radovan Karadžić.¹⁵ The accused in the Srebrenica cases have ranged from foot soldiers to generals to politicians, hence, from shooters to order-givers to planners. Combined, these judgments examined the factual minutiae of the massacre and delivered complex rulings on the legal contours of the crime of genocide as it happened in Srebrenica. It is the most assiduously litigated incident of the war. The jurisprudence has observed at length the conduct that satisfies the mens rea or specific intent¹⁶ of genocide, as well as the conduct that suffices to aid and abet persons who possess the specific intent to commit genocide¹⁷ or that suffices to establish the specific intent of perpetrators who participate in a joint criminal enterprise.¹⁸ However, it is the judicial examination of the substantive acts of genocide, the actus reus, wherein comprehension of gendered nature of the genocide resides.

Each judgment details the Bosnian Serb military's maneuver to splinter the Srebrenica Muslim refugees by conducting an operation

¹⁴ Prosecutor v. Mladić, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedule of Incidents (Int'l Crim. Trib. for the Former Yugoslavia Dec. 16, 2011).

¹⁵ Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Prosecution's Marked-up Indictment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 19, 2009). See *infra* section entitled Coda.

¹⁶ Nikolić, *supra* note 10; Krstić, Appeal Judgement, *supra* note 8, ¶ 20; Blagojević & Jokić, Appeal Judgement, *supra* note 12, ¶ 123.

¹⁷ Krstić, Appeal Judgment, *supra* note 8, ¶¶ 138–44.

¹⁸ On July 28, 2012, the Trial Chamber III rendered an oral decision in Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement on Accused's Application for Certification to Appeal Denial of Motion for Judgment of Acquittal Under Rule 98 *bis* (Count 11) (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2012), which retained Count 2 that charged Radovan Karadžić with the specific intent mens rea to commit genocide in Srebrenica as part of a joint criminal enterprise with other perpetrators. See also Prosecutor v. Karadžić, Case No. IT-95-5/18-AR98bis.I, Appeals Judgement, ¶ 83 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 2013), wherein the Trial Chamber Rule 98*bis* holdings concerning the specific intent to commit the Srebrenica genocide is not challenged by the accused.

that segregated the population according to sex and then age. The able-bodied males were separated from the general refugee population and subsequently killed.¹⁹ The remaining, overwhelmingly female, refugees were forcibly transferred out of the Srebrenica safe area. The consequential results of this maneuver were pronounced in the *Krstić* Trial Chamber's strikingly gendered-factual findings. The Appeals Chamber, in turn, approvingly cited to the Trial Chamber's observations, holding:

The Trial Chamber was [also] entitled to consider the long-term impact that elimination of seven to eight thousand men would have on the survival of that community. In examining these consequences, . . . [it] focused on the likelihood of the community's physical survival. . . . The massacred men amounted to about one-fifth of the overall community. . . . Given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizable number of men would "inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica". . . . With the majority of the men killed or officially listed as missing, their spouses are unable to remarry and consequently to have children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica community, potentially cosigning the community to extinction.²⁰

The reproductive ramification of the Srebrenica genocide was apparent to the judiciary. Notwithstanding these gendered observations, the Appeals Chamber affirmed the Trial Chamber judgment's holding that the genocide had been inflicted only against the males who were killed *and* against those males who were shot, but who miraculously survived

¹⁹ The Srebrenica evidence has shown that boys, infirm, and elderly males were among those singled out for execution. Popović, Judgment, *supra* note 12, ¶ 860.

²⁰ *Krstić*, Appeals Judgment, *supra* note 8, ¶ 28.

their intended execution. This latter group of surviving Bosnian Muslim males had been subjected to an act of genocide, namely, “causing serious bodily or mental harm to members of the group.”²¹

Neither the Trial Chamber nor the Appellate Chamber held that a genocide had been committed against the Bosnian Muslim female population as a group per se or committed against the remaining refugees, including elderly men and boys, who were removed from the Srebrenica safe area. The forced transfer of this population was not considered an act of genocide. According to the Trial Chamber, it constituted credible evidence of the perpetrators’ specific intent to commit genocide against the executed males and against those males who survived the executions. The Appeals Chamber upheld the Trial Chamber’s rulings.²²

Subsequent to the *Krstić* case, the Srebrenica jurisprudence furthered the distillation of complex gendered facts in order to grapple with the legal parameters of genocide. In the *Blagojević* case, the commander of the Brautina Brigade was convicted of complicity in genocide.²³

²¹ Article 4(2)(b), of the ICTY Statute reads:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

²² *Krstić*, Appeals Judgment, *supra* note 8, ¶ 33.

²³ Complicity in genocide is a distinct crime under the Genocide Convention. Article 4(3) of the ICTY Statute enumerates the substantive genocide crimes as:

3. The following acts shall be punishable:
- (a) genocide;
 - (b) conspiracy to commit genocide;
 - (c) direct and public incitement to commit genocide;
 - (d) attempt to commit genocide;
 - (e) complicity in genocide.

At the trial stage, *Blagojević* upheld acts of genocide that differed from those found in the *Krstić* jurisprudence. In terms of the executed males, *Blagojević* found that the actus reus of killing had been committed. As significantly, the Trial Chamber held that the very act of separating the males from their families, with the realization that they would be executed, entailed causing serious mental harm to members of the group.²⁴

Moreover, the *Blagojević* Trial Chamber reiterated, in keeping with *Krstić's* analysis, that males who survived the massacre, likewise, were victims of the genocide act of causing serious bodily and mental harm to members of the group.²⁵ These holdings confirm and expand recognition of the harm endured by the Bosnian Muslim males who were separated out for death. Accordingly, each of those males were subjected to two of three distinct acts manifest of genocide: the pre-anguish of death; death itself; and for males who survived, the anguish of a botched execution.

The *Blagojević* Trial Chamber further opined that the forcible transfer of the remaining Bosnian Muslims out of the Srebrenica safe area was evidence of specific intent to commit genocide.²⁶ Most significantly, the Trial Chamber found that the forced transfers *constituted* causing serious mental harm to members of the group.²⁷ Hence an act of genocide indeed had been perpetrated upon the mainly female refugee population. What in *Krstić* had been characterized only as evidence of genocidal intent, in *Blagojević* was evidence of genocide. The *Blagojević* Trial Chamber's careful factual scrutiny of the composite acts inflicted against the males and against the females refined the legal conceptualization of the Srebrenica genocide.

²⁴ *Blagojević*, Judgment, *supra* note 11, ¶ 649.

²⁵ *Id.* ¶¶ 647–48.

²⁶ *Id.* ¶ 675.

²⁷ *Id.* ¶¶ 650–54.

On appeal, the *Blagojević* conviction for complicity in genocide as an aider and abettor was reversed. The Appeals Chamber held that without knowledge of the massacres, Blagojević could not have understood that the forced transfer of the females indicated the existence of a specific intent to commit genocide.²⁸ The *Blagojević* Trial Chamber's recognition of the killings and of the physical and mental suffering of surviving males follows the *Krstić* appellate jurisprudence reasoning. Its acceptance of the mental suffering of males prior to their deaths and of the forcibly transferred refugees as pertinent acts of the genocide is significant. On appeal, the scope of acts that constituted the Srebrenica genocide was not discarded. However, in light of the reversed verdict, technically, such legal observations are *obiter dicta*.

In the *Popović* case, for the first time, the prosecution advanced arguments about the diminished capacity to procreate caused by the genocide. Consonant with the earlier observations contained in the *Krstić* trial judgment, the prosecution submitted that the forcible transfer of the women and children contributed to the destruction of the Muslims of Eastern Bosnia, including the failure of that population to live and reproduce normally.²⁹ Essentially, the prosecution alleged that as a consequence, two other *actus reus* of genocide had been committed: “deliberately inflicting conditions calculated to bring about physical destruction of the group in whole or part” and “imposing methods to prevent births within the group.”³⁰

Beyond previous submissions of killings and underlying acts of serious bodily or mental harm, the prosecution's pleadings invoked a more pointed factual assessment and legal analysis of the components of the Srebrenica genocide. This increasingly critical gendered-lens approach broadened the acts of genocide and its timeline by being

²⁸ Blagojević, Appeals Judgment, *supra* note 11, ¶¶ 123–24.

²⁹ Popović, Judgment, *supra* note 12, ¶ 850.

³⁰ *Id.* ¶¶ 851–53.

willing to redress acts that continued after killings of the males and after the forced transfer of the refugees in July 1995.

The *Popović* Trial Chamber disagreed with the prosecution's legal theory. It opined that the forced transfer alone, without combining the acts of killing, did not represent the types of conditions intended to be prohibited under Article 4(2)(c) of the Statute. The Chamber also noted that the prosecution's emphasis on the forced transfers were insufficient to be objectively seen as the type of measure imposed to prevent births.³¹ The adverse ruling seems at first glance to contradict the *Krstić* case's observation. However, the *Popović* Trial Chamber's refusal to hand down a conviction on these charges could be owed to the prosecution's failure to plead in tandem evidence of killings and of forced transfers, as well as lack of a convincing articulation of Article 4(2)(c) and (d) of the ICTY Statute. Recall that *Krstić* had emphasized the killing of the men, stating "the physical destruction of the men therefore had severe procreative implications for the Srebrenica community, potentially cosigning the community to extinction."³² The *Popović* Chamber did acknowledge the killing of the men broached issues of biological group survival.³³ The prosecution, however, had stressed the forced transfer of the largely female survivors.

The *Popović* judgment did reiterate and uphold convictions based on acts of genocide committed in relation to the men who were about to be killed, those executed, and the mental suffering of the male survivors.³⁴ Again, the Trial Chamber found that the population of females, boys, and elderly men that had been transferred out of Srebrenica were themselves victims of an act of genocide, causing serious mental harm, in the immediate aftermath of the separation and

³¹ *Id.* ¶¶ 854–55.

³² *Krstić*, Appeals Judgment, *supra* note 8.

³³ *Popović* Judgment, *supra* note 12, ¶ 866.

³⁴ *Id.* ¶¶ 844–45.

forced transfer and in the long term effects that the killing had on the mental suffering of the community.³⁵ The prosecution did not appeal the *Popović* ruling concerning diminished procreation.

However, in *Tolimar*, a subsequent Srebrenica case, the prosecution revisited its pleading. It argued that forcibly displacing the Bosnian Muslim women, elderly men, and children from the Srebrenica safe area, in *combination* with killing the men and boys, constituted the genocide act of inflicting conditions of life calculated to bring about the group's destruction.³⁶ The *Tolimar* Trial Chamber accepted these pleadings, finding:

[The] Majority . . . has therefore considered the overall effect of not only the forcible transfer operations of the women and children of the protected group, but also of the killing of at least 5,749 Bosnian Muslim men from this same group. The Majority finds that the combined effect of these operations had a devastating effect on the physical survival of the Bosnian Muslim population of Eastern BiH . . . and is satisfied that the goal[s] of . . . these operations were aimed at destroying this Bosnian Muslim community and preventing reconstitution of the group in this area.³⁷

The *Tolimar* Trial Chamber ruled in favor of the charge of inflicting conditions calculated to bring about physical destruction based upon the combined acts of killing and transfers. The Trial Chamber, however, did not find that the forcible transfer operation itself qualified as a measure imposed by the Bosnian Serb Forces "intended to prevent births within the group."³⁸ The *Tolimar* Trial Chamber

³⁵ *Id.* ¶ 846.

³⁶ *Tolimar*, Judgment, *supra* note 13, ¶¶ 760–61, 763.

³⁷ *Id.* ¶ 766.

³⁸ *Id.* ¶ 767.

offered that even if Srebrenica females refused to marry due to, *inter alia*, the availability of men in their community, that the killings were not a measure as intended within the meaning of Article 4(2)(d) of the ICTY Statute. In sum, the *Tolimar* Trial Chamber's reasoning grappled with the long-term reproductive implications confronted by the Srebrenica Muslim community based upon what had happened to its male and female members.

On appeal, the favorable ruling concerning the inflictions of conditions calculated to bring about physical destruction were overturned. The Appeals Chamber held that the different acts under Article 4(2) express different means to effectuate the physical destruction of a protected group. Killing is one manner to destroy, while conditions calculated to bring about physical destruction is a separate means. Therein the *Tolimar* Appeals Chambers said that while deprivation of food, or conditions that weren't hygienic, or lack of medical care or shelter could qualify as a condition, "killings" could not. Killings are an immediate manner to destroy the group and not a condition in the sense proscribed by Article 4(2)(c).³⁹ The Appeals Chamber found that the Trial Chamber had committed a legal error in interpreting the provision otherwise and in entering a conviction. Moreover, the Appeals Chamber held that the forcible transfer alone was not tantamount to the prescription of Article 4(2)(c) since it was not intended to lead to the physical destruction of the displaced Muslims.⁴⁰

This is the state of the Srebrenica jurisprudence on genocide. Read as a whole, the rich gendered observations pervade the Srebrenica cases. There are still political deniers, and, within the realm of acceptance, the legal tension of how to characterize the Srebrenica genocide remains palpable. The interpretation of acts of killings and causing serious bodily or mental harm seem to have been

³⁹ *Id.* ¶¶ 228–29.

⁴⁰ *Id.* ¶ 233.

consolidated. The factual and legal acceptance of other genocidal provisions are unsettled. Judicial pronouncements between trial and appellate chambers are not uniform. Upcoming judgments in the Radovan Karadžić and Ratko Mladić cases will revisit these issues and further develop the jurisprudence.

Factually and legally, what comprised the real scope of the Srebrenica genocide? What happened in addition to acknowledgment of the upward of 8,000 deaths of males leads to asking what genocidal acts happened to the females. And indeed, what other genocidal acts happened to the males before they died, and to those that survived? How was the genocide perpetrated against the females, boys and girls, the elderly, and collectively the surviving community of Srebrenica Muslims? An astute gender analysis has sharpened our focus as to the complex contours of the Srebrenica genocide. A deeper gender analysis, one that wrestles with the reproductive incapacity fostered by the genocide remains to be legally distilled.

The Srebrenica jurisprudence presents a doctrinal circling back to genocide's very foundations. The trajectory goes beyond killing and traverses the origins to the horrendous biological, reproductive practices committed by the Nazi regime against non-Aryans. The Srebrenica cases virtually re-situates the law of genocide closer to the fundamental issues of the ability of a community to exist and to reproduce. The sentence that follows that crucial paragraph regarding procreation in the Krstić Appeal Judgment is simply: "This is the type of physical destruction the Genocide Convention is designed to prevent."⁴¹

These are crucial issues to posit and to prove, especially when the Srebrenica genocide could be characterized as ongoing in that it continues to harm the targeted group, because—thank goodness—survivors exist.

⁴¹ Krstić, Appeals Judgment, *supra* note 8, ¶ 29.

Almost twenty years ago, *Prosecutor v. Akayesu*,⁴² the first case issued by the International Criminal Tribunal for Rwanda, reinvigorated litigation of the crime of genocide. Its landmark jurisprudence, inter alia, held that sexual violence, notably rape of the Tutsi women satisfied the actus reus of serious mental and physical harm to members of the targeted group and thus, constituted an act of genocide. This gendered analysis of the Rwandan genocide perhaps was more apparent and readily heralded due to the egregiousness of the sexual violence. *Akayesu* illustrated both the terrifying sweep of genocide conduct and the scope of legal redress owed to victims. A diligent gender analysis of genocide, unfortunately, is not a normative judicial, investigative, or prosecutorial inquiry. The examination of a genocide still concentrates on killings, often primarily of men. Even then, what happens to males before the killings, and to survivors, male and female, in the immediate aftermath and long-term period after the killings, frequently is ignored or misconstrued and therefore not deemed a component of the genocide.

The latter investigations of the historic Guatemalan proceeding against Efraín Ríos Montt⁴³ forced an inquiry into the genocide whose ultimate reasoning surpassed the killings of the Ixil Mayan men, to

⁴² *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

⁴³ The International Justice Monitor followed the historic trial of General Efraín Ríos Montt and Security Chief Rodríguez Sánchez in 2013 on charges of genocide inflicted on Mayan Ixil between March 1982 and August 1983. The Trial Chamber convicted Ríos Montt and sentenced him to eighty years imprisonment for his role in over 1,700 deaths, rapes, torture, and forced displacement of thousands of indigenous people in the Ixil region of Guatemala. Rodríguez Sánchez was acquitted. Ten days after the verdict, the Constitutional Court reversed the decision on technical grounds and ordered a retrial. Sophie Beaudoin, *A Ríos Montt Retrial in January?*, INTERNATIONAL JUSTICE MONITOR (Dec. 16, 2015), <http://www.ijmonitor.org/2015/12/a-rios-montt-retrial-in-january/>. As of this writing, the retrial for former Ríos Montt was suspended. Dan Lopez, *Genocide Trial for Guatemala Ex-Dictator Ríos Montt Suspended*, REUTERS (Jan. 11, 2016), <http://www.reuters.com/article/us-guatemala-trial-idUSKCN0UP21F20160111>.

determine what genocide acts had been perpetrated against the Ixil Mayan females. The investigation confirmed that the females suffered rapes, mutilations, and killings. In light of the Srebrenica case law, it might be argued successfully, that other discrete acts constituting genocide were committed against the males and females members of the Ixil community. Might we, or rather, dare we not retain an analysis of genocide-gendered analysis while witnessing the emerging acts of genocide in Iraq committed against the Yazidi religious group. The conduct appears to be composed, at the very least, of killing males and elderly females, serious bodily and mental harm of sexual violence on younger females, forced transfer of female children to another group, and the mental anguish of religious conversions.⁴⁴ Not to hone our gender-genocide analysis is to wilfully only partially redress genocide.

In closing, let me stress that purposefully analyzing the gendered aspects of genocide is integral to comprehending genocide and to avoiding diminishing or dismissing the extent of genocide. The entirety of conduct that is legally characterized as genocide is governed by *jus cogens* obligations to suppress, prevent, or punish. Contrary to distracting the focus from the massacre, the extensive jurisprudence of the Srebrenica cases exemplifies the depth, width, and voluminous protection specifically intended by the genocide doctrine. The complexity of the jurisprudence is a twenty-year tribute to both the dead and to the living victims of the Srebrenica genocide.

Thank you.

Coda: In March 2016, an ICTY Trial Chamber pronounced Radovan Karadžić guilty⁴⁵ of genocide for the events that transpired in Srebrenica. The Trial Chamber ruled that Karadžić had participated

⁴⁴ Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/30/48, ¶¶ 114–17 (Aug. 13, 2015).

⁴⁵ Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

in a joint criminal enterprise whose purpose was the elimination of able-bodied males and the forcibly removal of women, children and elderly men from the Srebrenica area.⁴⁶ The Trial Chamber held that the elements of Article 4(2)(a) and (b) of the Statute were satisfied. Accordingly, the killing of the men and the boys was an act of genocide.⁴⁷ The causing of serious mental and bodily harm to the males who suffered in the final days and hours of their lives knowing death was imminent⁴⁸ and to the males who, although shot, did not succumb to their wounds, likewise, comprised acts of genocide.⁴⁹ Furthermore, the Trial Chamber found the severe, pervasive anguish of the females, boys, and elderly men caused by their forcible removal and by the killings of their male family members had long-lasting effects that impaired their abilities to envision the future and “to live normal and constructive lives.”⁵⁰ The Trial Chamber held these to constitute the genocide act of causing serious bodily or mental harm to members of the group.⁵¹

The *Karadžić* judgment adhered to the charges pleaded in the indictment.⁵² Gendered harms inevitably underscored the findings. Holdings about the reproductive consequences of the Srebrenica genocide, poignantly, found berth in the evaluation of the mens rea evidence. In acknowledgment of *Kirstić*'s,⁵³ foresight, the judges opined that:

⁴⁶ *Id.* ¶ 5814.

⁴⁷ *Id.* ¶ 5660.

⁴⁸ *Id.* ¶ 5662.

⁴⁹ *Id.* ¶ 5663.

⁵⁰ *Id.* ¶ 5664.

⁵¹ *Id.* ¶ 5665.

⁵² *Karadžić*, Indictment, *supra* note 15.

⁵³ *Karadžić*, Judgment, *supra* note 45, ¶ 5669. The Trial Chamber notes “that killing every able-bodied male of a group results in severe procreative implications that may lead to the groups’ extinction” and cites to the specific paragraphs of the *Krstić* Appeals Judgment. *Krstić*, Appeals Judgement, *supra* note 8, ¶¶ 28–29.

Viewing the evidence in its totality, the Chamber considers that the Bosnian Serb Forces must have been aware of the detrimental impact that the eradication of multiple generations of men would have on the Bosnian Muslims in Srebrenica in that the killing of all able-bodied males while forcibly removing the remainder of the population would have severe procreative implications for the Bosnian Muslims in Srebrenica and thus result in their physical extinction. The Chamber therefore finds beyond reasonable doubt that these acts were carried out with the intent to destroy the Bosnian Muslims in Srebrenica as such.⁵⁴

Unlike *Tolimar*, the judges on the *Karadžić* bench did not hear evidence in respect of Article 4(c) of the Statute that provides for the genocide act of inflicting conditions calculated to bring about physical destruction. In *Karadžić*, the long-term procreative implications of the combined executions and forced transfer were not contemplated as an underlying act, but verily, evinced the intent to destroy in whole or part the Muslim males and females of Srebrenica.

⁵⁴ Karadžić, Judgment, *supra* note 45, ¶ 5671.

Keynote Address

Patricia Wald*

All of us here today are painfully familiar with the brutal facts of Srebrenica; its dubious distinction as “the single greatest atrocity since World War II,” the flimsy promises of “never again” by Western leaders, and the sad saga of today’s Srebrenica, twenty years later. It is an isolated hamlet, formerly two-thirds Muslim, now predominantly Serbian, located deep within a wider swath of territory handed over to the Serbs by the Dayton Accords only months after the July 1995 genocide.

Yet the gravediggers of Drina Valley persist in their relentless search for the estimated 1,000 bodies still missing from the mass graves where nearly 7,000 others have been unearthed—in whole or in parts. World leaders still meet to beat their breasts as to what really happened in Srebrenica and Potočari, who was to blame for the failure to stop the attacks and the handovers of innocent civilians to the Serbs for mass executions. Within this past year, the Supreme Court of the Netherlands has ruled that the Dutch government was responsible for the handover of 300 Bosnian Muslims from the UN Compound where they had sought refuge. An earlier Dutch government in 2002 resigned in the wake of an internal investigation exposing the incompetent defense of the enclave by the Dutchbat UN forces. A press account at that time called it “a belated act of collective penance.” A UN Ambassador laments that the failure of the international community to protect civilians “still haunts this organization,” and the U.S. Immigration Service announced its intention a few months ago to deport 150 Bosnian Serbs who came over in the nineties without revealing their participation in the Srebrenica massacre. The British

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Ambassador to Bosnia has sagely observed that twenty years after Nuremberg, Germany was at peace with its neighbors and a full-fledged player in NATO and the European Union; its relations with countries it had annexed or occupied restored to full normalcy, “while Bosnia remains a fragile state reliant on external aid, its economy hobbled by a complex and unwieldy power-sharing system and tensions between its two constituent republics.”

So what is to be said twenty years out about Srebrenica? What, if anything, is salvageable from its bitter legacy? Can it be viewed in any way like Nuremberg, as a step forward in the slow advance of international justice and the end of impunity for the worst wartime atrocities? Has the world learned anything from Srebrenica it can bring to bear on the horrendous massacres and genocides going on, even to this day?

My answer is a modest one and focuses largely on the Srebrenica trials themselves. Painfully slow and frustrating as they have seemed at times, they stand, in my view, not only as a lasting and uneradicable memorial to the 1995 tragedy, but as having made a substantial contribution to the evolving international legal institutions and legal doctrines that are indispensable to ending impunity for wartime tyrants. Their contribution has not proceeded in a smooth or even steady way, but nearing their end we are in a different and—on balance—a better place today in international justice than we were in July 1995.

First and foremost, it was a triumph that there were trials at all, not one but many for the Srebrenica perpetrators and their enabling subordinates. According to Chief Prosecutor Serge Brammertz, there have been over twenty prosecutions and fifteen convictions in the International Criminal Tribunal for the former Yugoslavia (ICTY) so far. The same cannot be said of other historical genocides, like the 1913 Albanian death marches, nor can we be confident it will be true for the victims of the mass Syrian atrocities or the heinous destruction

of entire communities by the Islamic State of Iraq and the Levant (ISIL) going on right now. The Srebrenica trials and appeals have not been flawless, not by a long shot, and survivors have complained bitterly that only a handful of high level perpetrators involved in the genocide have been prosecuted, and not all of them convicted. In their defense, however, the international tribunals have had to wage—not always successfully—a continuous battle for resources. And dozens of Srebrenica suspects have been tried in domestic Bosnian war tribunals and a trickle in Serbian courts. Still, cumulatively they are but a fraction of an estimated 850 Bosnian Serbs who took part in the massacre, many of whom have not only avoided justice but still hold important posts in local, regional, and national intelligence and police services.

Still, it was a triumph of raw human perseverance that we had the first and flagship Srebrenica trial at all, the trial of Radislav Krstić, the commander of the Bosnian Serb army in the Drina Valley where the killings occurred, a trial in which I served on a bench of three international jurists. Jean-René Ruez, the original ICTY investigator who for five years combed a wide swath of crime scenes covering seventy by forty kilometers, recalls that he started out with only one other investigator, a single Srebrenica survivor's statement, and what were then only rumors of a "genocide without corpses." Initially, the newly legitimized post-Dayton Republika Srpska refused any entry to the crime scenes; American intervention was necessary to negotiate access. The early investigators sometimes had to personally scratch the walls of the school houses and warehouses where the captives had been held for execution looking for blood and human skin traces, and ferret out ammunition casings in the soil of the execution fields. Soon after the search for bodies began, it became clear that the victims had been moved from the original execution sites and new searches for the reburial sites hundreds of miles distant had to be initiated, an arduous process assisted by aerial footage from U.S. intelligence satellites. That too became available only after protracted negotiations. Initial attempts by Serbian authorities, including

President Slobodan Milošević, to explain away the mass graves as those of combatants killed in battle required painstaking forensic evidence to be mounted showing large numbers of the victims had been blindfolded, their hands tied behind their backs, and that they died from bullet holes in the back of their heads.

The trial of Radislav Krstić, commander of the Drina Corps and the second in command to General Ratko Mladić, who headed the operations of the Bosnian Serb Army in Eastern Bosnia, began in early 2000. Although not the first ICTY trial to include a genocide charge, it would be the first to carry that charge through to judgment, and Krstić was the highest military officer to be so charged. The success of the trial would be defined by two criteria: the first was the prosecution's ability to mount a persuasive case of genocide in circumstances far different from the paradigm examples of the Holocaust or Rwanda—at Nuremberg the crime of genocide had not yet been defined, and in Rwanda the occurrence of a nationwide genocide was acknowledged by all parties and high ranking Hutu leaders pled guilty to the charge. In Srebrenica's case, not only was the fact of a genocide disputed, but initially, not even the fact that the killings occurred outside of combat was admitted. The second hurdle for the prosecution and the judges would be to convince the world that the trial was not a sham, a "victors' revenge," but rather a fair and judicious proceeding. Comparisons with Nuremberg—good and bad—were inevitable, and they still go on. It has, for example, repeatedly been pointed out that the principal Nuremberg trial took less than a year to convict twenty-one and acquit three of the top Nazi leaders, while the *Krstić* trial would end up lasting seventeen months—preceded by five years of field investigations. The *Krstić* trial itself involved 118 witnesses, 1000 exhibits, forensic evidence from 21 exhumed burial sites, and for the first time, use of overhead satellite photographs to identify the location of killing fields.

Krstić’s defense did not seriously dispute that the killings had occurred but rather argued that Krstić himself was not involved in their planning or execution. Mladić was, according to the defense, the originator of the “diabolical plan” to capture and kill the fleeing Bosnians and used intelligence and police under his control to carry it out while Krstić was conducting military operations elsewhere. The prosecution argued otherwise: that while Krstić may not have been an originator of the genocide, he nonetheless qualified as a “perpetrator” because he learned of its existence while it was still ongoing and lent Drina Corps forces under his control to help carry out the later stages. Moreover, he did nothing to try and stop the genocide or to initiate punishment against those who were actively involved in it. Krstić insisted he learned about the killings too late to stop them and Mladić’s iron fist control over the Army made any attempt then or later to stop the killings or punish the active participants in the genocide impossible.

The trial bench consisting of Judge Almiro Rodriguez from Portugal, Judge Fouad Abdel-Moneim Riad from Egypt, and myself (I had just arrived in The Hague two months earlier) unanimously found that Krstić did indeed learn of the killings in time to intercede or at least refrain from enabling them through deployment of the troops and resources under his command.

But without doubt our most critical ruling, again a unanimous one, was that the executions of the 8,000 men and boys constituted genocide. It was critical not only to the credibility of a still precariously situated ICTY, but even more important to the future utility of the crime of genocide outside of the paradigmatic Holocaust and Rwanda settings. But the finding of genocide was not uncontroversial. The chief argument against Srebrenica as a genocide was that the Serbs had spared the women and younger children of Srebrenica, thus nullifying any intent to destroy a religious or ethnic group as such, nor had they engaged in any such massive killings in the other villages they captured. Srebrenica was—the defense said—more likely ethnic

cleansing with a vengeance or a revenge killing, but not genocide. I would be remiss if I did not acknowledge that we judges had long and intense discussions about the elusive line separating massacres and crimes against humanity from the apex crime of genocide, but at the end all three of us agreed Srebrenica met the requirements of genocide. I do sometimes wonder what would have happened if we at the trial level had not ruled Srebrenica to be a genocide. Would the appeals court have reversed us—I tend to think not—and if I am right, the next fifteen years of Srebrenica’s legal history would have been very different.

The ICTY appellate bench, however, a few year later did uphold our finding of genocide based on the significance of the Srebrenica Muslim community as a defined part of the Eastern Bosnian Muslim group due to their symbolic and strategic importance in the region. And the killing of the majority of men and boys in a male dominated culture along with the forcible removal of the women and children from the area assured the effective destruction of the Srebrenica Muslim community, thereby meeting the genocidal requirement of a special intent to destroy an ethnic or religious group or part thereof.

The Trial Court’s finding that Krstić himself possessed the requisite special genocidal intent for a perpetrator did not, however, survive the appeal. At the trial level we had relied on prior rulings that this special intent might be inferred from circumstances indicating that a perpetrator had knowledge of the genocide and of the originators genocidal intent, and in light of that knowledge provided substantial support for carrying it out, both proven facts in Krstić’s case. A majority of a split appellate panel ruled, however, that despite numerous witnesses and intercepted communications from which Krstić’s intent to aid in the executions could be inferred, they were not sufficient to display “unequivocally” Krstić’s personal intent to destroy the Srebrenica Muslims as an ethnic or religious group. He was in the Appellate Division’s words, “a man unwillingly caught up

in the evil around him”); thus he could legally be charged only as an “aider and abettor” and not as a perpetrator of genocide. In short, they reinterpreted the evidence and came to a different conclusion as to its import than we on the trial bench did.

I have over the years reread that decision many times and candidly find it impossible to agree with the Appellate Court’s interpretation of the evidence. With regard to each separate piece they appeared to insist that it have only one possible interpretation. They did not engage in any balancing of the reasonableness of alternative interpretations or assess the cumulative persuasiveness of the totality of evidence. Judge Mohamed Shahabuddeen wrote a long, thoughtful, and in my view, persuasive dissent cautioning that “the line between knowledge of intent and a showing of intent can be a subtle one. It turns on an appreciation of the evidence. In accordance with settled principles regulating the appeal process, the appreciation should be left to the trial division even in the case of a stringent test.” He then proceeded to dissect each piece of evidence of Krstić’s intent rejected by the Appellate Court and showed how the Trial Court’s interpretation had been a reasonable, even preferable one, concluding that “[a] stringent test does not empower the Appellate Court to step in where otherwise it could not. I am not able to see any error here.”

Inherent in Judge Shahabuddeen’s caution were two issues that would hound the subsequent line of Srebrenica prosecutions throughout the next decade and beyond: namely, to what degree should the Appellate Division second guess the Trial Court on inferences legitimately to be drawn from facts found by the Trial Court, and just how specific must the manifestations of genocidal intent be beyond knowledge that a genocide is going on and active contribution to its execution in light of that knowledge. Only a few reckless leaders—the Nazis in Germany or the Hutu leaders in Rwanda—have been audacious enough to write or speak aloud of their desires to eradicate a religious or ethnic group. One commentator on the *Krstić* appellate decision observed

accurately: “In attempting to preserve the uniquely serious nature of the crime (genocide) the Appeals Chamber in *Krstić* interpreted the law so narrowly that it could only snare a few leaders at the top.”

And that seems to be precisely what happened. By 2005, ten accused had been indicted at the ICTY for participation in the genocide but none convicted of perpetration; it became known at the Tribunal as the “crime without a perpetrator.” Following the *Krstić* appeal, all but the very top leaders of the Srebrenica genocide were prosecuted or convicted only of aiding and abetting genocide, a lesser form of guilt than either commission or complicity in genocide. Even as to those few, like Milošević, charged as perpetrators, the issue of lack of special intent permeated their trials, despite in Milosevic’s case strong evidence of his power to stop the genocide. Milosevic’s death aborted his trial so that we do not know what the ultimate decision on his genocidal intent would have been. But a chronicler of his trial echoed the frustration of many when she wrote: “When a person knowingly lends his assistance to a genocidal campaign which could not be accomplished without him, he should be as guilty before the law as the fanatical racist who wants to exterminate a people or the cabal that sets the campaign in motion to achieve its ends. Only the broader conception of responsibility can deter those who find it easier to go along and to lend themselves to a genocidal machine.”

I myself have pondered over the years why beginning with the *Krstić* appeal, a common law notion of aiding and abetting designed for a second-level degree of participation in domestic crimes should have been imported wholesale into international criminal law so as to apply in cases involving the highest level of war genocidiaries who knowingly contribute to the murder of thousands of innocent civilians or captured prisoners. I am not alone in that bewilderment. Both ordinary survivors and expert commentators have shared the concern.

In 2013, another panel of the ICTY Appellate Division added an additional requirement for holding high-ranking genocidal suspects operating remotely from the crime scene responsible even on reduced aiding and abetting charges. The “actus” of the aiding and abetting charge, i.e., the enabling assistance the leaders provided for the genocide must have been specifically “directed” to the commission of the genocidal acts—knowledge that their aid would likely be so used was not sufficient. General Momčilo Perišić, the Chief of the Yugoslav Army General Staff, had been convicted in the Trial Court of aiding and abetting genocides in Srebrenica and Sarajevo by knowingly providing weapons and personnel to the troops committing genocidal crimes there. On appeal, that conviction was reversed on the basis that substantial contribution in light of knowledge that the assistance was likely to be used in the commission of the genocidal acts was not sufficient to convict for aiding and abetting genocide unless the assistance had been “specifically and unequivocally” directed to the genocidal actions. Widely criticized for contradicting earlier tribunal case law and for lack of foundation in customary international law, the ruling nonetheless resulted in several subsequent acquittals, some presently on appeal. In the interim since *Perišić*, a different panel of the Appellate Court in the *Šainović* case repudiated the *Perišić* specific direction doctrine in a forceful opinion, disclaiming its validation in customary law or ICTY precedent. The Special Court for Sierra Leone has also refused to adopt the *Perišić* doctrine in upholding the conviction of Liberian President Charles Taylor, and so far the International Criminal Court (ICC) has not embraced it.

David Scheffer, former U.S. War Crimes Ambassador, has recently posed this central question of context about the “specific direction” doctrine and international criminal law:

Are standards of conventional criminal law, particularly as they may relate to a time when technological means of communication and monitoring were undeveloped,

appl[icable] to a modern situation where proximity to the crimes becomes practically irrelevant? Where the perpetration of atrocity crimes against large numbers of victims . . . occurs in order to advance state policy or the ideological objectives of a state's or organization's leaders? How do we define *mens rea* and *actus reus* when one is examining the commission of atrocity crimes? Is it precisely the same analysis as one would apply against a single individual for the commission of a common crime? Is not knowledge that one's actions are likely to aid in the commission of atrocities the very essence of leadership culpability in the realm of atrocity crimes, in the context of a nation torn asunder by perpetrators associated with organized military elements over months and years of illegal conduct? At what point is a court narrowing its understanding of the context of the situation so profoundly that justice in fact is denied?

The Srebrenica trials are not yet over. In the case of Karadžić, whose trial is nearing conclusion and who is charged as a perpetrator, the Appellate Court has reversed a Trial Court acquittal based on the genocidal acts in municipalities other than Srebrenica, finding there was enough evidence to sustain a possible finding of the special intent necessary. Hopefully, the final judgment will help to clarify just what kind, if any, evidence beyond knowledge and contribution is necessary to show special intent. Mladić's trial could as well address these cloudy issues. And the ICTY Appellate Division has the opportunity in several pending appeals to clarify or perhaps eliminate the divide between "specific direction" and traditional aiding and abetting requirements. So, although we do not so far have the legal legacy of Srebrenica some of us might have wished for, we can claim a reason-based extension of the application of genocide beyond its originating context. And we can hope along with Ambassador Scheffer that the final stages of the Srebrenica proceedings will, in his words, validate the proposition that "practical realities as articulated through customary international

law [will] prevail about how criminal conduct . . . emanate[ing] from the highest reaches of power to devastate the lives of ordinary innocent civilians who are entitled to credible justice” will meet its match in the tribunals of justice.

The legacy of the Srebrenica trials cannot, however, be judged solely by numbers convicted or acquitted or even doctrines expanded. For the trial records themselves contain the raw stuff of history. In the Broadway hip hop musical *Hamilton*, the founding father propounds the critical question: “Who lives, who dies, who tells my story?” Make no mistake, here as well, the saga of Srebrenica continues in what Refik Hodžić calls, “A war fought by ‘other means,’ a vicious fight for the dominant narrative of the past, for the ‘truth,’” a war that is being fought “in the media, in classrooms, churches and mosques, at family dinner tables and its consequences are bound to have a lasting impact on the region’s stability.”

How we talk about Srebrenica, what is passed on to the next generation, and what goes into the history books matters. Prosecutor Brammertz said: “If you cannot agree on how the conflict is described in the history books in school, how can you move forward as a country?” Even if, as Joseph Lelyveld reminds us, “the Nuremberg trials failed totally in postwar Germany to kindle an interest in the subject of war crimes and crimes against humanity. The German encounter with that past started in earnest only in the sixties, a full generation later,” the time has passed for us to accept a wait-and-see approach any longer as to how the events of July 1995 are acknowledged worldwide.

Two decades later, there are, according to the Director of the Institute for War and Peace Reporting, “substantial levels of denial of the genocide within the Bosnian Serb entity and in Serbia itself and a continuing lack of dignity and justice for the victims.” Srebrenica school children are taught by Serbian teachers without recognition of the fact a genocide took place. On this twentieth anniversary, Serbia

successfully leaned on its friendly ally Russia to defeat a UN Security Council draft resolution that not only condemned the genocide itself but its denial as well and urged its truthful nature be taught in school textbooks throughout the region. U.S. Ambassador to the United Nations Samantha Power called the defeat of the UN resolution “heartbreaking,” but I think it is more than that. A recent column in the *Washington Post* on the obituary of a great Russian historian remarked on his lifelong efforts to expose the terrible human casualties of the Soviet Union experiment, noting that during the Cold War “it was possible to control and distort that country’s history so much so that its own citizens were unable to find out the truth from their own writers in their own language. . . . Nowadays it’s much harder to stop books from crossing borders, ideas and information can travel at the speed of a mouse click. But that hasn’t stopped authoritarians around the world from trying to distort facts and history in new ways. The world must find the ‘courage to fight big lies.’”

Srebrenica is such a case. The civilized world must keep fighting back harder on Serbia and its Russian ally’s proactive strikes to usurp historical truth. Certainly the United States has arrows in its quiver that it has used in the past with some success to push Serbia into surrendering suspects. U.S. President Barack Obama has declared that the prevention of mass atrocities is a “core national security interest and core moral responsibility” and created an Atrocities Prevention Board to coordinate rapid responses to indicators of embryonic genocides like ethnic cleansing. But is it not equally compelling to our security and moral responsibilities to assure that past atrocities are not downgraded or allowed to be dismissed as less than the terrible crimes they were?

And the Srebrenica trial records are indispensable in any such campaign. A *New York Times* article called Srebrenica “one of the most thoroughly documented war crimes in history”—at least the equivalent in that respect to Nuremberg. Apart from the prominent trials

of the top-level perpetrators, many midlevel indictees pled guilty in anticipation of leniency, and in so doing spoke out, describing (in *New York Times* reporter Marlise Simons' words) "the countdown to the massacre and depicting a well-planned and deliberate killing operation coordinated by the military security and intelligence branch of the Bosnian Serb army They provided so many names, firsthand accounts, documents and even a military log of the crucial days, that one court official blurted, 'They've practically written the judgment.'"

Krstić trial witnesses, documents, wiretaps and even findings reappeared as evidence in several later proceedings. But each new trial or plea added new details, even on occasion contradicting older accounts. (Ironically later proceedings brought forth additional evidence of *Krstić*'s own knowing involvement in the killings—evidence that might well have borne upon his genocidal intent as a perpetrator.) The ICTY trial records formed a major basis of the International Court of Justice's 2007 ruling in *Bosnia v. Serbia* that Serbia, while not guilty of genocide as a perpetrator, was guilty of complicity in genocide and of violating the UN Convention on Genocide by not preventing or acting to discipline Srebrenica's prime movers. And though in one commentator's words, the *Milošević* trial ended before judgment, it "compiled a record that can and has been used in other trials at the ICTY and in domestic courts, and though it may take generations as it did in Germany after the Nuremberg trials, the record will remain available for the time when Serbs, Kosovars, Croats, and Bosniaks are able to view it more openly, without the fog of war, hatred, and suffering."

The truth, especially historical truth, will always remain somewhat elusive and many say trials are not the best way to find it, involving as they inevitably do so much adversary jousting and litigation strategy. Those risks intensify as the "truth" must encompass actions by thousands of participants in areas spanning hundreds of miles over a period of several years. Yet an equally compelling truth is that

we have few alternatives to these tribunals to make people involved in terrible acts speak out and to compile real-time narratives of unimaginably horrible deeds. And a series of trials over several years are arguably better than a single one.

The Srebrenica trials in totality did succeed in establishing one unassailable “truth”: that a genocide did occur and that it was planned and executed from the top echelons of the Bosnian Serb Army and its civilian supporters. There have been many fact finding commissions and investigations of Srebrenica over the past two decades that have validated the genocide finding, but the still developing narrative of the court proceedings has its own special persuasive power gleaned from the real time voices of the victims and the perpetrators. It has been aptly observed by Bridget Conley that “when truth telling aligns with the interests of power, it invariably softens its demands. . . . The real dilemma concerns what must be excised from international genocide and mass atrocities agendas in order to produce the kind of lessons learned that are palatable to powerful international actors.” In contrast, the court records stand on their own as a formidable obstacle to historical lies and half-truths.

In vital ways, then, Srebrenica is still an unfinished story. The responses of the international community to the original Srebrenica genocide were too little and too late. But there were trials, and even to this day the perpetrators and their subordinates are not entirely free from capture and prosecution. The Srebrenica trials beginning with *Krstić* also represented a crossroads for the ICTY—at that time skeptically viewed as “seeming to proceed at a snail’s pace, delayed by the complexities of evidence-gathering and its judges’ inexperience as much as by difficulties in apprehending suspects.” Just as Srebrenica needed the ICTY to memorialize and define its tragedy, the ICTY needed Srebrenica to secure its foundation as a credible instrument of international justice.

But as it nears the end of its tenure, what kind of tribunal will take over its role? Can the ICC with its limited jurisdiction and resources do it alone? Can national courts ever regain the required level of quality justice and impartiality to take these cases on? And if trials similar to Srebrenica's do occur in the future, should we not also be thinking about how the crimes of genocide and crimes against humanity which originated in the context of wars now a century old fit the new technologies and paradigms of modern day warfare? Is genocide itself—the “crime of crimes” requiring a special intent to destroy a racial, religious, or ethnic group—that much more reprehensible than the annihilation of thousands of innocent civilians of mixed origins or beliefs so as to require some not yet well-defined indicia of evil intent over and above knowledge by the actors of the probable consequences of their actions? And finally, can we allow the frightful facts of a genocide like Srebrenica to fade away in the shroud of historical cover-ups taught to future generations? Twenty years is just a moment in history, but it is our moment to insure that the true story of Srebrenica is told. We may not be able to control “Who Lives and Who Dies” but we can control who tells the story. We owe at least that to the 8,000 young boys and men who died in Srebrenica's genocide, to their still grieving survivors—and to ourselves.¹

¹ Randovan Karadžić was found guilty of genocide based on the Srebrenica episode mentioned here. He was sentenced to forty years in prison on March 24, 2016. Further, the ICTY Appellate Division has repudiated the “specific direction” doctrine in several convictions of Srebrenica leaders as perpetrators of genocide and crimes against humanity.

Kaleidoscopic Conflict: A Summary of Comments

David M. Crane*

We are in an age of extremes. The challenges faced by the old world order are problematic beyond their understanding. With the last visages of the Cold War fading, new and misunderstood events are taking place that were never foreseen and are completely unplanned. We are reacting; we are not able to predict and prevent or face this new world order.

With these unforeseen events we see decades-old institutions, international arrangements, and legal regimes fading or vanished. I would call them “the givens.” One “given”: the nation-state is not THE power center. New centers of power now exist—from nongovernmental organizations to international corporations to international criminal cartels—and they all influence the new world order. There was no clear winner in the Cold War. Even though the United States appears to be the last world power, at the end of the day, the Cold War was a destructive distraction that weakened the Westphalian model of international order, setting the stage for this age of extremes. The United States is no longer the single power of influence. With this weakening of the Westphalian model we see that single nation that would have become a center for stability weakened by misadventure and criminal activity that has diminished its stature and put the idea of the rule of law in doubt.

Another “given” is that the long relied upon regional security arrangements are no longer valid. Treaty-based security organizations created to counter Soviet expansion are ruined shells of what they once were. NATO, for example, can no longer face the challenges

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presented to it by Vladimir Putin's Russia. But for the United States, NATO would be incapable of any major attack on Europe. With that in mind, Europe is no longer a significant geopolitical player. Europe, the center of geopolitical prominence for five hundred years, now has little influence. Their strength lies in their economic viability, but as a center of global influence, those days are gone. Europe has become essentially a tourist destination. Additionally, the United Nations paradigm remains valid but is not influential. The promise of settling disputes peaceably and maintaining international peace and security are the hallmarks of the United Nations. Given the current geo-political circumstances in this age of extremes, these concepts are challenged. With this waning of influence by the United Nations, international law is no longer a stabilizing influence. After the tragedy of 9/11 and the U.S. resort to only force in its dealings with terrorism and other direct national security threats, ignoring the international legal regimes, the rule of law has been weakened despite efforts internationally to hold world leaders accountable for their misdeeds.

The premise of kaleidoscopic conflict is this: with the past there is a certainty. The more things change the more they remain the same. In the present there can be predictability; things are changing and we react to these changes using the past as solution models. Yet the future is kaleidoscopic—one thing changes and all things change and there are no solution models to draw upon.

The dilemma then is that organizational theory and planning are based on lessons learned and past experience. We look back to learn lessons and plan forward based on the past. Our problem solving process focuses on solutions and end-states. Set piece warfare and current doctrine related to that type of warfare is based on this planning process. Yet geopolitical events and twenty-first century conflict are evolving quickly beyond this deliberative planning cycle into unimaginable circumstances where none of the above matters. The results are uncertainty and unpredictability, thus rendering

planning obsolete, doctrinal failures, and confused reaction, leading to unexpected outcomes—even failure—and kaleidoscopic change.

Is there a solution or a fix? Even trying to solve the dilemma makes us fall into the kaleidoscopic trap! Currently there are no base models to solve this dilemma. Current and even future planning and scenario driven solutions need to be questioned. At this point an awareness that kaleidoscopic conflict may be the future is a start. Kaleidoscopic theory is a new lens to view these challenges. By this awareness, considerate discussion may point to a workable and perhaps sustainable result. We may have to accept that there is no solution. At the end of the day we may only be able to manage international peace and security, not restore that peace and security.

Commentary

International Criminal Law: Year in Review 2014–2015

Mark A. Drumbl*

First, let me tell you a little bit about myself. This background might help explain why my “Year in Review” talk follows the lines that it pursues.

I first became interested in international criminal law through work at the national level: prosecutions and defense work for serious human rights abuses and international crimes. One point of view that I would like to bring to the table today in thinking about not only a year in review, but also the years ahead, is to underscore one very important reality: the vast number of attempts to deal with justice following terrible atrocities do not happen at the international level. In fact, statistically speaking, only a tiny number of trials occur at the international level. This number is completely dwarfed by national and local prosecutions.

Therefore, I would like to review not only what has happened over the past year at international tribunals—I will talk a bit about that—but also to underscore the importance and to tell a story or two about national prosecutions as well. The action on the justice front operationally happens in a lot of places that people just do not talk about much. And these places lie well beyond The Hague.

What I do not want to do is review and repeat what has already been said about the international arena. I thought what I would do is boil it down to a couple observations that I have about the activities at the international institutions over the past year, and discuss four elements that have emerged.

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One is transition. What I mean by this is that the work of a number of the international institutions is winding down, moving on, relocating.

The second criterion is what I would call unevenness. With the International Criminal Court (ICC) in particular, I think we see some high highs and some low lows. It is a staccato process. And I cannot fully figure out if it is two steps forward and one back or one step forward and two back; or maybe even higher numbers, probably more in the backwards direction. But I am an optimist, so I would say that there are two forward and one back.

The third theme: migration. This grafts onto the theme that I opened with: proceedings moving from the international level to the national level and being dealt with there.

And then, the final criterion that I see emerging is what I would simply call omissions. I woke up this morning agape at another omission that we have been talking about quite a bit: a photo I saw from the latest torture practices that ISIS is deploying. There was a photo of four men on a bar—it actually looks like a swing set—and there is a bar that goes across the middle. These men are tied to the bar, arms and legs up above, so they are face down. In front of these four men is a row of kerosene: a row with straw on it. There are four of them. Their bodies are also doused with kerosene. Each of these four rows is lit on fire. Kerosene advances, and the men burn to death, face down.

So here, we see omission. Conceptually, these are crimes that definitely fit within the realm of international institutions. Operationally, though, we see nothing because of jurisdictional concerns. So if I have to summarize the past year, it would be transition, unevenness, migration, and gaps.

What I would like to do today is take three different steps. First, I would like to discuss some facts about activities at the international

level. This is an audience where I see some familiar faces and I see some new faces, and that suggests to me that there are going to be a number of people in the room who may not necessarily be insiders to the process of international criminal law. So I am also going to set out a bit of simple background about some of the institutions.

Then I want to talk to you about people, because at the end of the day, justice is about individuals. Human beings are the ones—not monsters, not demons—that commit atrocities against other human beings, and the human beings accused of atrocities have stories. I am not saying they have much, perhaps, in the way of humanity, but they are at least members of the human collective.

I want to tell you stories about three defendants that appeared this past year in the news whose stories I think are somewhat compelling, not necessarily from an empathy point of view, but certainly from a point of view of getting us thinking about what is happening.

Then from the third of these three, I want to move to the final part of my remarks. This is the “Year in Review,” looking at years behind and years ahead, and trying to excavate some of the work that has happened at the national level, with regards to our gathering on international criminal justice.

Of the three individuals that I am going to talk about, the first will be Dominic Ongwen. He will appear in The Hague. The confirmation of charges will be in January at the ICC. The second person, Pauline Nyiramasuhuko, is being prosecuted as part of the Butare Six trial. The appeals judgment is pending, and as we heard from Chief Prosecutor Hassan Jallow yesterday, it is the last case of the Rwanda Tribunal. The third person is someone that I am quite fascinated with, a man called Oskar Gröning. He was prosecuted in Germany, in Hamburg, for his role as the bookkeeper at Auschwitz, seventy years after his bookkeeping. This is a national prosecution that took place this summer.

As you all know, there are ad hoc institutions at the international level, and there is the permanent International Criminal Court. The two ad hoc institutions that have done quite a bit of work demographically in terms of numbers are the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). These institutions, as you have learned over the course of your time here, are transitioning into basically their own nonexistence in terms of graduating from the excellent work that they have done to the residual Mechanism for International Criminal Tribunals that is then going to take the brunt of the work going forward. This is the theme of transition. As I mentioned, the ICTR retains one case on appeal. There are about five or six, maybe seven, ongoing cases for appellate and trial at the ICTY.

Let us look at the numbers. Since its inception and creation, the ICTR has indicted ninety-three individuals: sixty-one have been sentenced, fourteen acquitted, and ten referred to national jurisdictions. Three of the defendants passed away prior to or during trial. Three remain fugitives.

Jurisprudentially, as we learned yesterday as well, the ICTR has done great work in terms of, for example, redress for grievous sexual violence, associating rape with genocide. In another landmark case, the *Media* case, the ICTR became the first international tribunal to hold members of the media responsible for incitement to genocide.

Remember that number: ninety-three. Roughly 10,000 individuals have been prosecuted at the national level in specialized chambers at the Rwanda national courts. I think it is a safe estimate, a conservative estimate, to say that roughly 800,000 people—perhaps even more—have been prosecuted nationally in Rwanda through the neo-traditional Gacaca prosecution. Gacaca is, in theory, a traditional form of dispute resolution in Rwanda, but it has been officialized and standardized. It was completed a couple years ago. Those numbers

are strikingly disproportionate. Yet, there is so much more talk about the ICTR than about Gacaca.

The ICTY, as we learned yesterday as well, has a slightly larger number of people that it has indicted: 161. Proceedings have been completed in the cases of 147 individuals, 18 of whom have been acquitted, 80 sentenced. A number have been transferred to serve their sentence, and fifty-two have already served their term, which in many instances may vary widely, including early release.

As I mentioned before, the work of these institutions is transitioning to the Mechanism, as is the work of the Special Court for Sierra Leone to its own residual institution. The Mechanism's work is not only to deal with ongoing prosecutions, but also to track remaining fugitives; to deal with appeals proceedings, retrials, and contempt trials; to keep protecting victims and witnesses; and, very importantly, to supervise and enforce sentences. As you may or may not know, individuals convicted at the ad hoc tribunals serve their sentences in national courts that have conducted agreements either with the tribunals or with the mechanism that convicts them. This has actually led to quite a diaspora of individuals in terms of where they serve a sentence. The Mechanism is also geared towards assisting national jurisdictions when it comes to dealing with their own proceedings.

The permanent International Criminal Court is similarly invested in nine situations and, at present, twenty-two cases. There has been a great level of unevenness—again, the staccato process, forward, backwards. The situations in which the ICC is involved divide into those where the Office of the Prosecutor gets referrals from state parties, referrals from the Security Council, and when the prosecutor proceeds independently *proprio motu*. There are also preliminary investigations where the ICC has been involved. The big one in the past year has been about Palestine, which ratified the Rome Statute on April 1, thereby becoming the 123rd state to do so.

I think it will be interesting now to segue from these numbers to talk about people. Let me talk to you a bit about Dominic Ongwen. Dominic Ongwen has been indicted by the International Criminal Court. As I said earlier, the confirmation of charges hearing is scheduled for January 2016. So who is he? He is a brigadier commander in the Lord's Resistance Army (LRA), a group most virally notorious through the Kony 2012 video. He is also a character that has had quite the life trajectory. He is the youngest individual to be accused and indicted at the International Criminal Court. His life story begins one day when he was walking home from school and is kidnapped, abducted, and forcibly recruited into the Lord's Resistance Army as a child soldier.

He was nine years old when abducted. After being abducted and forcibly recruited, he is trained and later becomes a child soldier. He fights. He is an active participant in the Lord's Resistance Army. Through his use of violence, coercion, empathy, pardon, and at times mercy, he rises through the ranks of the Lord's Resistance Army to become a brigadier commander. That is when he surrendered in January 2015 while in the Central African Republic.

In the Ugandan situation, the ICC prosecution has indicted five people. Ongwen is one of them. Two are dead. Two are at large. Ongwen, therefore, presents as an indicted person who has suffered some of the crimes of which he is charged, mainly enslavement as a crime against humanity and unlawful recruitment and use of child soldiers, suggesting to me a very interesting fact: how the lines between victims and victimizers in the context of mass atrocity are often porous and permeable—not transparent, but there is certainly a translucence. This is something that is important for us to accept and appreciate because it is often very easy to divide perpetrators and victims into boxes that are clear-cut and categorically good/evil, innocent/guilty. Those categories are necessary for law, but the reality of violence is often much more complicated.

There has been a tremendous global push to restrict the use of children in armed conflict. But the protective push to shield children from violence becomes complex when an individual is an adult who was socialized as a child soldier. What do you do when someone has a “rotten social background” and then commits crimes as an adult? I cannot imagine a more rotten social background than growing up in the Lord’s Resistance Army. So what do you do with that? Does the global push to protect children from violence lead to a conversation about the culpability and responsibility of a former child soldier who has, in turn, as an adult, committed serial acts of violence?

Conversations in Uganda about Ongwen are complex. There are a number of Ugandans that believe that Ongwen should be prosecuted. Other Ugandans believe Ongwen, like many other LRA fighters, should be amnestied and in that particular context should be allowed to reintegrate into society without penal consequence.

Ongwen himself, according to reports from the LRA, is a bit of an enigma. Ongwen was apparently among the less abusive of the LRA leaders. He drank heavily. He occasionally was capable of showing mercy and would take risks to protect others.

Will Ongwen’s trial help unpack the reality of the complexities of child soldiering and how victims can become victimizers? I don’t know. Trials are geared to simple narratives, as I said before: guilty/innocent. As a prosecutor, I would not want to bring much into play about the accused’s social background. But the bottom line here is you cannot disentangle the conduct as an adult from the socialization as a youth.

If all we see in a trial is a conversation about the guilt or innocence of the person in the box, then these questions may be less relevant. But if we see in a trial something that teaches, that messages, that instructs, that reports on the anatomy of collective violence, then we do need to have these particular conversations because a great deal of

collective violence is committed by people who are not categorically evil, but who themselves have complexities. Many perpetrators are tragic; many victims are imperfect. And to me, that complexity belies the reality that atrocity itself is just not so simple.

So I am hopeful that in this trial, germinating this year and coming to fruition in the future, it will serve that purpose. There is one question I want to throw out to you; How do you approach it, a child socialized in this function who then becomes a leader?

A second person that I want to talk about is Pauline Nyiramasuhuko—the former minister of Women’s and Family Development in Rwanda—the lead defendant in the Butare Six trial, accused together with others, including her son, Arsène.

She was one of three ministers in the Rwandan government at the time of the genocide who is a woman. Another is the justice minister who is serving a long-term prison sentence in Rwanda right now, prosecuted at the national level; the third, the former prime minister of Rwanda, a moderate within the government, was murdered by her own guard after having been sexually assaulted by them. Her assassination was one of the opening factors that led the genocide in Rwanda to be as graphic as it was.

Nyiramasuhuko flees after the genocide ends. She is found later in a Congolese camp. She is indicted in 2011. Trial Chambers sentences her to life. Her appeal is ongoing.

There are a very small number of women who are accused at an international level of committing crimes. To me, this is interesting because I think, once again, we have the reality that here is someone within a position of influence accused of committing terrible crimes—including ordering rape and sexual violence—as well as those she ordered her own son to commit. Yet, if one reads the trial judgment,

it is almost rehearsedly gender neutral. There is no mention made whatsoever of the gender of the perpetrators, other than just the initial background, as I mentioned.

If you look at the media reports of this case, something I have written about a little bit, there is actually quite a lurid gender sensationalism or glorification of a woman in a senior position convicted of rape, including having ordered and urged her son and others to commit the violence. To me, the sensationalism in the media goes two ways. One way is to find her more culpable because she is a woman, because it is even more unfathomable that a woman could commit these particular crimes. So here, gender is trotted out to make her more guilty, therefore deserving of greater punishment. But then there is the opposite stream where gender is spooled out to have a conversation about how there is no way that she could ever be guilty because no woman could ever do this. And this narrative is not only gender-specific—I can't think of a better word for it—but it is also parental. No mother, no grandmother, could ever commit these kinds of crimes. She is not the only parent-child tandem to have been prosecuted by ICTR, however. There is another involving a pastor and his son, and the conversation there between father and son genocidaires is very different than the media conversation of mother and son.

I think this case offers a porthole in which to open up broader dialogues about the role of gender, not only in the innovation, but also in perpetration of violence, and to assess how a broader analysis of masculinities and femininities in the development of an atrocity could and should be handled so that we can have a deeper understanding of why violence occurs—human violence occurs—and how gender plays into perpetration. It's a very under-discussed phenomenon. So that is a question I leave you with.

The third is Oskar Gröning. Gröning is a young SS man at the time he arrives in Auschwitz in 1942. He was an accountant and a

bookkeeper there. So what does that mean? That means that when the detainees come in, he removes from them their cash, jewelry, and valuables. He meticulously records the amounts and ensures that the stolen proceeds are sent back to Berlin to assist in the Reich war effort. He is a good, punctilious bookkeeper. The level of theft that occurred in the camps from other individuals who served as guards and bookkeepers into their own pocket, where they only sent half of the stolen proceeds back to fund the Reich war efforts, is very large. Gröning is a committed bookkeeper.

Gröning leaves Auschwitz in the fall of 1944 after having asked to leave twice before. His requests are denied. He wants to transfer out because he sees what is actually happening in the camp, so he says. His transfer request is denied. Finally, the war effort number of soldiers gets so thin he has to transfer out. He ends up getting wounded, captured. He ends up in England. He plays in some musical band for a couple of months in the United Kingdom after being in the war.

This July, a German court in Hamburg convicts him at the age of ninety-four of being an accessory to the murder of 300,000 of Auschwitz's inmates. He was most directly responsible in the summer of 1944 when a staggering number of Hungarian Jews were deported to Auschwitz. The investigations against Gröning began in 1977, but it took nearly forty years for him to be put on trial. He received a four-year sentence. He is appealing. He is well enough to face trial, but it is unlikely that he would actually ever serve a prison sentence.

Here are some aspects of Gröning that I think are particularly interesting. Consistently, he has acknowledged his "moral" guilt. He is very candid about his contribution to the functioning of the camp. He, in fact, went public himself with his moral guilt and the details of his involvement with journalistic interviews and in a sense did not challenge the idea of being prosecuted for a trial. What he did challenge, however, was his legal guilt. His take on it consistently is that he was

a cog in a small machine, and the question of whether or not he is criminally responsible is to be left to judges to decide, not to himself.

One of the major reasons he went public with his moral guilt and his involvement is because he claims to have been so disgusted by the residual Holocaust denialism that was ongoing in Germany. He is a member of a stamp club. One day, Gröning is at a stamp club meeting, sitting down, and instead of talking about stamps, the other stamp guy next to him starts saying, “Oh, the Holocaust never happened.” Gröning says, “Well, I actually know something about that,” and he starts to go public with his story.

He, after conviction, did acknowledge his legal guilt. He also, however, refused to apologize at trial for his deeds. He refused to apologize because the enormity, in his words, of his own guilt was so large that it was simply impossible for him to get any forgiveness or ask any forgiveness from mortals, survivors, or relatives. The only entity from whom he could beseech forgiveness was the divine.

So, for me, the *Gröning* case opens up three interesting questions: First, is it worth prosecuting someone seventy years after the fact? What do we make of delayed justice? Can it survive? Is it right? To me, though, more powerful is the legal counterfactual? Is it absurd to prosecute a ninety-four-year-old man, seventy years after the fact, or is it more absurd not to prosecute a ninety-four-year-old man seventy years after the fact when you actually have a pretty solid case against this particular individual in part because of his own willing participation in the process? It’s a worthwhile inquiry.

Secondly, once again, the victim/victimizer divide emerges here. In a lot of ways, Gröning’s life story actually shares some parallels with Ongwen’s. Gröning’s mother dies when he is five or six, very young. His father is austere. Like a lot of young people at the time, Gröning drifts into military service, success and so forth. At Auschwitz he

never committed any violence directly against anyone. He is your classic bookkeeper. He conducts audits in an overarching enterprise.

And, finally, what do we make of his statement that he has the power to admit his moral guilt, but that as a defendant, his legal guilt can only be assessed by outsiders? And he will accept what the outsider says, but determinations of legal guilt are not for the accused to make.

Those are three people that have been part of the tapestry of international criminal law, either internationally or nationally, over the past year. I think there is a lot more to be gained, in a sense, by thinking about their stories—by thinking about what they did and the questions that their experiences raise—than systematically going through a number of facts, figures, and statistics. The machine of justice involves individuals; there is a great deal of eccentricity, malevolence, but also mercy that narrates the actions of these individuals.

To me, the *Gröning* case is an important pivot to look ahead in the sense that the future of international criminal justice is not going to be written by international entities. I think the future of international criminal justice is going to happen at the national level in which the norm, the law, the energy that has emerged internationally, becomes instituted and implemented at the national level.

But, in a sense, that has been happening for a long period of time, and we do not talk about it very much. I have actually become very interested in looking at national proceedings—not in military courts, but in civil courts—after World War II in a number of jurisdictions that have involved the prosecution of atrocity related to World War II.

One project that I have become very interested in concerns an institution that hardly anyone has heard of, the Supreme National Tribunal of Poland. It operated from 1946 to 1948. It ran seven trials involving forty-nine individual defendants for Nazi atrocities within

Poland itself. This is the institution that convicted Rudolf Höss, the most infamous commander of Auschwitz. This is the institution that convicted Amon Göth, who was a leader of forced labor camps in Kraków, played by Ralph Fiennes in *Schindler's List*. This is the institution that convicted a man called Arthur Greiser, who was the regional governor of a large part of western Poland. He was the architect of forced Germanization in that area of the country. This is an institution that convicted Josef Bühler in a trial closely conceptually related to the justice trial at Nuremberg. This Tribunal prosecuted German lawmakers in the general government of Poland.

The jurisprudence of this particular institution is rather rich. It has dealt with issues of criminal membership, sexual violence, medical experiments, and genocide. This institution put in play a definition of genocide that was actually broader than the ultimate definition adopted in the Genocide Convention that included spiritual, artistic, and economic aspects of society.

One thing I think I would encourage everyone to do is look through the window not only about goings-on in The Hague and other centers of the transnational world, but also to look for windows that open to places where justice happens but where people don't really look that much. There are so many underexplored, under-discussed, and very valiant and very courageous forms of justice that took place, will take place, and are taking place. I think there is an incredible amount to learn from those particular institutions.

At Chautauqua we come to learn about the big-ticket international institutions, but there are a lot of smaller shows going on in many spaces. They, too, are important.

So I'll stop, and I hope that some of the questions that I've raised are ones that might trigger another conversation.

A Complementarity Challenge Gone Awry: The ICC and the Libya Warrants

Jennifer Trahan*

On July 28, 2015, a domestic court in Libya announced death sentences against Saif al-Islam Gaddafi, the son of former Libyan leader Muammar Gaddafi, and Abdullah al-Senussi, who served as Muammar Gaddafi's intelligence chief. In total, thirty-two former Gaddafi-era officials were convicted, including nine who were sentenced to death. Yet, observer accounts suggest the trials were deeply flawed, lacking key fair trial protections.¹ The possibility that Libya will carry out the death sentences is clearly of huge concern to the defendants, but should also be of concern at the International Criminal Court (ICC).

On February 26, 2011, the UN Security Council referred the situation in Libya to the ICC. The Court originally issued three warrants for crimes committed during the 2011 uprising against Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al Senussi, charging them with murder and persecution as crimes against humanity. The case against Muammar Gaddafi was terminated after his death.

Initially at issue in both the Saif al-Islam Gaddafi and Senussi cases was whether they should be tried in Libya or at the ICC, as the ICC will only try cases where national courts are "unwilling" or "unable" to conduct the trials. The Court ruled that Gaddafi needed to be tried at the ICC, whereas Senussi could be tried in Libya, as he was the subject of domestic proceedings and the ICC deemed Libya "willing" and "able" to carry them out. The ICC Appeals Chamber affirmed both rulings.

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¹ *Libya: Flawed Trial of Gaddafi Officials*, HUMAN RIGHTS WATCH (July 28, 2015), <https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials>.

Yet, despite the ruling that Gaddafi should be tried in The Hague, he was never surrendered, and remains in Libya. His situation is complicated by the fact that he is not held by any governmental authorities, but rather by the Zintan militia in Libya.

As to Senussi, this author thinks the Court erred in its decision. The problem with the criteria of willing and able (or that a national court is unwilling or unable to try the accused, as it is phrased in Article 17 of the Rome Statute), is that it generally ignores an equally problematic third possibility—that a national court is all too willing to try someone (i.e., the situation of overzealous national proceedings). This is a situation one can certainly anticipate any time there has been a regime change and the new government wants to “get” at officials of the past regime—in other words, potentially the situation here. The rush to justice resulting in the Saddam Hussein execution is another example.

Human Rights Watch reports that Senussi was denied adequate time to prepare his case and adequate assistance of counsel.² Gaddafi, who was not even present for his trial, was apparently denied both these protections, and while trials in absentia are permitted in Libya, the procedural safeguards required for them were apparently not provided. While the death penalty is permissible under Libyan law (and its imposition alone does not necessarily mean the trials were unfair), more and more countries categorically oppose the death penalty. At a minimum, where it is a possible punishment, it is especially important that fair trial guarantees are scrupulously observed.

Should this turn of events be of concern to the ICC? Indeed.

Gaddafi was supposed to be tried at the ICC, but instead he could end up being executed in Libya. As a result of the ICC’s rulings, a green light was given to al Senussi’s trial in Libya, which has also resulted

² *Id.*

in a death sentence. If the sentences are affirmed on appeal and carried out, the ICC will have played a role in allowing two executions based on trials suspected of serious due process flaws.

There is still a chance for an appeal in Libya. Libya's Supreme Court should independently and fairly review the verdict, particularly with a view to due process. But in the meantime, more pressure should be put to bear to ensure that Gaddafi is transferred to The Hague (where he should have been all along), and Senussi's counsel should move to reopen the admissibility challenge based on newly discovered information (the events in Libya), or the ICC Prosecutor's Office should do so.

The Appeals Chamber did leave an opening in its July 24, 2014, ruling, suggesting that it would not utterly ignore due process violations by a national court, suggesting some concerns of an "all too willing" or "vengeful" national court:

It is clear that regard has to be had to "principles of due process recognized by international law" for all three limbs of article 17(2), and it is also noted that whether proceedings were or are "conducted independently or impartially" is one of the considerations under article 17(2)(c). . . . As such, human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted "independently or impartially" within the meaning of article 17(2)(c).³

To the extent the Appeals Chamber also suggested the national proceedings would have to be "completely lack[ing in] fairness" such that they fail to provide "any genuine form of justice" before

³ Prosecutor v. Gaddafi and Al-Senussi, ICC-01/11-01/11-565, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on the Admissibility of the Case Against Abdullah Al-Senussi," ¶ 220 (July 24, 2014).

the ICC can be the proper venue, the judges are setting the bar too high.⁴ (Alternatively, it is conceivable that, upon further inquiry, one might find even that bar met.)

It is true that the drafters of the Rome Statute specifically rejected making the lack of due process a ground for admissibility. Yet, the precedents they were dealing with at the time—the experiences of the ICTY and ICTR, where unwilling and unable trials were the concern—simply do not reflect what has become the experience of the ICC. Moreover, it is quite possible (as the Appeals Chamber has done) to read a due process component into the language of Article 17 of the Rome Statute.

Based on the events in Libya—flawed proceedings that suggest a lack of impartiality—the Court should now find the Senussi case admissible at the ICC and order him transferred. If that happens, individual states and the UN Security Council should be prepared to help ensure the transfer actually happens.

These may not seem the most significant cases that the ICC has on its docket, but it would be a bleak day if the ICC (and the UN Security Council) stand by and let these death sentences be carried out on cases that stemmed from the Security Council’s referral and involved the ICC.

⁴ *Id.* ¶¶ 229–30.

Learning About International Justice on the Ground: The Balkans and War Crimes

Belinda Cooper and Jennifer Trahan*

Students of international affairs or international law can learn about the field of international justice through textbooks, films, discussions, and lectures in the classroom, but an additional depth of understanding comes from traveling to the locations where crimes occurred, observing tribunals adjudicating those crimes, and meeting in the field with court officials, NGOs and victims.

Each year, we lead a group of master's degree students from New York University's Center for Global Affairs on a trip to The Hague, Bosnia, and Serbia to learn about war crimes prosecutions and issues surrounding international and transitional justice. We both work in the international justice field, and over the course of years have built up networks of contacts in both The Hague and the Balkans region; we are thus able to introduce students to a broad variety of actors and institutions and thereby expose them very directly to the controversies and pitfalls, as well as successes, of international and transitional justice.

The Hague

While still in New York, we hold a number of class sessions that provide basic background on the wars in the former Yugoslavia and the ways in which judicial systems and societies deal with the aftermath of mass atrocity crimes. But the trip really begins in The Hague, which puts us on the doorstep of international institutions, even in the literal sense: our hotel is next door to the International Criminal Tribunal for

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the former Yugoslavia (ICTY). That tribunal has been the focus of our Hague visit, but we also bring students to the International Criminal Court (ICC) and, on occasion, to the Special Tribunal for Lebanon.

To provide some insight into the history of the movement for international justice, we spend some time at Andrew Carnegie's imposing Peace Palace, the home of the International Court of Justice and the Permanent Court of Arbitration. Whenever possible, we sit in on trials at the ICTY and ICC. In past years, students have had the chance to view the *Karadžić*, *Mladić*, *Haradinaj*, and *Bemba* trials, among others. Sitting barely feet away from accused war criminals and hearing lawyers, judges, and witnesses speak brings home the drama—and sometimes the tedium—of international criminal trials.

In addition, we organize substantive meetings with a wide variety of people involved in the courtroom process: these include the various offices of the ICTY (prosecution, defense, judges, outreach, registry) and the ICC, as well as journalists covering the tribunals. Highlights of past years have included ICTY Judge Theodore Meron, ICC Judge Hans-Peter Kaul, Karadžić defense advisor Peter Robinson, SENSE news chief Mirko Klarin, and many others. Sometimes serendipity takes a hand: this year, the chief prosecutor of the ICTY, Serge Brammertz, passed our students as they waited to enter the building and began a conversation with them. At these meetings, students gain insight into the mechanisms of international justice and profit from speaking directly to people involved every day in the nitty-gritty of preparing and carrying out trials of major war criminals.

The impression they receive is an understandably positive one of successful, if not always perfect, institutions staffed by dedicated, skilled, and often idealistic professionals. But questions about the efficacy of the tribunals on the ground in former Yugoslavia arise in our discussions about the ICTY's reception in the region, its outreach program, and its perceived legacy. These concerns increase

in immediacy and intensity once we arrive in the region, and they become a central focus of our discussions.

Sarajevo

After experiencing The Hague tribunals, we travel to the region itself, starting in Sarajevo, Bosnia and Herzegovina—the city that was besieged from 1992–1995. From the moment we arrive and begin to pass buildings covered in bullet holes, students are confronted directly with the reality of a conflict that ended barely twenty years ago. Interaction with survivors of the conflict begins almost immediately. The guide who tells us about the tunnel under the airport that was used to bring in supplies during the siege was involved in building it. The staff at the hotel we stay in, as well as many people we meet in interviews and casual conversation, lived through the siege and lost family members during it. These discussions and conversations heighten the impact of our more official meetings and discussions.

We visit the International Commission for Missing Persons (ICMP), which conducts forensic analysis to identify persons killed in the war. Visiting the DNA labs is always fascinating, but we are particularly interested in the crucial role forensics plays in both international and transitional justice. Where private individuals and government officials deny or minimize the number of people killed at Srebrenica, forensic proof of the number of victims and how they were killed becomes a critical component of criminal trials, as well as one way of establishing the truth and combatting denial. Also, for families whose loved ones went missing, return of the bodies for burial becomes critical in seeking some level of closure.

Our visit to the ICMP, as well as meetings with other NGO representatives, leaves students feeling that much positive work is being done in Bosnia. But they are very quickly confronted with fundamental political problems that defy solution. In our meetings with journalists, academics, survivors, and ordinary people, we hear

repeatedly that Bosnia is not a functional state—that it is mired in the regime created by the Dayton Peace Accords, which was never meant as a permanent solution. The two entities that comprise the state—the Muslim and Croat “Federation,” and Republika Srpska—coexist uneasily, with very little sense of unity. The pessimism this creates extends to the existing mechanisms of international justice, which were once heralded as at least a partial solution to the region’s problems.

Thus, we encounter great skepticism about the ICTY and its role in the region on the part of Bosniaks, who were the main victims of the war. After seeing the courts in The Hague, meeting their committed staff, and learning about their achievements, it can be disconcerting to discover how deeply the hopes they once raised have been disappointed. From our perspective as professors, however, it is very useful for the students to be so directly confronted with the limits of international justice and perhaps take away some important lessons for the future. Importantly, too, despite the often pessimistic and critical responses, no one has suggested that the region would be better off without the ICTY. Those we speak with may be frustrated that the ICTY is not a panacea to all their problems—for instance, it cannot try a low-level perpetrator who may still live down the block—but ultimately, they admit that things would be far worse had the ICTY never existed.

National war crimes courts are both a legacy of, and a supplement to, the work of the ICTY, but they also have their weaknesses. When we visit the State Court—the hybrid chamber in Bosnia adjudicating war crimes cases—and find that witnesses still require protection, or hear about the procedural failings of more local war crimes trials, we are reminded that ethnic tensions persist and that the search for justice, twenty years after the end of the conflict, still leaves much to be desired.

Meetings with civil society groups round out our experience in Sarajevo. We are always particularly glad to make a stop at a women’s collective run by war victims, who seek companionship and a small income by

coming together to produce handmade crafts that we appreciatively purchase. These women, many of whom were held in “rape camps” during the war, receive little or no support from the state. While their resilience is humbling, their impressions of both the war crimes courts (international and national) and the state of transition in Bosnia underscore the pessimism we frequently encounter among survivors.

The town of Sarajevo is filled with history, both old and more recent, all of which is important in understanding its current situation. We visit the site opposite the Latin Bridge where Archduke Franz Ferdinand was assassinated, the eternal flame to Bosnian victims of WWII, and memorials to the horrors of the 1992–1995 siege, including the children’s memorial, the site of the marketplace massacre, and the “Sarajevo roses” (throughout the city, these mark locations where people were killed by mortar shells; the indentations have been filled in with red resin in roughly the shape of a rose). Memorialization and historical memory are key aspects of transitional justice, and these memorials to Sarajevo’s suffering form a backdrop to our upcoming encounter with the very different view of the recent past in Republika Srpska and Serbia.

We have learned over the years that our students’ intense encounter with the region’s recent violent history must be balanced with time to experience the positive aspects of Sarajevo today. It is a beautiful city, and we also ensure that students have a chance to enjoy the old town, where they can shop and sample Bosnian food, sometimes overlooking the beautiful Miljacka river, and enjoy the sunset over the city.

Srebrenica

The one part of our trip that participants are unlikely to forget is a day spent in and around the massacre site of Srebrenica, where 8,300 men and boys were executed on July 11, 2005, and the days after. As we drive to Srebrenica and admire the beautiful mountain scenery

and picturesque small farms, it is hard to fathom how ethnic tensions reached that horrible nadir of inhumanity.

Our first visit brings home with great force the stark contrast between Muslim and Serb versions of historical truth—a central concern of transitional justice that most of our students have likely encountered only in the abstract until now. It involves a brief stop at the location of a mass atrocity—the Kravica warehouse, where an estimated 1,000–1,500 Bosnian Muslims were murdered. Because, at that point, we are deep in the territory of Republika Srpska, not a sign marks the spot. Indeed, this year—the 20th anniversary of the massacre—this site of horror was covered with posters of Vladimir Putin, meant as an anti-EU protest and a call for Russia to veto an upcoming UN resolution on the Srebrenica genocide. By contrast to the lack of commemoration at this site, across the street a large cross looms over a memorial to Serb victims of past wars. Our Bosnian guides always advise caution when we seek to photograph these sites, but this year, due to the tensions unleashed by the 20th anniversary commemorations, we were told not to even leave our bus.

In Bratunac, we pass Hotel Fontana—the command headquarters of General Ratko Mladić, currently on trial in The Hague, who led the assault on Srebrenica. We have also been able to visit another memorial in Bratunac, this one to Serbs, mainly soldiers, killed around Srebrenica; a further disconcerting example of contrasting “truths” as well as denial on the part of perpetrator societies. The actual town of Srebrenica, where we stop for lunch, is so small that it is hard to imagine it swollen with 40,000 desperate Bosnian Muslim families seeking sanctuary in the so-called UN “safe haven,” which turned out to be neither “safe” nor a “haven.”

At the Potočari memorial (whose creation was mandated by the international community—since we are still in Republika Srpska, which would have created no such memorial), we lay a wreath to the

victims and walk silently among the graves. In the battery factory where men and boys were separated from the women, we tour the memorial room, including the last effects of some of the victims, and read Army of Republika Srpska (VRS) wire intercepts regarding the disposal of “packages” (cynical code for bodies). The use of the word “genocide” throughout the memorial site brings home one powerful legacy of the ICTY—its determination that the massacre at Srebrenica met the legal definition of genocide. The preserved UN Dutchbat barracks, complete with the peacekeepers’ sometimes racist graffiti, provides a graphic reminder of the UN’s powerlessness to prevent that genocide.

As if our visit is not devastating enough, we listen spell-bound to a survivor of the column of men who tried to escape the Srebrenica executions by walking through miles of hostile territory. He was one of the few who made it to the Free Territory of Tuzla. We have also had the chance to meet with one of the “Mothers of Srebrenica” who lost all the male members of her family, including her two sons. She returned to Srebrenica, she says, unlike many other Muslims, in order to be reminded of her children by two trees planted in her front yard when they were small. At this point, there is hardly a dry eye in the room and students begin to understand on a much more fundamental level what, exactly, we are seeking justice for.

Belgrade

From Srebrenica we continue on to Belgrade. At this point, student sentiment is understandably somewhat hostile to Serbia. But we have met wonderful colleagues in Serbia who are striving to commemorate history and deal with its legacy honestly. We hope that our students will comprehend what we have tried to teach them in the abstract—that criminal responsibility is an individual matter. No nation’s people deserve all the blame, especially in this war, where atrocities were committed by all sides, and not all Serbs sided with Milošević’s policies or took part in them. Still, some of the opinions, and even denial, we encounter do reveal persistent gaps in Serbia’s reckoning with history.

We are soon off to meetings with NGOs in Belgrade (including Youth Initiative for Human Rights, Helsinki Watch, Humanitarian Law Center, Organization for Security and Co-operation in Europe, among others). These meetings fill us with appreciation for their efforts at truth-seeking, justice and reconciliation, yet dismay that these efforts are still deeply unpopular with large portions of the Serb public—so unpopular that some of their members have received death threats.

We end with meetings with officials of the War Crimes Chamber in Belgrade, both at the trial and appellate level. While it is quite an achievement that war crimes prosecutions are taking place at all in Belgrade—especially of Serb perpetrators, given the persistent climate of denial—these trials continue to be incomplete, as they have yet to prosecute higher-level commanders and tend to focus more on crimes by paramilitary, rather than military or police, units. (The Chamber’s indictment of eight Bosnian-Serb special police for the Kravica massacre, which came after this year’s trip ended, is a welcome new development.) Unfortunately, however, witness protection continues to be run by the police, which has never itself been purged of possible perpetrators, and thus “insider” witnesses—those from the perpetrator side—face risks if they decide to testify. Our students have read about these problems, to be sure, but hearing such facts directly from court personnel and NGOs that have worked to ensure justice gives them a new level of meaning.

The very concept of “denial”—the not-uncommon response of perpetrator communities to the atrocities of which they are accused—takes on greater significance through direct encounters. On our way to the Appeals Chamber, we walk by the former Ministry of Defense in Belgrade, destroyed by NATO’s 1999 bombing. It is left as a reminder of the bombing—interpreted as Serbia’s perceived victimization by outside forces—and is pointed out to us, the visiting Americans, in a sometimes accusatory fashion. Each year, one or two of our interviewees refers to this bombing—a response to Serb crimes in

Kosovo that is generally believed to have prevented much worse atrocities—as if it were an unprovoked act of anti-Serb aggression. Hearing this sort of nationalist rhetoric from people who otherwise seem to share our worldview is unexpected and revealing.

Once again, after these difficult and intense encounters, we encourage participants on the trip to enjoy some of the beauty of Belgrade, such as the Fortress, surrounded by the lovely Kalemegdan Park, overlooking the Danube and Sava rivers, and the historic Skadarlija area.

Throughout the world, international justice institutions are being established, and they have been greatly influenced by the experience of the former Yugoslavia. But the ICTY's legacy also includes the lessons learned from both its successes and missteps. By exposing our students to a wide variety of institutions, actors, and points of view, our trip attempts to highlight the strengths and weaknesses of the international justice institutions in The Hague, the variety of responses to them in the regions for which they were created, and the ways in which they contribute (or fail to contribute) to the post-conflict search for justice, truth and reconciliation. We believe that our students return with a greater appreciation for the complexities and gray areas inherent in that search. Indeed, after one trip, two students decided—for their Master's thesis—to return to the region, interview an even broader variety of people, and ultimately complete a documentary film entitled "Seeking Truth in the Balkans," exploring the legacy of the ICTY and asking interviewees the very questions we had raised on the trip. The film has been shown to staff of The Hague tribunal as well as people from the region and has received praise for its even-handed portrayal of the questions it explores. We could not wish for a better representation of the educational mission behind our trip.

Transcripts and Panels

Reflections by the Current Prosecutors

This panel was convened at 10:30 a.m., Monday, August 31, 2015, by its moderator, Dean Michael Scharf, Dean and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law, who introduced the panelists: James K. Stewart (for) Fatou Bensouda, International Criminal Court; Serge Brammertz, International Criminal Tribunal for the Former Yugoslavia; David Kinnecome (for) Norman Farrell, Special Tribunal for Lebanon; Hassan B. Jallow, International Criminal Tribunal for Rwanda; Brenda J. Hollis, Special Court for Sierra Leone; and Nicholas Koumjian, Extraordinary Chambers in the Courts of Cambodia. An edited version of their remarks follows.

JAMES JOHNSON: It is a pleasure to start what is certainly, I believe, one of the favorite sessions that we have at the Dialogs: “Reflections by the Current Prosecutors.”

Moderating today’s session is a long-time sponsor from the beginning of the Dialogs: Case Western Reserve Law School and Dean Michael Scharf. As I said, they have been with us since the very beginning and have been very generous sponsors and supporters. I will even give Michael thirty seconds to talk a bit about their sponsorship and support, and we could not be happier with that continued support.

I present to you Dean and Director of the Frederick K. Cox Center for International Law Michael Scharf.

MICHAEL SCHARF: So Jim is actually one our professors now. He runs our War Crimes Research Office and the War Crimes Research Lab that does work for all the folks that you see up here, piracy courts, and other institutions. It is always great to have Jim introduce me because I know he is not going to say anything negative, given that I write his paychecks.

Anyway, it is really great to be here with my friends, the prosecutors. We have been doing this a long time. We have some new faces here, but for me, they are old faces, people I have worked closely with. We start with David Kinnecome. David is at the Special Tribunal for Lebanon, and that is the tribunal that is prosecuting the case regarding the Rafic Hariri assassination and related matters. It is ongoing and you are going to get a very interesting update about that.

So next to David we have James Stewart. No, this is not Jimmy Stewart, the actor, this is James Stewart, the Deputy Prosecutor of the International Criminal Court. Fatou Bensouda could not be with us. I think this is the first year she could not come, but we are really fortunate to have James. James is a Canadian; we are not going to hold that against him here in Chautauqua. And he has, by all accounts, been an amazing influence on the professionalization and the effectiveness of the Prosecutor's Office.

Then we have Serge. Serge Brammertz, you all heard yesterday, is the current prosecutor of the Yugoslavia Tribunal, and he stands on the great shoulders of people like Richard Goldstone, who started out as the prosecutor for the Tribunal. He gets to do the clean-up act with some of the biggest cases in the history of any tribunal: *Karadžić* and *Mladić*.

Next to Serge is a Case Western Reserve honorary degree holder, Brenda Hollis, the current prosecutor of the Special Court for Sierra Leone. She got to be the prosecutor standing on the shoulders of people like David Crane when they prosecuted their biggest case, the case of Charles Taylor.

Then we have Hassan Jallow, who has been the prosecutor at the International Criminal Tribunal for Rwanda for over a decade. They are just finalizing their last cases. They have completed major cases involving genocide and by all accounts have been very effective, and we are going to hear what their completion strategy has brought about.

And then finally we have, last but not least, Nick Koumjian, who used to work at the Special Court for Sierra Leone and is now the Chief International Prosecutor at the Cambodia Tribunal, the ECCC. That to me is the hardest job on the planet, and we are possibly going to hear why when we talk to him.

So this is the format; we are going to have three questions, but I am going to frame them for each of the speakers. We want you to be very short because there are a lot of you, and we also want to have questions at the end from the audience. But the first thing we will be talking about is this: What was the most important development in the past year at your Tribunal? Secondly: What are the most controversial things that have happened in the last year at your Tribunal? And then, finally: What are the challenges that you see in the year ahead?

So let us start out with Serge, since this is, after all, the twentieth anniversary of the massacre at Srebrenica. Serge, you were at a commemorative event this year where you said something like, twenty years ago there was only a hope for justice; today it is increasingly a reality. At your Tribunal, there are a lot of cases that have just wound down—the *Popović* case, the *Tolimir* case, the *Hadžić* case. *Hadžić* is in bad health, and one of the interesting things you may want to talk about is that you wanted to have that case go on, and the defense wanted it to end. I guess the Tribunal has compromised by saying it is on hiatus—something to that effect. And then, of course, we have the *Karadžić* case. The judgment will be coming out in December, a little bit later than had been hoped. And in the *Mladić* case, the defense is in the middle of presenting their case. Then in the midst of all that you have the most bombastic person to be tried since Saddam Hussein—Šešelj—and they tried to release him due to poor health, and you got him brought back on appeal and he is still there. So tell us, amongst all of that, what do you think are the most important developments of the year?

SERGE BRAMMERTZ: Well, that is a difficult challenge. But let us—as we always do—give a brief summary on what happened in the last twelve months. I think it is always interesting for the participants to see what happened or did not happen.

You already mentioned the two important decisions on appeal: *Popović* and *Tolimir*. *Popović*, seven accused; *Tolimir*, one accused. All eight in relation to the Srebrenica genocide where now in total there have been twenty-four individuals prosecuted in one way or another related to the genocide in Srebrenica. All eight convictions in these two cases were confirmed on appeal. What is important is that we have for the first time convictions for direct perpetration of genocide. Before, the convictions were in relation to aiding and abetting genocide. Now we have with the accused *Popović* and *Beara* convictions for committing genocide. Those were two important appeal judgments, which have confirmed few important principles. One of them Patty mentioned this morning, that the Appeals Chamber held that although forcible transport is not in itself a genocidal act, in certain circumstances, it can be an underlying act. So this, as a principle, was confirmed.

It was important as well that the issue of specific direction came up again—you know how controversial this was in the *Perišić* decision. In *Popović*, the Appeals Chamber again confirmed that specific direction is not a requirement for aiding and abetting.

You mentioned *Karadžić*, of course, where we are expecting a judgment before the end of the year. It will be an extremely important judgment. We are in the final phase of the *Mladić* trial, the defense phase; 130 witnesses have already been called by the defense. We are expecting that the defense case will be over before the end of the year.

Two months ago we reopened the *Mladić* trial to enter evidence in relation to the Tomašica mass grave. It is a mass grave only discovered one and a half years ago where 400 bodies were found twenty years

after the conflict, which just reminds us that the issue of missing persons is one of those remaining important problems. There are in Bosnia alone more than 8,000 people missing, and we are still arguing very strongly that the international community has to continually be interested in the issue of missing persons because for families of the victims, it is extremely important to being able to move forward. Before being able to speak or to think about reconciliation, they have to know what happened to their loved ones, and it is important in this context that the ICMP, the International Commission for Missing Persons, which was set up in Bosnia when we started our cases, has now become a treaty-based international organization with a seat in The Hague and will be an instrument for future conflicts because in relation to their database's DNA analysis, it was extremely important.

The reopening in the *Mladić* trial was important also because it underlined the very organized character of the disappearance and execution of thousands of people in the Prijedor area. We will use it as an additional argument to try to convince the *Mladić* Trial Chamber that genocide not only occurred in Srebrenica but also in other municipalities in 1992.

Very briefly, *Hadžić*—you mentioned it already—unfortunately, for health reasons, his trial has been interrupted. The prospect of the trial continuing is relatively low. We have over the last few months argued that we should move forward even if we are only sitting for half-day sessions, but unfortunately we have not yet been able to convince the judges.

Šešelj is, of course, our nightmare case. He is back home in Serbia. The Trial Chamber released him for humanitarian grounds while waiting for his judgment. He made a number of very strong statements back home that we considered as being a threat to witnesses and confirmation that he was refusing to come back to The Hague, so we went back to the Trial Chamber asking for a reconsideration. The Trial

Chamber refused. We appealed, and the Appeals Chamber ordered him to come back, but this happened a few months ago. He is still in Serbia. Again, all these elements or issues about being in The Hague or not in The Hague are side issues. The only important issue in this case is that a judgment has to come out. The last witness was in court in 2010. Since then, we have been waiting for a judgment, and it is extremely important that one is issued as soon as possible.

As for appeals proceedings, written submissions were filed for the *Prlić* appeal, a very important one: 168 grounds of appeal from the defense. We had to react to 1,000 pages. Oral appeal arguments are anticipated in March 2017 and it is expected the judgment will be issued by the end of 2017.

And one last word, in relation to the *Stanišić and Simatović* case, where the two accused, who were number one and number two of the Serbian Intelligence Service, were acquitted in the first instance, based in part on the erroneous concept of specific direction. We appealed, and a decision will be issued before the end of the year. We are hopeful that the judges will come up with a solution to address those issues.

That is it in a nutshell. Perhaps two additional words, if I may, in relation to cooperation with the region. We still have liaison prosecutors from Serbia, Croatia, and Bosnia in our office, who provided thousands of pages of evidence from our databases to be used in national proceedings, which I mentioned yesterday. We see increased activities still ongoing in the region, but there are thousands of cases still to be conducted. So while we will close our doors at the end of 2017, it is obvious that for many, many years to come there will be work on these cases in relation to the former Yugoslavia.

And the last point, also following what Patricia Sellers said this morning, is that we are trying to work on a number of legacy projects. What are the good and bad lessons learned from the past? What can

we do better? And we are in the fortunate situation that with fifteen staff members we are finalizing a publication this week, a book, to be published by Oxford University Press on twenty years of conflict-related sexual violence investigations in the former Yugoslavia. So I hope that when I come next year we can speak about this very important and specific issue. Thank you very much.

MICHAEL SCHARF: Last night there was a big debate among the Yugoslav prosecutors and former prosecutors about whether genocide was really a more serious or more weighty crime than crimes against humanity. Bill Schabas, who is sitting here, wrote a book called *Genocide: The Crime of Crimes*, whose title seems to suggest—and the popular media always suggests—that genocide is somehow much more important. I think politically the term is very weighted. I do think that if the Yugoslavia Tribunal had finished up and had not had a conviction for actual genocide that the legacy would not have been as strong as it is going to be now. So of the things that you mentioned, to me, that might have been the most important development of the year.

Let us go to James Stewart and the ICC. The ICC is involved in many situations around the world: Central African Republic; Darfur, Sudan; Democratic Republic of the Congo; Ivory Coast; Kenya; Uganda. They have preliminary investigations in Afghanistan, Nigeria, and Ukraine. But to me, the one that has been in the news the most this year has been Palestine. James, the state of Palestine on January 1 lodged a declaration accepting the jurisdiction of the ICC, then on January 2 acceded to the statute, and there is now an ongoing investigation. To you, what is the most important development? And do you want to comment on Palestine as well?

JAMES STEWART: Thank you, Michael. And may I express greetings from Prosecutor Fatou Bensouda, who regrets that she is not here and I am sitting in for her. It has been a very rich period this past year, but I will pick just five things to deal with.

First of all, I think it is important for us that we have a new group of judges. Six judges have come to the Court, which is changing the atmosphere, changing the composition of the benches, and infusing new energy and excitement into our proceedings. We have a new presidency. We have been celebrating the role of women in international criminal law, so it should interest you to know that the president, first vice president, and second vice president, are all women for the ICC and very distinguished ones at that. So that, for us, gives us all a new lease on life in the litigation we are doing. That is the first point I wanted to underscore.

The second one is that we are now moving into the trial phase. I think all of us can agree that international criminal justice tends to develop slowly. It is not like the news media. It is not like so many other things in this short-attention society that we live in now. And moving from the successes in the confirmation of charges hearings, we are now moving into a series of trials, and it will be very interesting and I hope very positive in terms of the results. We have four trials engaging ten accused opening this year. One of those trials, which is going to be opening on the second of September this week, is the trial of Bosco Ntaganda. And again, in keeping with some of the themes that we have been discussing, one of the issues in that case will be whether he can be held criminally accountable for the mistreatment and exploitation of girls under fifteen in his own forces' ranks. I think if we are successful in that aspect of the prosecution, we will have clarified the protection that children enjoy under international humanitarian law. So that is an issue to watch. That is the second point I wanted to make.

The third one relates to legal developments that are occurring. We are, in every individual case we do, trying to do justice in the particular case, but also at the same time inevitably developing the law, developing the powers of the Court. For example, in the ongoing *Ruto and Sang* prosecution that relates to the situation in Kenya, there have been two significant decisions: One, confirmation

by the Appeals Chamber relating to the power of a Trial Chamber to compel witnesses to testify, not in The Hague, but in their own country via video link. That is an important power for a court to have, and it was suggested to us that we did not have that power, but we do. The other development that I think is important, and is related in a sense tactically to the one I just mentioned, is the recent decision by the Trial Chamber in *Ruto and Sang* that the prior inconsistent statements of recanting witnesses in five out of six cases that we were arguing may be—in fact, are being—received into evidence for the consideration of the Trial Chamber. Now, they have not said what weight they are going to give these prior inconsistent statements, but essentially those prior inconsistent statements could potentially form part of the evidence for the prosecution that results in convictions. That is a very important development in terms of the legal powers that the Court has to get at the truth.

Now the defense is seeking leave to appeal that decision. I anticipate that the issue will go before the Appeals Chamber, and once again we will achieve clarity with respect to the kind of discretion a Trial Chamber has to obtain evidence. I think that is a very important development. There are others, but I will just confine myself to those.

A fourth very important development was the capture of Dominic Ongwen, one of longest at-large fugitives from justice. He was a former commander of the Lord's Resistance Army. I can tell you that the team is working extremely hard to bring Ongwen's case up to trial readiness by the time of the confirmation hearing in January of next year. They are receiving very good support in Uganda on the ground. And I must say, since I have to recognize where we are on the planet at the moment, the support and assistance of the United States was critical in the apprehension of this man.

And, finally, we are moving into new permanent premises in December, and that has to be a pretty important development for the International

Criminal Court. It has created a great deal of excitement and lifted the morale of our staff and the Office of the Prosecutor certainly, and it is something that we look forward to.

With respect to Palestine, I was going to talk about Palestine in your second category there, Michael, about controversy, because I suppose the adherence of Palestine to the Rome Statute and our acceptance that as an entity it did have the status to become a state party to the Rome Statute is a controversial decision. And, of course, the Court gets drawn into one of the most difficult controversies in modern day.

And so anticipating that issue, Michael, I can say that during the preliminary examination phase, which is not an investigation—it is simply an information-gathering phase that we go through in our situations—we have three objectives. One is to acquire the most reliable and balanced information that we can, touching on all of the aspects of the declaration that the Palestinian Authority filed with the Court. The second objective is to manage expectations because, of course, they are soaring on the Palestinian side. We had a discussion yesterday about managing expectations, and that is a very real concern for us in such a situation. And the third is to build trust on the Israeli side, and the Israeli government has said publicly in the press that they are willing to engage with us. Beyond that, Michael, I have nothing further to say on Palestine.

MICHAEL SCHARF: So, James, I thought I would ask the Palestine question now because I want to save the Bashir visit to South Africa for the next panel.

JAMES STEWART: I had that one on my list, too.

MICHAEL SCHARF: So let us go to Nick over here with the ECCC. The first trial against Duch: done. Second trial against the five ended up being against the two, and that is completed. And

now you have Case 002/02, which is against Khieu Samphan and Nuon Chea. This is the first time your court is actually looking at a genocide charge, a case with forced marriage, and rape charges. Meanwhile, there were some other interesting things that happened at your court. For example, Judge Mark Harmon resigned, though he tells me that it was not for the reasons they said in the press, but really for just personal reasons, so it was not a big protest resignation. But still, interesting things happening.

And then the co-prosecutors have filed an appeal about using joint criminal enterprise III liability. And to me, since I have written much about it, this might be one of the most important legal issues that will be resolved. So to you, what are the big issues that are coming out of your court in the last year?

NICHOLAS KOUMJIAN: Well, as you said, we got a judgment in the first trial of Khieu Samphan and Nuon Chea on August 7, 2014, which I talked about a little bit on my last visit here. But that case is now on appeal. And, Serge, we beat you because the defense in our case has filed over 350 grounds of appeal in that case.

One team has 227. The other team, it is debatable because they will not specify what exactly a ground of appeal is, but by the paragraphs, it appears to be about 150 additional grounds. So that is going on and there are some interesting issues in that.

Meanwhile, in January we started the case that Michael mentioned, which is the second part—you could say the continuation—of the trial of Nuon Chea and Khieu Samphan. To explain that for those of you who may not be familiar, these were two of the top leaders: the number two in the regime, Nuon Chea, and the head of state, Khieu Samphan. Because of their age—they are currently 83 and 89—when the trial started in 2011, the judges made a decision to sever charges. The trial that we finished in August of last year dealt with limited

facts regarding the beginning of the regime, the forced transfers of the populations from Phnom Penh and then within the country, and with one relatively small—on the scale of Cambodia—massacre at the very beginning of the regime.

That case is currently on appeal, but the evidence from that trial is on the record. Now we are dealing with issues such as forced marriage, which was dealt with in the Special Court for Sierra Leone, but actually occurred in a very different context and different manner in Cambodia. In Sierra Leone, the forced marriages were generally commanders rewarding their fighters by giving them women as wives or sex slaves. In Cambodia, it was the regime saying, “You two,” picking people and saying, “You must get married,” and then typically monitoring the couple—literally having people, young kids, militia, walk under their houses at night and eavesdrop to make sure that the marriage was consummated. So both the man and woman arguably were forced to engage in sexual relations. Those charges of rape are pending in this case. It was not dealt with in the first case.

And as Michael mentioned, genocide is pending in regards to two groups. These are within the context of the crimes that happened in Cambodia in terms of numbers. The numbers killed in these two groups—the Cham Muslim and the Vietnamese—are small compared to the number of Khmers that were killed by the regime. But we still think these are very important charges and very interesting. I think one of the things that people do not know—it is not often mentioned—is that right now we have this court, a United Nations court, that is conducting a genocide case involving killing people because they wanted to practice Islam, because the Cham Muslims were particularly targeted. There are many interesting issues, as Patty talked about, regarding what acts indicate an intent to destroy a group. And for the Cham Muslim, there are very interesting policies of the regime to prohibit the practice of religion, to prohibit the speaking of their own language. Those who agreed to that, who gave up their

identity, may have survived, while those who were leaders or who asserted their ethnic identity were targeted and killed. So some very interesting issues about what manifests an intent to destroy a group.

Another, I think, fascinating issue to many here—I think legally very challenging—came up in the last few months. Many of you have heard of the famous prison S-21 in Phnom Penh, and if you have seen the movies, you know that torture was a common practice. People were horribly tortured. They were all destined to be executed, almost every single one, but before that, they were tortured in every way imaginable, including pliers and rape, being starved, being electrocuted. From the torture, the common practice was to take a long statement, a confession, and those confessions include—as is typical when people are tortured—truth and falsehoods. How do you determine what is and what is not, and what value that could possibly have in evidence?

There is a convention against torture that says that torture evidence cannot be used except against the torturer to prove that the statement was made. Both the prosecution and at least one of the defense teams have put forward different theories about this, arguing that the confession should come in when the defendant wants it and that this treaty was only meant to stop the prosecution from torturing people and then using their confession against them. We have said that does not make sense because then you would be rewarding the very people at the top who ordered the torture. What they wanted at the time was to get people to confess to being KGB, CIA, Vietnamese agents, and you would be using this unreliable evidence and rewarding those that ordered it. You would be using it for the very purpose it was obtained, to try to justify their crimes and the eventual execution of these people. But the prosecution has said when there is evidence that does not go to the truth of the statement it should and can be used. For example, there is evidence that Duch, the commander of the S-21 camp, came to Nuon Chea, the number two in the regime, and said, “Oh, I have big news. We have now obtained information that this conspiracy goes to

the very top. We have evidence against Khieu Samphan,” the other defendant in our case. And as a result of that, Nuon Chea said, “I do not want to hear any more of that, get rid of that, and never come back to me with that type of information.” Now, for us, we do not want to use that to prove that Khieu Samphan was a KGB or CIA agent, but we think it is very relevant, not for the truth, but to prove the power of Nuon Chea over the commander of the camp where the torture was happening. It is relevant to prove the close relationship between Nuon Chea and Khieu Samphan and the fact that he was being protected, as well as the fact that the regime knew that people tortured would say anything under torture. So we want to use it for purposes that do not go to the truth. Now that issue is before the Trial Chamber. It could have been before the Appeals Chamber, but they kind of ducked it in a hearing, and we are awaiting a decision from the Trial Chamber on that issue. I think it will be very interesting.

MICHAEL SCHARF: Since we are here at the Jackson Center and are thinking about Nuremberg, that brings up a moral issue that I think you can wrestle with even if you are not a lawyer, and that is related to the Nazi experiments. As you recall historically, the Nazis did all sorts of experiments using torture, but they got some data that is potentially usable, and the medical community has decided not to use that because to use that would allow or encourage future acts of torture. And I think that is an ethical question that lurks behind the legal issues that you are talking about.

Let us just keep things exciting and go all the way down to the end to David at the Special Tribunal for Lebanon. I think the good news for you and your colleagues is that the UN extended your mandate through 2018, so you have a job.

The bad news is that your suspects remain at large, so you are having trials in absentia. Again, in the context of Nuremberg, the last time someone was tried in an international criminal court who was not

actually there was Martin Bormann, and it later turned out he was dead before the trial started. So the Nuremberg Tribunal has gotten a lot of criticism for that. I suppose you do not think that the four suspects are dead and you have reason to believe they are still around. And could you tell us what happens if they are found afterwards?

Then there is one other case that is interesting. There is a collateral case against Karma Khayat, who is a news broadcaster, for endangering confidential witnesses.

So tell us about the most important things you think are happening at your court in The Hague.

DAVID KINNECOME: Maybe a little background would assist. So the Special Tribunal for Lebanon (STL) is a bit different than the other tribunals, and that starts with the nature of the crime that precipitated the creation of the Tribunal. That was the assassination of Former Prime Minister Rafic Hariri in 2005 by a vehicle-borne improvised explosive device, which was put in a Mitsubishi Canter van and exploded as his convoy traveled past on a crowded street in a coastal road in Beirut. It led to his death and the death of 21 others, with over 200 injured. That was detonated by a suicide bomber. There was no one actually involved in the attack that was identifiable by any witness given the nature of the crime. And so the STL was faced with a bit of a “whodunit” as compared to the other tribunals, and that has influenced our investigation, and, therefore, the presentation of our case, which is now ongoing. The investigation has involved pulling together lots of different pieces of evidence, kind of like putting together a puzzle, and each piece of evidence may not be clear on what it represents individually, but we believe that once we put it all together, it will demonstrate the five accused are responsible for the crime.

So the major development this year—and over the past, I guess, couple years—has been that our evidence has been going in smoothly

with all these different pieces, and in order to facilitate the admission of that evidence, we have taken a couple of approaches that are a bit different from the other tribunals. We have relied more heavily on what we refer to as bar table motions, which is seeking to get different pieces of documentary evidence admitted through a motion as opposed to coming in through a witness testifying live in court. And the Trial Chamber has been amenable to that approach in part because we have a specific rule, Rule 154, in our *Rules of Procedure and Evidence* that facilitates that practice.

We have also been successful in getting a lot of witness statements admitted through our Rule 155, which is equivalent to rules of other tribunals, allowing witness testimony to come in not through live oral testimony, but through statement, and we rely on that pretty heavily as well. This facilitates our work and allows us to bring in a lot of small pieces of evidence to build the larger puzzle. One area is our telecommunications evidence, which is a unique facet of our investigation that we had to engage in in order to identify the accused, given the nature of the attack that I described earlier. And we have had a landmark decision this year finding that evidence could come in.

There was the collection of evidence by the UNIIC, which, for those unfamiliar, was the United Nations Independent International Investigation Commission. It was established prior to the Tribunal to assist the Lebanese authorities in investigating the attack. The evidence collected in that manner was collected consistently with both the laws that govern the collection of evidence by the international bodies as well as international standards on human rights, and that was affirmed by the Appeals Chamber. So this facilitates us moving forward to the part of the case involving the actions of the accused. We demonstrate this mostly through telecommunications evidence, which we rely on to show the communications amongst themselves, their movements at significant times, their locations related to the preparation for the attack, and the carrying out of the attack itself. So those are some of

the major developments this year. We have been moving the trial along since the beginning of 2014 when we moved into the trial phase, so it has been a bit longer than a year, but it has been going along smoothly.

As far as the nature of trials in absentia, which you alluded to, it is different, but the most striking thing is how “undifferent” it is. We have full representation of all the accused with defense teams—defense teams that I think are pretty big in comparison to some of those at the other tribunals—and they have taken the understandable approach that they cannot agree to any aspects of the prosecution’s case given their lack of contact with any client. They are fully contesting all aspects of the prosecution’s evidence, and it is going forward as if it were a full trial.

What would happen, as you asked, if the accused do show up? Under the statute and the rules, if any accused persons appear, whether officially by coming to the seat of the Tribunal or by acknowledging their appointed counsel or appointing counsel on their own, they would then have the option to elect to start over or to accept anything that has gone before. So that could lead to, in theory, a do-over, but we have no information that they are deceased, as you mentioned, nor that they are in contact with anyone either.

MICHAEL SCHARF: Okay. So let us go to the ICTR, Hassan Jallow. On December 5 of last year, you had the twentieth anniversary of your Tribunal. In September, the appeals judgment in three cases was issued. In December, the first appeal judgment was issued by the new residual Mechanism for International Criminal Tribunals, and I am sure we are interested in finding out how that is working. And in February of this year, you issued a best practices manual that everybody is talking about as a very effective and useful document for the other tribunals and courts hearing war crimes and universal jurisdiction cases. In April, the Appeals Chamber heard its very last appeal. You do have,

however, three fugitives that are still at large, and so we will have to figure out how that will be dealt with once the Tribunal shuts down.

So tell us about the most important things you think have happened in the last year.

HASSAN JALLOW: Well, thank you so much. You have already mentioned many of them. Some twenty-one years after the establishment of the Rwanda Tribunal, the ICTR is now poised to close in the course of this year. In the course of the past year, we have finished all of our trials. Since it started, we have indicted ninety-three persons who, in our view, played a leading role in the genocide. We finished all the trials.

All the appeals were disposed of except one. There is only one pending now, and that is the Butare case. The case is unique in many respects. It is the biggest case we have in terms of numbers of accused; it is six accused. It has been the longest trial we have had. It took seven years plus at the trial stage, and the appeal itself has already taken two years more to dispose of. It is also unique in that it is the only case with a female who has been indicted by any of the international tribunals. And adding to the uniqueness is the fact that she was charged with her son, and they were both charged with sexual violence. They were both charged and convicted of the offense of rape in the course of the genocide. So it is unique in many respects. And then it turns out, of course, to be our last case as well for the Tribunal.

We expect judgment to come out perhaps by November, and then that will definitely mean closure of the Tribunal this year. It will be the first of the ad hoc tribunals to close after almost two decades. So we are in a particular position.

A lot of our focus has also in the past twelve months been on the legacy projects, trying to identify the best practices and the lessons

to be learned from successes, from challenges, from difficulties, and perhaps failures that we have also experienced. We have been able to publish, as a result, a best practices manual on the investigation and prosecution of sexual violence in conflict situations. We have also done a practices manual on tracking and arresting fugitives. We are currently working on two other manuals that we expect to see published before the end of the year. One of them will be a digest of the jurisprudence of the ICTR because we think there is still some lack of familiarity and publicity of the jurisprudence of the ICTR, and the digest would make it more readily accessible in national courts and also international tribunals.

One particularly important legacy project we are working on is what we call the Genocide Story Project. Many of you may know the different theories about what happened in Rwanda, about the controversy, about how some say there was no genocide, some say there was more than one genocide, et cetera. So we thought we would write out the history of the course of the genocide based exclusively on facts as found by the judges, by the Trial Chambers and the Appeals Chambers, and the project has gone quite a long way. And as I said, by the end of the year, before we close, we expect both manuals will be out.

The transition to the Mechanism also has been progressing quite well. There are two branches established, one in Arusha and one in The Hague, taking care of the residual work from the ICTR and the ICTY, respectively. Much of the work in the past twelve months at the Mechanism has focused on management of requests for assistance, particularly with evidence from national jurisdictions, and the work in that area has actually turned out much more voluminous than had been anticipated. This is very encouraging because it is an indication that national jurisdictions are accessing more of the international tribunals' evidentiary databases for the purposes of investigation and prosecution at the local level.

In addition to that, the Arusha branch has its own specific workload, which is focused on tracking and arresting the remaining fugitives, about which I will speak more in discussing the challenges that we face. In The Hague branch, we are focused on preparing for the management of appeals in the major cases that will come up in the course of next year—the *Karadžić* and *Šešelj* cases. We do not know when they will come up yet, but we expect that the *Karadžić* appeal will at least be in the pipeline by next year.

So that is where the ICTR is. With the judgment in the Butare case coming up hopefully in November, we should be able to have our closing ceremony in the first week of December, which I hope many of you will be able to attend. And then it will be quite the end of an era. Thank you very much.

MICHAEL SCHARF: So the thing about ad hoc tribunals is as they slowly shut down, they still have work to do, and so they create these residual mechanisms—they are like mini courts. And, Brenda, if I am not mistaken, you were the first prosecutor to be a prosecutor at the Special Court for Sierra Leone and now the prosecutor for the Residual Mechanism—the Residual Special Court for Sierra Leone, the RSCSL.

So in your new position, from what I can read, the two big events were that the residual court granted the former head of the Civil Defense Forces (CDF) conditional release. And was that something that you supported or you opposed? Was that over your objection? And the other one is that the Residual Mechanism denied the motion for Charles Taylor to transfer to prison in Rwanda. I think knowing that Charles Taylor has escaped from other prisons—he has a knack for that—that was probably a really good thing, but you can tell us that story as well, and anything else about your experience with the Residual Mechanism.

BRENDA HOLLIS: Thank you. But first let me offer both my thanks and congratulations to the Yugoslav Tribunal, and in particular the

Rwanda Tribunal, which will be closing this year after, in essence, developing the body of law that we deal with today when we deal with genocide. Both courts developed the foundation upon which all modern international criminal justice is building. And I would hope that other courts build on that foundation and do not ignore it. So my thanks and congratulations to both of those courts for a job very well done.

The Residual Special Court is indeed in the later stages of the life cycle of a nonpermanent court. And so we are not dealing with matters that have the intensity and visibility of judicial proceedings, but, in the last year we did have two decisions that I think were very important and I think should give us pause and cause to reflect on their underpinnings. The first one was the decision to conditionally release one of the leaders of the CDF. We, in fact, did oppose that early release and we opposed it on several grounds, primarily because our primary concern is about our witnesses, and our witnesses were very fearful about retaliation upon that release. But even more fundamentally, certainly in my view, when we are dealing with these kinds of international crimes that have such an impact, so many victims, and in particular with the Sierra Leone Court, where the guidance was to prosecute those most responsible for those crimes, I think any release short of the last day of their sentence is an inappropriate release. And I have always opposed this. The jurisprudence of the courts, the international courts, has been clear; their rehabilitation is not one of the determining factors in sentencing in these cases. And again, in particular with our mandate, I think it is inappropriate to release these individuals early, and that was another reason that we opposed it.

Now, I must say that in order to send a reminder to this prisoner and his supporters, I did issue a press release when he went back to Sierra Leone, reminding everyone that this was not an acquittal—this did not mean he was not guilty. He remained a convicted prisoner who had been convicted of crimes against humanity and war crimes against his fellow Sierra Leoneans. No interference with witnesses would be

tolerated, and if there was a violation of any of the conditions, the prosecution would certainly press very hard for his return to prison. I thought it was important to have a very strong warning note so that no one misunderstood the nature of that conditional early release.

I must say we have heard of no instances of the conditions being violated. Whether that is because the monitoring is not effective or because he is behaving himself, I do not know, but we certainly have heard nothing of that.

In relation to the Charles Taylor request, it was filed as a motion, and throughout most of the course of deciding this request, it was treated as a judicial matter, something that we were very, very opposed to. We continue to point out this is not a judicial matter. This is an administrative matter. It is for the president to decide. The president decided that he would have a three-judge panel look at the issue. They issued a “decision,” which we argued could not be a decision because they did not have the authority to decide the matter. Ultimately, the president did decide the matter. This was a request by Charles Taylor for a transfer from the United Kingdom to Rwanda, to serve imprisonment there. It was a sentence enforcement issue that is purely for the president, and eventually that is what the president held, and dismissed it.

We believe that there were several reasons he should have dismissed it. First of all, part of the grounds was that the United Kingdom would not issue visas for his wife and two of his children to come to the United Kingdom, but they had explained to his wife why they did not. There were reasonable conditions imposed that basically had to do with the source of her finances, and his wife simply refused to meet them. And our position was Charles Taylor simply did not wish anyone to know the source of finances. It was information they could have provided and chose not to, so the denial of the visa

was a matter entirely within their decision-making, and it was not unreasonable for them to have denied it.

We also argued other grounds. For example, in Rwanda it may have been very difficult—especially with the tenor of relations with foreign courts—for the government of Rwanda to have treated him as anything other than a former head of state who was present in their country. And so there may not have been the security and the monitoring that would have been appropriate for a prisoner. But eventually, as I said, the president did dismiss that motion.

Both Serge and Hassan have talked about requests for access to archives, and that really—at the Office of the Prosecutor over the last year—has been most of our work. This refers to receiving requests from many countries for us to search our archives to provide them information either from national prosecuting authorities or, just as often, from immigration authorities. I think that will become a very important function in the residual courts, the Mechanism, once the judicial activities have completely ended.

So those really were the activities of consequence over the last year for the Residual Court.

MICHAEL SCHARF: Okay. So let us consider this the end of round one. It took an hour. We have a half hour left. I think what we will do is call it the lightning round. We will squeeze the two questions about controversies and challenges into one, and we will ask you to be brief because we really do want to have some time for questions from the audience.

I will start back with Serge. Building on what Brenda said about how the ad hoc tribunals have a life cycle, you are also coming toward the end of your life cycle, and an interesting thing is happening; a lot of your staff are leaving. So you have said publicly that one of

the biggest challenges you face is staff attrition and it is making it very difficult for you to finish up these major cases. Do you want to comment on that or anything else?

SERGE BRAMMERTZ: That is indeed one of our main challenges, this logic that with an organization that is closing its doors in two years' time, staff is actively looking for other jobs. We very much support our staff, and every time we are very proud if one of our staff members is, after a competitive process, selected to go to the ICC or to other organizations. So on the one hand, we are pleased when our staff are considered as being very qualified. On the other hand, of course, we are losing staff. In the *Mladić* trial, since the trial is ongoing, out of three senior trial attorneys, two left, so we had to replace a number of people.

So we have put a different system in place where we use almost everybody in a multidisciplinary way. The immediate office, trial team, and appeals team are all working as one team and are used there where they are needed. We had to come up with a more flexible system. It is not easy, but so far, touching wood, it is still under control and we have a number of colleagues, a number of senior trial attorneys, who are really committed to staying until the end of their cases and a number of other colleagues who were really there almost since day one and who are so dedicated they are even not looking for other jobs, lucky for us. So it is a problem, but it is still more or less under control.

MICHAEL SCHARF: Okay. So, James, over at the ICC in your strategic plan for the year, you say that the need for cooperation is still the biggest challenge, and I asked you before about the Omar Hassan al-Bashir case. Bashir ends up going to South Africa. There is a court decision that he must be arrested. The South African authorities instead facilitate his departure. How do you see that playing out?

JAMES STEWART: My understanding is that in the past when this sort of thing has happened with respect to Bashir, it is the Pre-Trial Chamber itself that has taken the initiative to refer the matter both to the Assembly of States Parties and the UN Security Council. So we will have to see what happens with this particular case. I think, frankly, our approach is to allow it to unfold as it will. Whether we will be actively involved is another matter. We may. We were dismayed, of course. I thought we were going to get him. I really thought that South Africa—being a state ruled by the rule of law—would get him. I thought we had a good chance. And I think the work of the NGO before the court in Pretoria, South Africa, the Southern African Litigation Centre, was brilliant. It was a very disappointing outcome, although I suppose one can take some comfort from the fact that Bashir did not leave South Africa in the way he thought he might have. He did not go out in quite the same dignified fashion as he came in. He went out as a fugitive, really.

So it really illustrates one of the major difficulties that the ICC has, and that is—as was the case with the ad hoc tribunals—we do not have our own police force. We cannot go and touch people on the shoulder and say, “Please come with me, sir.” We have to rely on the national authorities to do that. We certainly understood that there were national authorities prepared to act in South Africa, but in the end, it is a political decision, and we know what the outcome was, at least for the time being. But it is a long game. I must say I take comfort and inspiration from what Louise Arbour, the prosecutor of the ICTY and ICTR, said in relation to Milošević: “You know, time is on our side, eventually we will get our man.” And in the case of Milošević, she was absolutely right, and I take comfort and inspiration from what she said there.

So cooperation is one of the issues. We get very good cooperation generally speaking, but there are issues, of course, with cooperation, and arresting fugitives is one of them.

MICHAEL SCHARF: And Nick, one of your major defendants in Case 002/02, Khieu Samphan, he and his legal team are boycotting. I am sure that creates all kinds of challenges for you. How are you dealing with that?

NICHOLAS KOUMJIAN: Well, this is very recent, so it is playing out. I think that the current status is that they are going to go to court when we have this next hearing, but they are not going to present documents. There is a hearing where both sides are entitled to present documents, but out of protest, they are not going to do that. And I hope that the court will simply continue. This is under the instructions of the defendant. He has the right to be represented and to participate in the proceedings. If he chooses to elect not to do so, that is his election. The court cannot be held hostage by the accused or their defense teams refusing to participate. We had another problem with a boycott that delayed the start of the trial and it was basically successful. The defense said they would not do the appeal and the trial at the same time. They just did not come to court. That was Khieu Samphan's team, and the judges said, "You're not allowed to do that, but there's nothing we can do," and basically gave them the continuance they asked for. But at some point, if you tell your attorney not to participate or to walk out, I think the trial has to go on. The court cannot be boycotted, cannot be blackmailed.

MICHAEL SCHARF: David, over at the Special Tribunal for Lebanon, what is the biggest challenge facing you next year?

DAVID KINNECOME: I should say I neglected to mention at the beginning that the prosecutor regrets that he could not come, and we also extend our thanks for the invitation. But getting to the biggest challenges, I guess the scary situation in Lebanon is a difficult one. Even with witnesses who, over the years, have never previously indicated concerns about coming to testify or having their name being used openly in court if they do not intend to testify orally,

we are seeing more and more requests within the days preceding their testimony to have protective measures and/or try to get out of coming, and that is a difficulty.

So far, the court has been open to granting protective measures on reasonable grounds, including grounds that can affect not just the physical security of witnesses, but also those that impact their livelihoods and their relationships with their neighbors, especially for business owners. That has facilitated giving them some comfort to come testify. So it has been a workable arrangement so far, but it is a problem that we foresee continuing, especially as the security situation, although not directly related to the Tribunal, continues to look a little more difficult in Lebanon these days.

MICHAEL SCHARF: Okay. And, Hassan, over at the Rwanda Tribunal, Serge told us that their cases are plagued, especially in the chambers, by departures. Are you having the same kind of problems? And what are some of the other challenges you might want to mention?

HASSAN JALLOW: No, we are not faced with staffing problems. We have retained a minimum level of staff just waiting for the judgment to be delivered. But, nonetheless, we do have a couple of challenges. As you may recall, the referral of cases to national jurisdictions was an important part of the completion strategy, and in that context, we had referred two cases to France, one of them being in respect to Father Wenceslas Munyeshyaka. Recently there has been a declaration by the French prosecutor that she is making a submission to the French judges that there is no case against Father Wenceslas Munyeshyaka, who was charged with genocide and sexual violence, rape. Of course, that is causing quite an uproar in Rwanda, among survivors and victims associations in France, and a great deal of concern to the ICTR as well. It is one of the things we have to try and manage, and we will see how we get out of that impasse. I expect

in the next few days to be picking that up with the French authorities, but it is a major issue we have at the moment.

Moving from that, we have arrested most of the fugitives, as I said, but there are still nine outstanding. The United States government has been very, very supportive of our tracking efforts and provided rewards for information leading to the arrest of the people that we have been looking for under its Rewards for Justice program. But nonetheless, there are these nine outstanding fugitives. We have been faced with situations of noncooperation by some states, and also the extraordinary lengths that some of these fugitives will go to avoid detection. Six of them have been referred to Rwanda, so we are basically concerned with only three cases, and it is a challenge we have shifted to the Mechanism. The ICTR has passed those three fugitives to the Mechanism, and the Mechanism is intensifying its tracking efforts together with the technical and financial assistance of the United States Department of Justice.

Finally, we have this difficult situation, even as we close, where a number of people who have been convicted have finished serving their sentences. Some have been acquitted, and they are all sitting in Arusha, Tanzania—about a dozen of them. They do not want to go back to Rwanda, and it has proven extremely difficult to get any other country to accept them, but under the host agreement with Tanzania, they are actually supposed to leave the territory within fifteen days. Of course, they have been there for more than a year now. So it is a big challenge that we face. They are currently housed and taken care of by the Mechanism, but that situation cannot continue. When the ICTR closes and the Mechanism closes, where are they going to go? So we need to put more and more pressure on member states to recognize that these are people who have been acquitted or they are people who, even though found guilty, have actually served their time and that they are entitled to relocation in a country where they can pick up their lives and reunite with their families if possible.

These are some of the challenges we face now.

MICHAEL SCHARF: And big ones, too. So, Brenda, are you all by yourself in the Prosecutor's Office of the Residual Mechanism, or do you have some staff? Where are you located now? You had those spacious offices. Now where do they have you? I am curious about how the Residual Mechanism is moving.

BRENDA HOLLIS: Well, I am not even in the Prosecutor's Office. And actually I think a very smart model for the Residual Mechanism is that there will be a very, very small staff. The president, the prosecutor, and the judges will operate on an as-needed ad hoc basis and will work remotely—that is to say, typically from home to the greatest extent possible, and to me that makes perfect sense. And so we have a very, very small staff. We do have three individuals in Sierra Leone, at my insistence, to be sure that our witnesses have an effective way of telling us if they are being harassed or interfered with in any way.

But our biggest challenge, as it was in the life of the Special Court, is money, money, money. We have a very modest budget. We are once again supposedly funded by voluntary contributions, but we are finding that even with this modest budget—which, by the way, is possible thanks in large part to the Yugoslav Tribunal agreement to share office space and administrative support with us—but even with that, we cannot find states that will provide us sufficient money to operate. So what we are looking at now is a concept of an assessed funding, shared platform model so that we will have sustainable funding.

MICHAEL SCHARF: Assessed by the UN or by a group of likeminded states or—

BRENDA HOLLIS: Well, we are open to whoever will give the assessed funding.

I think they are envisioning the UN, but, of course, there is resistance to that. But if it were assessed funding, the states that are now basically carrying the court and have for years, would, of course, be paying a miniscule amount compared to what they are doing now. So voluntary contribution courts are not a good idea. States get tired of giving them money. And also the appearance is not good. For a judicial institution to go hat-in-hand begging for money is not the appearance of impartial and independent justice that we want to promote.

MICHAEL SCHARF: Now, this is the part that the audience likes the best, their chance to interact with the international prosecutors. I would ask you to only ask questions, not make speeches, identify yourself, and tell us who you want to answer your question. So let us begin. Don't be shy.

Mark Drumbl.

MARK DRUMBL: Thank you for a fantastic presentation. Several of you spoke of legacy, so this is the question; For you, what is the most unexpected or unanticipated development, or contribution, or thing that happened in the life of your particular Tribunal, whether looking backwards or in the present?

MICHAEL SCHARF: Let's have two or three answers to that. Any of you want to? Brenda?

BRENDA HOLLIS: I think with all these courts, the primary legacy is, how well did you carry out your judicial mandate? A lot of expectations are put on courts that are well beyond a judicial system. So I think that is the primary one.

I think in Sierra Leone, a very positive contribution, and surprising contribution, was the reaction of the civilian population to the importance of the court. They did actually believe that the court helped

them to move forward and to rebuild their country and to reconcile. I think that was because of a very, very active outreach program from the very beginning that allowed the court to manage expectations but also set up a dialog so that the primary stakeholders felt they really were a part of that court, not just the object of the court's existence.

MICHAEL SCHARF: Hassan?

HASSAN JALLOW: Well, I guess the development of the jurisprudence was always an expected byproduct of our work, and perhaps the arrest and prosecution of these leading figures. One area, though, which was totally not expected at the beginning was the kind of impact we had on Rwanda—the impact that the ICTR had on Rwanda—in terms of helping to restore its legal system to the point where our judges were then able, under this completion strategy, to transfer the cases to Rwanda, and then in that way, to also open the doors for extraditions from other countries of cases to Rwanda. So in a way, the ICTR, through working with the Rwandans to ensure law reform, capacity building in the legal system, et cetera, actually ended up giving a seal of international judicial approval of the legal system, which has had a great impact on the country's relationship with other states where, for instance, fugitives have taken refuge.

MICHAEL SCHARF: Nick, you wanted to chime in?

NICHOLAS KOUMJIAN: I think one of the legacies that exists that is not appreciated is the fact that despite the many limitations, the limited reach, the limited number of people that can be prosecuted in these international courts, international justice has become part of the conversation, and the first question we have is a perfect example. So twenty-two years ago, in a conflict such as what exists in Yemen, would people have been talking about international justice? I do not think so. So part of the legacy is that while international justice still has very many limitations, in every conflict around the world, whether you are

talking about Syria or Gaza or Afghanistan, part of the conversation now is, are crimes against humanity war crimes being committed, and what kind of judicial mechanism should be created to address it?

MICHAEL SCHARF: Okay, Serge, you will have the final word on this question.

SERGE BRAMMERTZ: I mentioned yesterday, if today our Tribunal is the only tribunal with no fugitives at large—and this is quite unexpected—it is because in our situation there is a clear political agenda from one political group, the European Union, with a clear unanimous message to the countries concerned. That is why it worked, and that is a problem, of course, for the ICC and the non-arrest of many ICC fugitives—that there is no clear political international agenda, that there are many different interests, and that is why the implementation of the warrants is still problematic. I think it is important lessons learned. If there is political will, international justice can function. If political will is not implemented in practice, we have the situation we are facing today.

MICHAEL SCHARF: Another question. Yes. James?

JAMES STEWART: Well, certainly from our perspective, it is a case-by-case situation, a country-by-country situation. I mentioned that we are getting good support in Uganda with respect to the Ongwen investigations. That is purely a matter of political will of very competent people in Uganda. If they are given political space in which to move, they can be extremely helpful.

In la République centrafricaine, Central African Republic (CAR), there again you have a combination of forces that see the ICC as an extremely important player in a very tumultuous situation to bring about peace and stability. So the transitional government has been extremely supportive of us, but so have the UN, the United States,

the European Union, France, and religious leaders, both Muslim and Christian. I look at the Central African Republic and see wonderful momentum in favor of the work that we are doing, and we can do some really good work there. Of course, the major difficulty is the extremely fragile and volatile security situation. But we are very active in CAR, and there is an example of where you have a combination of support, which helps international criminal justice do its work effectively, but in other situations, it is not as easy.

MICHAEL SCHARF: James, can I ask you a follow-up about international civil society related to international criminal law? It did not exist twenty years ago, but now there are organizations in every country that you are working in, including Kenya. Do you see a role that they are playing that is positive?

JAMES STEWART: They are playing an extremely positive role. We have a roundtable every spring with the NGO community. We engage with the NGO communities as well because we recognize that in many situations because we are a court of last resort, we cannot intervene immediately in an investigative way. A lot of evidence and information is actually being gathered by NGOs who are there and who see what is happening, and so we are trying to develop ways that will allow them to record and capture information, not as an investigative arm of the ICC but in a way that would be useful to us down the road if, in fact, we become involved. And we have a similar attitude toward UN forces and toward military forces, intervention forces. We need to develop these relationships. But civil society is critically important. We get a lot of criticism from civil society, but what I say to the NGOs is we always welcome constructive criticism because we feel the love. We know that the criticism is given in the hope that we will do better.

So civil society has been very much involved with the birth of the ICC and in its continuing operations. Of course, we have to maintain an independence from every player out there. We have to chart our

own course, but we do engage with civil society. And I must say in some situations, in countries like Kenya, civil society has been extremely important, and they feel very much under pressure. And this is something that is very concerning and should be concerning to all of you. They need support because in many situation countries, including Kenya, civil society really is the flagship of democracy. They are the flagship of human rights, and we need to keep that flagship afloat and in good shape.

MICHAEL SCHARF: More questions. Right there.

ATTENDEE: This question is for James. It is a follow-on to the last one. In light of the *Lubanga* decision regarding questioning evidence from sources other than the Office of the Prosecutor, have you developed guidelines for military and civil society organizations as to what and how they can provide information to lead to further investigations?

JAMES STEWART: We have a continuing conversation with civil society on just that issue. I think we may have an opportunity to do the same with respect to military formations. Michael Johnson is involved in a Swiss Defense Department-sponsored initiative that I think may give us an opportunity to begin developing along those lines. We have sought other opportunities and have not been successful in getting in the door so to speak, but it is something of real interest to us because often soldiers are the first people who are going to encounter events. I am not telling tales out of school, but, for example, in our Uganda cases, one of the attacks that is the subject of prosecution was the subject of an investigation by the Uganda police. They arrived the day after the attack and they took a film of the conditions of the village. That is invaluable information. It is that kind of thing that we need to make militaries sensitive to so that they are not just working for themselves, which they must do, but also thinking that down the line some of this could be useful if people are going to be held

accountable for what they see on the ground. So that is something that is of real active interest for us.

MICHAEL SCHARF: The last question. Let us see, way back there.

ATTENDEE: This is a general question. I was wondering about any potential problems that you see in the prosecution of ISIS leaders for war crimes.

MICHAEL SCHARF: Okay. Prosecuting ISIS for war crimes. Anybody want to weigh in?

JAMES STEWART: This is an issue that Fatou Bensouda, the ICC prosecutor, has felt compelled to speak about simply because everybody invokes the ICC when it comes to ISIS. People affiliated with ISIS may commit crimes in situation countries like Libya, which would be within the reach of the ICC if we had the ability to follow up. But at the moment, the events that really focus the attention of the world are occurring in Syria and Iraq, neither of which is a state party to the ICC. But beyond all of that, interested countries will probably take action, I would expect. I think you are going to find the European countries, who have many nationals going abroad, will do so. Other countries perhaps like Tunisia and Egypt—who knows?—also have an interest in these things. So it may be that national authorities will be moved to take what action they can once they have military stability, which is right now obviously very much in the air.

I don't know if that helps, Michael, but it sort of brings it back down to the countries that are most directly affected by what is happening.

MICHAEL SCHARF: All right. With that answer, that brings to an end our prosecutors panel. I want to thank Hassan, Serge, Brenda, James, Nick, and David, and if everybody would join me in applause.

Roundtable: The Srebrenica Massacre

This panel was convened at 2:30 p.m. on Monday, August 31, 2015, by its moderator, Leila Sadat of Washington School of Law, who introduced the panelists: Hon. Mark Harmon, Judge (retired), Extraordinary Chambers in the Courts of Cambodia, Hon. Patricia Wald, Open Society Justice Initiative, and William Schabas, OC, MRJA, Middlesex University School of Law. An edited version of their remarks follows.

LELIA SADAT: Srebrenica is a town fairly close to the border of Serbia. It is located in Bosnia, and it was an area that was seen as having tremendous strategic importance. There was a lot of fighting in the area. The United Nations, to protect the Muslim population there, created what they called a “safe haven” by a Security Council resolution and had sent a Dutch battalion there to essentially hold that space for the civilians. As we heard this morning, the battalion was too small. The Serb army was too ferocious, and what happened in the summer of 1995 as the Muslim defenders of the area withdrew, is that the United Nations peacekeepers found themselves unable to meet the demands of the advancing Serb army. And in the afternoon when General Ratko Mladić marched into Srebrenica and demanded the surrender, there was really very little they could do.

And then I think you have heard through other speakers how the men were ultimately taken prisoner and killed for the most part. An estimated 6 to 8,000 men and boys were killed, and about 23,000 women were put onto buses with their children, and they were bussed out of the area. The death toll is obviously shocking, but the deportations were equally shocking. And I think it is one of the reasons why we look at Srebrenica and we say this particular event—even though the conflict overall was horrific in scale and in the atrocities committed—this one atrocity does stand out. And we will explore with our panel of experts why it was so significant that it was labeled a genocide and what that means.

So now I am going to turn to my panelists. They have decided we should do this as a kind of question-and-answer panel, and we will start each one off with a question. Mark, maybe we could start with you because you were there at the beginning, and you had suggested maybe we look at the *Erdemović* case first, which was not really discussed this morning. It is an early case, 1996 to 1998. What was the significance of that case? How did it help you and the prosecutor's office acquire the tools you needed to prosecute these cases, what kind of evidence, et cetera?

MARK HARMON: Well, to answer that question, let me give you a little more background. In the hot summer days of July of 1995, the Bosnian Serbs decided to restrict the size of the enclave, which sat in the middle of a territory that was coveted by the Bosnian Serbs. It was a festering sore. They initially started by trying to reduce the size, but by July 9, it dawned on them that there was no resistance—little or no resistance. As a result of that, their military decided to take over the enclave. That forced the population—probably 25 to 30,000 people—into a small village called Potočari.

Different and separately, there was a column of men, 15,000 approximately, who tried to flee the enclave and make it up to Bosnian Muslim territory. That column started out during the takeover. It was interdicted, and only a third of the column was able to get through into Bosnian Muslim territory. Some of those members of the column were armed. The people who were caught behind the Serb lines were pulled out and lured out of the hills around Srebrenica by Bosnian Serb soldiers wearing, for example, UN helmets and UN gear. As a result of the collection of those men who were lured out of the hills, they were separated and they were put in fields. At the same time, men were being separated in Potočari as the women were being bussed out. The men were being separated, and those two large groups of victims, ultimate victims, were collected and then moved to distant parts of Bosnia, remote parts of Bosnia, where the international eyes—the

Dutch battalion—could not see what was happening to them, and they were summarily executed over a series of days.

Now, since the events that were taking place in Srebrenica were being reported in real time, the ICTY put investigators into Tuzla in either late July or early August, and that is where the victims—people who had been bussed—were being brought into an area where they could be taken care of.

We knew early on in the investigation that men had disappeared and we were operating in a context of systematic denial by the Bosnian Serb authorities and the Bosnian Serb military. Nothing happened to the men. That is what was said to us repeatedly.

As survivors from these massacres started to straggle out into territory where they were free and safe, the full picture emerged. I think there were probably fourteen survivors out of the 7 to 8,000 people who were murdered. There were fourteen survivors, and it soon became clear to us what had happened to the men. But the investigative difficulty that we had was to determine what we thought had happened to the men. They had been killed—where had those murders taken place since we had no eyes or ears in that part of the territory?

As you know, the men were put on buses, and they were oftentimes blindfolded. They were put in schools. They were far away from their homes, and they could not describe to us where these murders took place.

Now let us focus on Dražen Erdemović to answer your question. Erdemović was a young Bosnian Croat who was a soldier in a Special Forces unit of the Bosnian Serb army. On the July 16, Erdemović participated in the systematic murder of 1,200 people at a location called the Branjevo military farm, and bus after bus of prisoners, defenseless Muslim men and boys, were brought and summarily executed at this location. Those massacres took place for five

hours, and at the end of those five hours, Erdemović was asked to participate in additional murders at a nearby village called Pilicia, and he declined. He said, essentially, he had had enough for the day, but some of his more eager and zealous mates participated. Erdemović then went down to the village of Pilicia and observed these murders from across the street in a café. Now, from the Branjevo military farm, there were probably two or three survivors who made it out into the free territory. From the Pilicia cultural dome, there were no survivors. It was something that was not on our radar.

So now let us talk about Erdemović and how he came to the attention of the ICTY. Erdemović was not liked by his mates because he was a Bosnian Croat, and he was distrusted. He had declined to participate in additional executions, and he was shot three times by his former colleagues, his fellow executioners. They attempted to kill him. They did not succeed, and Erdemović ultimately gave an interview in Belgrade to a reporter. The reporter had recordings of the interview with Erdemović, as well as a map of the location, and when she tried to get through the airport, she was arrested, and the tapes were confiscated. And Erdemović was also arrested.

Now, in what is a little known, but I think a very significant event, Judge Richard Goldstone asked the court to issue an order to the authorities in Belgrade to produce Erdemović, and I have marveled over the years at the effect of that; they produced Erdemović. Erdemović came to The Hague, and he was an insider who had particularly good knowledge about the murders, the location of the murders. He gave the orders, through the chain of command, and was a real insider. He was able to corroborate at least two of the survivors who said they had been executed at the Branjevo military farm. He identified the location, and then we had to corroborate Erdemović's evidence. And we corroborated this evidence by the use of aerial images. The massacres at Branjevo military farm took place on the July 16, 1995, and the U.S. government supplied us with an aerial image of the

Branjevo military farm that took place on July 17, one day later. In that aerial image, you can see the bodies. You can see the excavation where the bodies are being buried, and it corroborated Erdemović.

Erdemović also described to us the massacres at the Pilicia cultural dome, which we had no idea had been committed, and an aerial image again taken on July 17, a day later, showed the trucks backing up into the Pilicia cultural dome. Obviously, they were there to remove the bodies. Subsequently, as a result of Erdemović's cooperation, we were able to get some traction in the investigation. We went to the Pilicia cultural dome. Jean-René Ruez went to the cultural dome with a pair of bolt cutters. The doors were locked. He cut open the doors to the cultural dome, and of course, there were the grim remnants of a massacre. There was blood on the floor, shell casings, and human tissue on the walls.

So Erdemović contributed significantly, identifying another location. He identified perpetrators. He identified the chain of command for us. He testified in probably six or seven of the Srebrenica trials, and as a collateral benefit from Erdemović, he was the person who engaged in the first plea agreement at the ICTY. As you know, when the Tribunal started there was resistance to plea bargaining, and I remember Judge Antonio Cassese had given a speech to the General Assembly essentially saying there would be no plea agreements. Well, Erdemović was, in my practice at the ICTY, one of the two people who were genuinely remorseful. He genuinely regretted that he had committed as many murders as he did. He, by his own admission had committed between 10 and 100 of the 1,200 murders that took place at the Branjevo military farm. So he agreed to enter into a plea agreement. It was an oral agreement with me and his defense counsel. Eventually, he appealed the sentence, which was ten years. The matter was reversed and the first written plea agreement was executed. Prosecutor Peter McCloskey prepared the written plea agreement, and as a result of that precedent, there were many others. I think there

were probably twenty plea agreements at the ICTY. If you understand the benefit of a plea agreement as opposed to a six month or a two year trial for each cases, it saved considerable time for us.

So Erdemović was a critical witness for us to start. What was very, very important for us was that there was a dispute publicly between Bosnian Serbian authorities and the Belgrade authorities saying nothing happened, and here for the first time was an insider who actually participated in these murders. The significance of that cannot be underestimated, and so Erdemović is a little footnote in the Srebrenica saga, but he is a very important footnote.

LELIA SADAT: Thank you, Mark. There was quite a lot of story there that I did not know actually.

I would like, then, to turn to our second question, which is for you, Pat, moving forward in time, looking perhaps at the *Krstić* case—the trial judgment in 2001 and the appeals judgment in 2004—which was the first case to convict for genocide. Do you want to talk about that case and about its implications for jurisprudence going forward?

PATRICIA WALD: Sure. Well, I should point out, as you probably have surmised, that Mark was the chief prosecutor in the first *Krstić* case, and I was one of three judges. The other two judges had been on the *Blaškić* case. After two months, we got the Srebrenica case, the *Krstić* case. But I should point out to you that we came out with a judgment eighteen months later, which is really not bad considering the time lag, not just then, but subsequently in many cases.

Also, during that entire time, we were also trying the Omarska prison case, which is also a major ICTY case.

I would like to just address a little bit, in light of Pat's speech this morning, the evolution or the possible evolution of the kinds of

genocide. This is by no means a justification, even if it comes out that way, of the fact that our particular finding of genocide was limited to the men's part. But I have to tell you I think we are all children of our times, and you cannot count Nuremberg as genocide because genocide had not been invented.

Also, I will give you a footnote. When I was in law school—and I entered law school in 1948—Raphael Lemkin was teaching a course there. He was the originator of genocide. I had no interest in it whatsoever.

But, at this particular time, we did have, of course, Rwanda, but that was a totally different situation. Nobody denied there had been a genocide in Rwanda. All you had to do was look at all of that publicity that had gone out ahead of time and all the calls to kill the Tutsis, et cetera, so there really was no dispute. But the ICTY had never taken a genocide case through to trial before. In fact, while I was there and during this whole period, there was the *Jelisić* case. Now, Goran Jelisić was a head of some small camp where prisoners were held, and he was obviously insane with hate because he did Russian Roulette with some of the prisoners. He called them “cockroaches,” and said that “they ought to be wiped off the face of the earth.” Actually, they brought a genocide charge against him—and correct me if I get some of these facts wrong, Mark—but, as I recall, the lower court, the Trial Court, dismissed the genocide case, but the prosecution appealed.

And I was designated. I was a trial judge, but I was designated to fill the place of somebody who was recused on the Appeals Court. When it came up to the Appeals Court, we all agreed—I think it is okay to talk about these things now—that there was enough evidence to withstand a motion to dismiss, which comes in the middle of the trial, after the prosecution's case. But a majority of the court said it was very clear, they thought, that this should not be the first genocide case at the ICTY to go through because this was almost a nut case, as it were, and this would not have the aura or the trappings of

the first genocide case. So they said there is enough evidence that clearly he is going to be convicted on these other cases, even if he had admitted to some of the crimes against humanity, and we do not need the genocide conviction. So we are going to uphold the dismissal or simply not remand it because we do not want this to be the first genocide case that goes to the ICTY.

Judge Mohamed Shahabuddeen and I dissented from that appellate ruling because, at that point, I was kind of a stick-to-the-law person left over from my twenty years in the American courts. I did not realize how creative you had to be in international courts.

So, we dissented, but that is the way it went. And therefore, when *Krstić* came up, that obviously presented a much better vehicle. But I will say just in reference to Pat's point this morning about our particular genocide ruling only covering the men's part that, in all honesty, it was a sort of miracle that we got the genocide conviction. It was not an open-and-shut case to begin with because, at this point, the only genocide convictions you had were basically the Rwandan case, which was, if anything, parallel to the Holocaust, but it was a national case. There were guilty pleas in the Rwandan courts and there really was no dispute that that was a real genocide. So the case as posed to us by the prosecution was based upon what really was a novel genocide situation in those days, namely not that everybody in the whole group had been killed, but rather the men had been taken off and killed. The women had been separated and bussed off to Tuzla with the children, and in fact, that was one of the main defenses, if I recall, Mark, that this cannot be a genocide, because you did not kill everybody, so that those women could go and set up new families, et cetera, and that sort of thing. And apart from that, another reason is if you looked at all of the other villages that the Serbs had taken over, in no other villages had they killed the people. They might have imprisoned them in the Serb camps. They might have done bad things to them, but in no other cases did they kill all the people, so how

can you say that they had genocidal intent? This is the only situation where they actually killed the people. That went to whether or not this really was a legitimate “group” under the genocide.

But this was the novel situation put up to us by the prosecution. I suppose it is conceivable that if we were really brilliant people, we could have foreseen the other side of the allegations. We did have testimony about some of the terrible things that happened to women initially, in the first couple of days in Potočari, but those were crimes against humanity. But whether or not we went as far as we could have gone, I think that it was a significant first step in unloosing the notion of genocide from its paradigmatic background, which would have been the way the Holocaust was perceived—even though you did not have an actual genocide crime then—or the Rwandan situation, into a more flexible atmosphere, which would be governed by the practical realities of real life. I will stop there.

LELIA SADAT: Thank you so much. Bill, you had pointed out this led to a dichotomy with respect to Srebrenica being considered a genocide but not some of the other atrocities. Do you want to speak to that and then maybe speak to the *Popović* case and the recent cases? How is the narrative about genocide being shaped?

WILLIAM SCHABAS: Sure. Let me start with an observation that when the Yugoslavia Tribunal was set up by the Security Council in 1993, the lawyers who drafted the statute looked back essentially to the laws that stood in the 1940s, starting with the Charter of the Nuremberg Tribunal, which was authored by Robert Jackson, and then they added to it, basically to the core that came from the Nuremberg Trial, the definition of genocide, and they added as well the grave breach provisions of the Geneva conventions.

But if they had left it at the Nuremberg package, I do not think the result would have been very different at the Yugoslavia Tribunal,

frankly. The same people would be in jail for the same acts, and they would have received sentences for the same length of time because for the sentences there is no hierarchy in the crimes, as has been held over and over again by the judges at the Yugoslavia Tribunal. And the horror of these acts, whether they are described as genocide or as crimes against humanity, would not have any great change in terms of the sentencing, so the same people would be in jail. The same trials would have taken place.

So the question is, of course, the value added mainly from a legal standpoint, and I guess in terms of the way the victims view the results of the Tribunal by adding this qualification of genocide. And I think the first trial, the one that Pat referred to of *Jelisić*, he actually came to the Tribunal with a guilty plea, and he said, “I plead guilty to crimes against humanity.”

PATRICIA WALD: Yeah, he did.

WILLIAM SCHABAS: And it was then Louise Arbour, who was the prosecutor, who said, “I think we’re going to try this one. If he won’t plead guilty to genocide as well, then we’ll have a trial of that.” I think that probably created some of the frustration in the judges of the Trial Chamber as well—that they were going through a bit of an exercise in a case, as you have described, of a man who was not playing with a full deck, as we say.

PATRICIA WALD: Yes. Did not appear for the record.

WILLIAM SCHABAS: No, no. And, finally, that is why Jelisić was not convicted in the trial judgment of genocide because they said that he did not have the mental capacity, more or less, to do it.

I think one of the things I always thought was charming about Jelisić was he adopted this *nom de guerre* of Adolf. He called himself the “Serbian Adolf.” Do you remember that?

PATRICIA WALD: Yes.

WILLIAM SCHABAS: And I am very glad to hear Pat describing the *Krstić* judgment in 2001, which came a year after the *Jelisić* decision—or a year and a half after—as being novel because it is a novel interpretation. It was not obvious at that point because the only judgments we had were a few Rwanda Tribunal judgments, where nobody has really argued about the genocide. The Rwanda Tribunal jurisprudence on genocide I have always found to be of lesser interest, actually, as a general proposition, simply because the difficult issues about defining genocide were never really debated. They were never really controversial, whereas in the Yugoslavia Tribunal, it was a different matter.

So there was a judgment in *Krstić*—and then your judgment was partly overturned.

PATRICIA WALD: Only on the aspect of his liability.

WILLIAM SCHABAS: Exactly. So the core of it, of using the word “genocide” to describe the massacre has never been altered since your finding, but regarding *Krstić*’s own personal responsibility—again, I’ve never been a judge or sat in the room with the judges—that Appeals Chamber decision to me always smelled of a compromise among judges because it is a sort of a strange result. Knowing some of the judges who were in on it, I think they must have been horse trading there and one of them saying, “I’m going to dissent,” and then the other

two saying, “Okay. We’ll convict him of aiding and abetting. Could you sign on to that?” And they must have said, “Deal.” I’m speculating.

PATRICIA WALD: I do not know that. Let me add one thing. That is the Appeals Chamber.

WILLIAM SCHABAS: Yeah.

PATRICIA WALD: One thing you might be interested in, which you talked about—and I think I largely agree with you—is that those same people would have been found guilty of crimes against humanity and spent time in jail. Well, we discussed the sentence once it was agreed upon. First of all, I will tell you, as I was going to say tomorrow, too, we did debate within the Trial Court as to whether or not we would call it genocide. But eventually, we did have unanimity on that. It was a perfectly open discussion between us. We went back, and we eventually said yes.

But when it came time for sentencing, here was the way the discussion went; there is no death penalty in this court, so the most you could give is a life sentence, and nobody at that point had ever given a life sentence. And so the point that one of the judges made very strongly—and it probably ended up carrying the day, to some degree—was we cannot give him the highest that we can give anybody because Milošević and Krstić and Karadžić and those big guys are still out there, and there has got to be some place that is the highest for them. So we actually gave him a sentence that for him was a life sentence. It was forty-six years, and he was a gentleman with already one leg amputated and in his fifties, I guess.

So, basically, that was a life sentence, and we would save some category up there for these people who were outstanding. Of course, Krstić is still alive and in a Polish jail today. So there was a little bit of an effect of genocide on the actual sentencing.

WILLIAM SCHABAS: But I was just speculating about what judges were thinking. I had no insider knowledge.

MARK HARMON: Let me just make an observation because one of the difficult issues was what sentence is appropriate for genocide, and when you intentionally and premeditatedly murder 8,000 people, what is an appropriate sentence? I mean, compare it to the United States. I am not saying the United States is a system that is perfect. It is not. But a single death can result in the death penalty or life without possibility of parole, and in the international system, a life sentence is not truth in advertising. If you give somebody a life sentence in Europe, my understanding was that a life sentence in Europe is twenty years. And, therefore, if you behave properly in a prison in Europe and you do not cause problems, you get good behavior and work-time credits, brush your teeth every day, and make your bed, you get a reduction in your sentence.

So we were faced with the issue of what is the appropriate sentence, and so I did a simple calculation. I took a third off of a twenty-year sentence and divided the number of days by 8,000 people, and then I took a twenty-year sentence and did the same thing. And I recall my figures were less than two days for each premeditated murder. Now, in my view, somebody who kills 8,000 people should not have a thirteen-year sentence or a fifteen-year sentence. So I then asked, made a submission to the court, for consecutive life sentences, which means that for each crime for which Krstić had been committed, he would serve a life sentence, which would be twenty years with a reduction, and then for the next sentence, he would serve the next twenty-year sentence and so on.

And I will tell you, Judge Wald, that I was delighted with the sentence, but I then subsequently went to Srebrenica. And Jean-René Ruez and I participated in a conference in Srebrenica, and the Mothers of Srebrenica were present.

They were an interest group who found meaning in life to never forget what had happened to their families and keep it in the public eye. I am friends with the Mothers of Srebrenica, but we have our disputes and we have our debates. And I sat at lunch with the Mothers sitting across from me, and I was pilloried by the fact that there was no life sentence. And that carried a lot of meaning with the victims and the victim community, and I engaged them in a discussion with what the reality was, that the sentence that he had been meted out was essentially a life sentence.

PATRICIA WALD: It was, in fact, life.

MARK HARMON: And they got it, and they appreciated it. But sentencing is a question for which on crimes of this magnitude, there is no rational answer to what is the proper sentence.

PATRICIA WALD: I have always assumed that the reason—I do not know this—the Appeals Court reduced it from a perpetrator of genocide to aiding and abetting, was they felt they had to go down.

WILLIAM SCHABAS: That is right.

PATRICIA WALD: So I think if you look at where they differed with us and where I differ with them, and still do, is their notion that he was not a perpetrator, and this gets to what remains for me the critical unanswered question in all the Srebrenica cases. I have not read the latest cases, so I cannot include them where they were convicted as perpetrators. But it was this theme that went through a lot of the later Srebrenica cases, and they referred in the Appellate Court to Krstić as a man who was—I don't remember the exact words—but was caught up in his surroundings, caught up by the evil in his surroundings. So the question became if you could show how much you could infer from the fact, which they admitted and everybody knew and we certainly had made findings, that Krstić was aware at the latter

stages that there were these killings of the prisoners going on, he did in fact enable part of them by allowing the deployment of some of his Drina Corps troops to go in there. There was not much evidence in that particular case, though I found it interesting that in some of the later cases, more things would come out about him. But those were later cases. But he was not found like Jelisić. He did not scream and yell and say, “They are cockroaches, and we want them off the face of the earth.” There was no evidence. He was kind of a disciplined dramatic-type guy who sat there.

Despite the fact that there was knowledge that it was going on and then there was support in light of that knowledge, he was not carrying on like some of the Rwanda defendants, and therefore, they did not think it was proper for us to have inferred an intent of genocide. I found that theme coming up again and again in later Srebrenica cases about how much you could infer from knowledge and support. In some of the places, there seemed to be some notion there had to be something beyond, some evidence of somebody like the German Nazis writing down that these people have to be wiped off the face of the earth, which, at least in my view, should not be a necessity, anyway.

WILLIAM SCHABAS: Yes. Well, now, if you want to talk about sentences that appear to be on the low end, the *Erdemović* one is a good starting point. He confesses to participating in genocide and to killing somewhere between ten and one-hundred people, and he gets five years. The prosecutor asked for ten, and the defense asked for seven, and he got five.

But, to me, what remains from all of these cases now is actually a confused picture of the case law. It is a confused picture, and it shows that there is a lack of clarity.

Where there is some clarity on it—and this is a judgment that actually nobody has mentioned, but it is a very important piece of it—is the

judgment from the other tribunal in The Hague, the International Court of Justice. In February of 2007, the International Court of Justice issued its ruling on the Bosnian application that also identified this dichotomy—the genocide in Srebrenica, but in the municipalities and the rest of the conflict, no finding of genocide—and when they did that, it was controversial. They pointed to the judgments that confirmed this view, but also the conduct of the prosecutor. This bothered enormously the applicants in the International Court of Justice case, and they were criticized for it—but they said the prosecutor does not always charge genocide in these cases, does not do it systematically, and did not do it for *Erdemović*, for example, but he is hardly alone.

In the *Popović* case, I think three of the seven were charged with genocide. So they were all there, but they were not all charged with genocide.

So it leaves an uncertainty, and then these judgments have kind of a confused picture. So what remains from it, if we are looking at the legacy of it, is that we have this core finding from the *Krstić* Trial Chamber decision, confirmed by the International Court of Justice. It is the smallest number, 7 to 8,000 people. It is in a different order of magnitude than the Rwandan genocide, the Nazi genocide, the Armenian genocide. It is a novel approach, and now the question is if it can go down to 7 or 8,000, how low can it go? What is the bottom line there? And as Prosecutor Brammertz explained this morning, there is a little test on that.

There is a test now in the *Mladić* case with the new evidence that they introduced. I am uneasy about that, only because I think that we have got to a point where—it may lack coherence—but at least we have the idea that there is a genocidal event at Srebrenica, but the rest of the war is not genocidal. But we have now two judgments of the International Court of Justice that, more or less, confirm that consistent case law. And I am just nervous that at the Appeals Chamber of the Yugoslavia

Tribunal, there are going to be some judges who want to sort of go down in history as having the last word, and they are going to upset everything. And all that is going to leave us with actually is an even more confused and incoherent message about it all.

This came up in the second genocide case at the International Court of Justice. That case was Croatia and Serbia, and Croatians in particular came to the court and said, “If you look at the *Krstić* case, that is 7,000, so we do not have that. We do not have 7,000 killings, but we have the Vukovar hospital which was 200. So not the 400 of your mass grave, but it is in that order of magnitude.” And they said, “So have another look at it.” This was in Eastern Slavonia, the Vukovar hospital, and it involves a much lower number. And that was never even charged by the prosecutor as genocide, and so the International Court of Justice said, “No. We are not going to rule on that.” And, of course, it dismissed both the claims by Serbia and by Croatia.

LELIA SADAT: Mark, you can just finish this round with jurisprudence, and then we are going to turn to politics. So, very quickly, just to round it off, *Karadžić* and *Mladić*, what do you expect?

MARK HARMON: Let me just state a disclaimer. I have been out of the ICTY since 2010, and the *Karadžić* and *Mladić* trials started after I left, but what I do know is from a related case, the *Krajišnik* case. Momčilo Krajišnik was charged with genocide. And he was charged with genocide that occurred well before Srebrenica. He was charged with genocide that took place in 1992 during the ethnic cleansing campaign that took place in the municipalities all throughout Bosnia, and the court held that the actus reus of genocide had been established, but the mens rea had not been established.

In the *Mladić* and *Karadžić* cases, it is my understanding that they are reasserting that genocide took place in the municipalities in 1992, and they have evidence, new evidence, to demonstrate that, and new

arguments. I'm not going to elucidate on either of those because I am somewhat ignorant on that, but they are making an attempt to establish that genocide took place in Bosnia in 1992.

LELIA SADAT: Of course, the General Assembly did adopt a resolution calling the ethnic cleansing genocide early on, but that was—

WILLIAM SCHABAS: It said ethnic cleansing was genocide.

LELIA SADAT: It said ethnic cleansing was genocide.

WILLIAM SCHABAS: It did not say that ethnic cleansing in former Yugoslavia was genocide.

LELIA SADAT: No.

PATRICIA WALD: I think Bill has made a good point about one area that is still not clear enough, and that is what are the minimal kinds of scope of it—how small could you get it? There was a defined group. Well, that would again be how you define a group, but if they were leaders or something or sitting in a room and you threw a bomb into that room, is that genocide?

But the one area that I think has been confused is the business of what it takes to show genocidal intent over and above knowledge and substantial action.

And I think the whole business we went through of when it is not a perpetrator, then it becomes an aider and abettor, that particular definition carried over from domestic law into this particular area where you are talking about thousands of people. I thought the Appellate Court just took these domestic principles, as it were, and just without thinking about the different context—lifted it wholesale into an international massacre area without thinking about delineations.

And then when you added the specific direction business to that, to even the aiding and abetting, I thought you ended up, in my view, with a mess. Now I think the court is beginning to clear out from what I understand on the latest decisions. They have kind of gotten rid of the specific direction, or at least the majority of them have, and maybe clarified something. But I thought that for a while there, it was very difficult to figure out.

LELIA SADAT So part of what we are talking about here is that genocide has these constituent elements. You have to show a genocidal act. That is what Patty was talking about. You have to show that it was committed with criminal intent, and so we are fighting about really what kind of criminal intent and what kind of evidence you have to show. And genocide requires the specific intent to destroy. Of course, specific intent in different jurisdictions can be interpreted differently, and so the question is how does it play out?

And then just to make things really messy, they have all these different ways you can commit the crime. You can order it. You can be a superior. You can be an aider and abettor, and the jurisprudence at the ad hoc tribunals has different modes of liability than we will see at the International Criminal Court. So we are going to keep having complicated questions of law with respect to the commission of these crimes.

I might turn it now to some of the political issues that we talked about.

PATRICIA WALD: Just one last point, a court point. As long as the international courts, certainly the ICTY—I think I am right—operate on the notion that while the trial judges may be governed by what the appellate judges say, you can have one appellate panel come down with a decision as happening in specific directions. Six months later, seven months later, a different panel comes down with a different one, and for a while, if I were a trial judge, I would be very confused—and

I am told that some of the trial judges were. Some would be following one. Some might be following another. I do not say our system is so great, but at least in our federal system, once the court of appeals comes down with one decision, that is it. I mean, you would have to have an *en banc* session, or you would have to specifically get rid of it. You could not just have another panel come down with a different decision and then leave it all sort of out there. But that is a structural comment.

LELIA SADAT: And unlikely to get fixed at the ICC or at the ICTY anytime soon.

All right. Let us move on to some of the contextual or political issues. Bill raised a really interesting one. It is that the ICTY case law establishes essentially the facts of what happened in Srebrenica. There was an apology that was forthcoming from the Serbian president in 2013, although he did not refer to it as a genocide, and recently, there has been a lot of pushback on whether or not this was a genocide from different political constituencies. Recently, there was a big controversy in the Security Council.

WILLIAM SCHABAS: Yes. Well, there was an attempt in July, I think a week or two before the anniversary of the massacre, to get a resolution in the United Nations Security Council of commemoration for the Srebrenica genocide, and it was not successful. It was not adopted. It was proposed by the United Kingdom. It was vetoed by Russia, although there were, I think, five other abstentions among the members of the Security Council. So this indicates it is not just a question of Russia against—for some perverse reason—the rest of the world, and they barely have enough votes to adopt the resolution. They had just enough to get it adopted, a bare majority, which is why Russia then vetoed it. I think if there had been one more abstention, abstentions would have been good enough, because you need to have nine votes in the Security Council to adopt a resolution.

The transcript of the debates, which is readily available, reads like something that was out of the Cold War. It is quite tragic because the result of the feuding between the British and the Americans—Samantha Power was leading the debate—was there was no resolution. And it is a case where they ought to have been able to find some way of reaching a common narrative, sufficiently acceptable that they could adopt it. The result then is both sides scoring points and not a lot of thought being given to the victims of Srebrenica, who are the ones who are really entitled to have it commemorated in such a way.

It reminds me of another resolution, not in the Security Council, but in the General Assembly. Resolutions in either the Security Council or the General Assembly making a determination about something being genocide are very rare, actually. And, of course, they were not actually doing it in this resolution in July because they just refer to the judgment of the International Court of Justice saying it has already been legally determined.

The Russian objections, by the way, are not just about the word “genocide,” but they are about a number of issues. But thirty years ago, there was a debate in the General Assembly, quite similar in many respects, where the Soviet Union and some of its allies proposed a resolution following the massacre in Sabra and Shatila outside Beirut, a Palestinian refugee camp where Lebanese militias—but incited by you know who—went in and massacred the people. I forget the numbers. There was a resolution proposing it as genocide. The same countries that insisted on it being genocide at Srebrenica in the Security Council this time rejected the paragraph in the resolution calling it genocide at Sabra and Shatila.

So this is the political debate. I mean, part of the problem in the Security Council is that if they had just declined to get into the qualification of it, would that have done it? There is also the sense that by focusing exclusively on a massacre, atrocious as it is—and it does stand out of

all of the horrible events in the wars and in the former Yugoslavia as the worst single event I think by far—but nevertheless by focusing on that, it fails to acknowledge that there were victims in other parts.

One of the tragedies now of the legal legacy of dealing with the conflicts in the former Yugoslavia is that one of the great episodes of ethnic cleansing, a terribly brutal episode that took place after the Srebrenica massacre—I am speaking of Operation Storm—has essentially gone unpunished. There was an attempt to prosecute it. The prosecutor was very successful at the trial. Three judges unanimously condemned Operation Storm as being not only war crimes, but also crimes against humanity—this final episode of ethnic cleansing. But it was reversed by the Appeals Chamber with two very shrill dissenting opinions. Nevertheless, the result is that actually that is a gap in the legacy of the Tribunal, and that part of it has gone unpunished. So that is part of the debate as well about memorializing things and getting the memorialization right. I mean, we talk now. We look back at Nuremberg and the Second World War and the great critiques of the one-sided nature of that prosecution. It did not deal with the Katyn massacre. Or rather, it dealt with it, but did it in not an appropriate way. And there were other things. We talk about destroying a city—men, women, and children, by dropping a bomb on it—and we had a seventieth anniversary earlier this month of two cities that were just destroyed, and nobody has been called to account for that either.

LELIA SADAT: What might be interesting, Pat, if you would not mind speaking in regard to your time at the ICTY; Did you observe the way that crimes affected women and girls in particular, and what lessons do you think maybe the ICC could draw from that, from the successes and challenges of the ICTY in that regard?

PATRICIA WALD: Well, I can tell you mostly about what I remember. I am not sure what lessons I can draw. Actually, there was, during the period that I was there, an awareness about crimes against

women. I did hear some complaints from some women who were in the prosecutor's office that they felt that when the prosecutor's office was doing an investigation of a particular incident, et cetera, that because so many of the investigators out there were male, they would not be as aware of possible women's crimes that had been committed. They would not be looking for them the way they might be looking for some of the men.

On the other hand, while I was there, they had the first case that was all women. And I know that the alternate case that I had with Srebrenica over that first year was the Omarska prison camps. We had a parade of witnesses, of women witnesses who had suffered sexual abuses, and we did make findings of those in terms of—there was no genocide charge in this particular case—crimes against humanity and in terms of war crimes, a whole list of them.

I will just, again, give you one thing that stuck with me because we had a whole parade, and it was very interesting because we had five defendants who had been either the officials in Omarska or the next level down. And some of the women witnesses would go by, and occasionally, one or two of the male defendants—they were all male defendants—would yell out this nasty, nasty word at her. But, of course, it would be in a Serbian-Croatian dialect. The whole courtroom—the ones who understood it—would stand up and object, and then there would be a huge thing about: “No, that's not what he said. That's not what that word means.” Here, you had three judges from Portugal, Egypt, and United States who did not have a clue as to what had been said. You would have to designate the translator, who was present in all of these particular cases. The translator would become the ultimate authority on whether an insult of proportions had been brought out.

The one thing I remember most, which really hit home, was some of these women were from three camps: Omarska, Triple A, and Keraterm. And sometimes these women would be transferred from

camp to camp, and I remember one of the women who had been through three camps, had been raped and assaulted so many times. The problem you had was you had a particular defendant in the box, and under the laws that we are all accustomed to, you have to have proof beyond a reasonable doubt that a particular defendant committed a particular crime. In this case, this woman had been raped so many times. When she had to undergo any kind of cross-examination by the defense counsel about the particulars—“The night when this defendant attacks you, what room was it? Who was there? How did it happen?”—of course, she was confused. It left me with a feeling that I got sometimes during these proceedings, but I also get it during American court proceedings. Somehow the court system and all of our particular rules, which are necessary for the defendant in criminal procedures, sometimes miss the whole thing because this is a woman who had been assaulted dozens of times, and yet there was no way in this particular case to get anywhere near a modicum of proof.

LELIA SADAT: Please join me in thanking our three amazing panelists at the Jackson Center.

Impunity Watch Essay Contest Winner

***Editors' note:** The following essay is the winning entry of the 2015 Impunity Watch essay contest. The winner is Katherine Mills, a student at Buffalo Sacred Hearts Academy. The contest is sponsored by the Summer Institute for Human Rights and Genocide Studies, the Robert H. Jackson Center, and Impunity Watch law journal. The winning essay, which was formally recognized at the Ninth Annual International Humanitarian Law Dialogs, is reproduced here in its original form and has not been altered or edited.*

Impunity Watch Essay Contest Winner

Katherine Mills

In 1945, the Holocaust ended with the liberation of over 60,000 emaciated and maltreated Jews from Nazi concentration camps. Famous photos from this period have surfaced, depicting the German people as they were forced to walk through the camps and witness the repercussions of their silence. Indeed, some had even promoted the Nazis, shouted “Heil Hitler!” at the sight of the anti-Semitic, sadistic dictator. Others still had supported the Nazis, and were even outspoken about Socialist ideals in their communities, or hailed their works to rid the Earth of “non-Aryan” races as necessary. As they walked through the heaps of bodies, surrounded by the scent of death and suffering, they were brought to tears, overwhelmed by the realization of their actions. Women hid their faces with handkerchiefs, and men looked guiltily at the ground, in disbelief. These people were bystanders, and their silence contributed to the death of nearly six million Jews. These photos were taken to impart an imperative message: We must not let this happen again. Unfortunately, as a human race, we have not learned to look past hatred and prejudice, or to be upstanders. We have allowed further genocides to occur, and the time for standing aside is over. Everyone’s unique and individual voices and skills make an impact, and need to be utilized. The use of social media to promote Hate, the downplayed role of history, the fact that Holocaust survivors are dying, and the “them versus us” mentality of today’s

youth are issues that need to be addressed in order to be upstanders and learn from our past in order to liberate our future.

Being an upstander in the modern world is harder than it may seem. With the secrecy and therefore power of social media, it is simpler for people to spew Hate without consequences. Others either do nothing, or join in, as it is so easy to hide behind a username. Those that act as bystanders are doing so without the slightest inkling of any repercussions; the fact of the matter is, no one will ever know that the bystander saw a hateful tweet or post, unless he or she tells someone. Social media is an outlet for racism, sexism, ageism, and other prejudices, as well as being an outlet for good deeds. Solving this issue is less complex than one would think. Using the Holocaust as an example from the past, we can employ methods of stamping out social media inaction. A valuable lesson learned from the Holocaust is the power of youth. Hitler utilized the young, impressionable minds of children to form the Hitler Youth, an organization that promoted anti-Semitism while preparing children of all ages for future lives in the Nazi military or political hierarchy. When these children aged out of the group, they were put to work as fearless soldiers, brainwashed into paying any price for their country, many of which employing the ideology of “it is better to be dead than to be a prisoner.” Just as Hitler saw the power of younger generations, we can utilize children to solve this issue of social media. The solution is simple: teach children morals and contributory attitudes from kindergarten through high school. As a community, people can join their voices to call for these actions to be taken, as well as calling for stricter disciplinary action to be taken against students that employ social media Hate, or support Hate groups. Many people today underestimate the power of pressure put on authorities. As students, children and teens can promote upstanding by acting as role models and being proactive in the cause to remove Hate from their schools and communities. Also, by not conforming to stereotypes, or following the lead of those spewing Hate. Removing one’s self from bias or prejudicial situations

is imperative to the removal of bigotry from the community. In addition, an important step to being an upstander is eradicating one's self from friend groups that support- even jokingly- abhorrent groups that promote predisposed notions. Educators and administrative staff should also become role models; endorsing nonbiased views of others, and encouraging upstanding behaviors. On the whole, if actions are taken to look to the past lessons of the Holocaust, and individuals in the community promote change, prejudice made simple by social media can be combated effectively; through these actions, social media can be liberated of some Hate, to the extent of making a marginal difference that has the capacity to change the world.

Yet another problem faced by the liberators of today is the inevitable fact that Holocaust survivors are dying, and history is not widely appreciated by younger generations. The most infamous genocide is indubitably the Nazi Holocaust; this means that men and women that have survived the atrocities during that epoch are important contributors to the fight against successive genocides of the future. Hearing a survivor tell their story is imperative to ensure that events such as the Holocaust will never occur again. As a first-hand account, full of the original and unique emotions that individual felt during their oppression, is more moving than an incessant stream of facts. Unfortunately, the Holocaust transpired over eighty years ago, and consequently survivors are dying, and with them, so are their stories. Also, the majority of the younger generation today does not care about history, just about the modern world and the future. When important events in history similar to the Holocaust are ignored, or thought of as "a drag" to learn about, further genocides are inevitable. Students today must liberate themselves of these ideas, become upstanders, and fight against the causes of genocide. Students as individuals have a powerful voice, and should attempt to remove themselves from the cycle of looking ceaselessly forward and never learning from the past. In order to liberate our future, younger generations must make an effort to learn from Holocaust survivors while they are still here to

share their stories. The younger generation will be the teachers of the future generations, and need to be passionate about saving the world from crimes against humanity. As a community, people must promote Holocaust education, especially by survivors. Those passionate about the need for effective Holocaust education in schools need to put pressure on school administrators and teachers. The time for improving Holocaust and genocide studies is now; the urgency of the matter cannot be stated more clearly. As teachers and administrators, people need to take an interest in contacting Holocaust survivors in order to expose students to their engaging and moving stories. There is also a great need for Holocaust studies to be appealing to young people, and to endorse upstanding behavior. Teachers, administrators, members of community, and students alike are obliged to liberate themselves of passive attitudes when it comes to genocide education; there is no time like the present to prepare for the future of humanity.

Additionally, the upstanders of today and revolutionaries of tomorrow are faced with the attitude of the modern world; an “us versus them” mentality. Today, when devastating news about a foreign country reaches America and other countries, the original reaction is that of “Wow, things look terrible over there,” followed immediately by “What are they going to do about this?” This reaction displays the “them versus us” mentality. The ideology of “We have our own problems” is always at the forefront, with people constantly wondering what they can do for themselves. The world has become an environment in which bystander activity is normal, and the illusion of “that’s their problem” is everywhere. This temperament is just that however, an illusion; genocide is a crime against humanity, against everyone in the world. It weakens alliances, crumbles treaties, and demolishes human nature. This approach to genocide was a chief factor in the lack of upstanding seen in the Holocaust, and contributed to the death of millions of Jews during that time. To liberate the future, individuals must lead by example, and exhibit the qualities of an upstander. Those that witness upstanding behavior need to then mimic such attitudes,

and spread the cause. It is difficult to be a leader, but much more challenging to be the first follower. Looking to the past, and learning what not to do in the face of adversity is essential to the act of freeing one's self of prejudice, and allowing and supporting empathy for others. Empathy is a major part of making a difference, and the idea that weakness is synonymous with caring for others is absurd. Society needs to be supporting compassion, as it drives people to achieve extraordinary feats. Also, ridding one's self of egocentricity is key, as removing the need to constantly improve one's own position will pave the way for compassion for those suffering in other parts of the world. Moreover, placing one's self in the belief that all humans deserve to be liberated will help with the removal of the aforementioned them versus us mentality. Blurring language and country boundaries and viewing everyone as equals is essential, as is eliminating prejudice and bigotry. Liberating the future means removing the major issues of today and striving to do better.

Individuality is an essential part to liberating the future. Everyone has different talents which contribute to the cause, which stimulates different ideas and creativity. Those with a gift for writing must utilize their abilities and speak out towards injustice with powerful writing. Writing is an important tool to employ during human rights studies, as properly placed words motivate others to achieve the impossible. Those that are creatively inclined are obliged to use such talents to create artwork, music, dances, or films to express the need for change in our world, and convey emotions to move people into action. Like writing, dance, art, film, and music can be extremely powerful to some individuals, and will push bystanders to become upstanders. Those with a natural ability to speak and be heard must take advantage of their talents and become leaders of the cause to liberate the future. People inclined to follow or be behind-the-scenes are important as well; being a follower is just as important as being a leader, and humility is always needed to keep everyone focused on the main goal. Without the use of different talents, a one-dimensional interpretation

would be displayed to the world as the only outlet of change, and change would therefore be doomed. Different approaches appeal to different people, and a variety of individuals are needed to spark a revolution that will change today, and liberate tomorrow.

Moreover, the misconception that someone else's voice is more powerful than yours is an imminent problem in the journey that is the liberation of tomorrow. Everyday people can make a difference in the world, because every voice matters. The belief that there is a certain age or time to take a stand is equally absurd; average individuals have made an impact at every age and stage of their lives and taking action is not just for the people that seem to have their path laid out for them. Upstanding is something everyone can do, and standing up, in even the smallest of ways, causes a ripple which expands and spreads to others. There is no "right way" to be an upstander, there are no rules; when you see injustice, act upon it, and change someone's view; that one person will spread contributory attitude to others, and those will spread upstanding to yet more people, and so on until there is an overwhelming amount of people that have a capacity for change. Gandhi once said, "Whatever you do will be insignificant, but it is very important that you do it." The fundamental lesson of this is that everything you do, in the grand scheme of things, is trivial, but it is imperative that you do it; one small act can spark a change bigger than one individual. The bottom line is: Your voice *counts* and it is imperative that you act upon it to liberate the future from the issues of today.

The future is dependent on our actions today as a global community. The upstanders and liberators of the modern world realize this; and are fighting to end genocide, prejudice, stereotyping, and bigotry. However, there are major issues they face on a daily basis, such as the use of social media to promote Hate, the downplayed role of history, the fact that Holocaust survivors are dying, and the "them versus us" mentality of today's youth. As an international society, we must work to solve these issues by looking at the lessons of

the Holocaust for answers, and by becoming upstanders in order to liberate the future of the atrocities of today. The individual talents and voice of each person now contribute a great deal to this cause, and it is imperative that we set aside differences and passive attitudes, and work together to save tomorrow from today.

Conclusion

Concluding Observations: Out of the Bitter Legacy of Srebrenica

Mark David Agrast*

For nearly a decade, the American Society of International Law has been honored to cosponsor the International Humanitarian Law Dialogs and to publish these annual *Proceedings*.

On behalf of the Society, I would like to express my appreciation to David Crane, who established this annual forum and continues to guide and nurture it; to our fellow cosponsors for their generous support of the Dialogs; and to the Robert H. Jackson Center. I also wish to acknowledge our publications manager, Caitlin Behles, our director of education and research, Wes Rist, and Emily Schneider, who once again served as editor of these *Proceedings*.

Since 1996, the Dialogs have examined the role of international criminal tribunals in enforcing and reinforcing the norms of international humanitarian law in post-conflict situations. These Ninth Dialogs once again brought together current and former prosecutors, judges, and experts from government, academia and international organizations to take stock of the state of international efforts to hold accountable those who commit genocide, war crimes, and crimes against humanity.

This year's Dialogs commemorated two solemn anniversaries: the seventieth anniversary of the opening of the Nuremberg trials and the twentieth anniversary of the Srebrenica massacre. One could hardly imagine a greater contrast than that between the idyllic surroundings of Lake Chautauqua and the site of the unspeakable horrors visited on the men, women, and children of Srebrenica. More sobering still was the realization that as we were assessing the achievements and failures of the Srebrenica trials, a new humanitarian catastrophe was

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unfolding in Syria. A question pervading these Dialogs was whether the international community would again be able to summon the will and the resources to demand accountability for those crimes.

The stage for our discussions was set by the Clara Barton Lecture, delivered by former Guatemalan Attorney General Claudia Paz y Paz. She recounted her country's efforts to achieve accountability and reconciliation after a conflict of three decades that claimed hundreds of thousands of victims, culminating in the trial of former head of state Efraín Ríos Montt for genocide. She described the challenges of gathering forensic and testamentary evidence of the killings, internal displacements, and sexual violence, and the campaign aimed at the annihilation of the Ixil people. Montt's conviction, although reversed on appeal, represented an overdue if incomplete acknowledgment of the genocide that had taken place in the face of a continuing campaign of official denial.

In her Katherine B. Fite Lecture, Patricia Viseur Sellers, Special Advisor for Prosecution Strategies for the Office of the Prosecutor at the International Criminal Court (ICC), spoke of the atrocities at Srebrenica as “an intrinsically gendered genocide.” She analyzed the extent to which the gender of the victims played a role in judicial determinations, such as whether forced transfers of Bosnian Muslim women, elderly men, and children from the Srebrenica safe area, either alone or in combination with the killings of men and boys, were acts of genocide aimed at the destruction of the Bosnian Muslim community within the meaning of the Genocide Convention and Article 2(4)(d) of the Statute of the International Tribunal for the Former Yugoslavia (ICTY). She also explored the extent to which sexual violence at Srebrenica constituted a separate act of genocide.

In a coda written for this volume, Sellers evaluates the March 2016 judgment holding Radovan Karadžić guilty of genocide for his participation in a joint criminal enterprise whose purpose was the

elimination of able-bodied males and the forcible removal of women, children and elderly men from the Srebrenica safe area.

In a powerful keynote address, Judge Wald reflected on the failure of the international community to prevent the atrocities, and asked, “What, if anything, is salvageable from [the] bitter legacy” of Srebrenica? She concluded that the trials have helped extract some meaning from the horror by enabling the international community to establish the truth of what occurred, and to insist—however fitfully and haltingly—on a measure of accountability for what it was unable or unwilling to prevent. She concludes that despite enormous legal and evidentiary challenges, the trials have made

a substantial contribution to the evolving international legal institutions and legal doctrines that are indispensable to ending impunity for wartime tyrants. Their contribution has not proceeded in a smooth or even steady way, but nearing their end we are in a different and—on balance—a better place today in international justice than we were in July 1995.

Indeed, “it was a triumph that there were trials at all,” and Judge Wald warned that this may not be the case when the time comes to establish responsibility for the terrible crimes taking place in Syria today.

Finally, she warned of the efforts of denialists to “usurp historical truth” about Srebrenica, and urged “the civilized world” to use the trial record of what the *New York Times* called “one of the most thoroughly documented war crimes in history” to combat such efforts.

David Crane opened the second day’s proceedings with provocative reflections on “Kaleidoscopic Conflict.” He discussed the waning influence of traditional centers of power, from the nation-state to regional and multilateral alliances and the United Nations, the accompanying decline of international law as a stabilizing force, and

the increasing resort to the use of force to respond to terrorism and other security threats. Such profound “kaleidoscopic” changes mean that we can no longer draw upon old doctrines and solution models, and we may have to content ourselves with “managing” international peace and security, rather than restoring it.

In his review of the year’s events, Mark Drumbl identified four features that have characterized international justice institutions over the past year: *transition*, with cases moving to residual mechanisms as the work of the tribunals winds down; *unevenness*, in terms of the outcomes achieved; *migration*, with proceedings moving from the international to the national level; and *omissions*, or jurisdictional gaps.

He followed with three compelling case studies of individuals convicted in various tribunals over the past year—Dominic Ongwen, a Ugandan abducted at the age of nine who became a commander in the Lord’s Resistance Army and the youngest person to be indicted by the International Criminal Court; Pauline Nyiramasuhuko, a former Rwandan government minister who was the first woman to be convicted by the International Criminal Tribunal for Rwanda (ICTR) of genocide and crimes against humanity, including rape; and Oskar Gröning, the bookkeeper at Auschwitz convicted by a German court at age 94 of being an accessory to the murder of 300,000 inmates. Each of these cases raises novel and complex questions about the nature of collective violence and individual culpability that criminal trials can illuminate but cannot answer.

Professor Drumbl also cited the *Gröning* case as an example of the migration of criminal prosecutions from international tribunals to national courts, noting that “the vast number of attempts to deal with justice following terrible atrocities do not happen at the international level,” but occur in national and local civilian forums. He argues that it is there that the future of international justice will be written, and he urges that greater attention be given to the “under-explored, under-

discussed, and very valiant and very courageous forms of justice that took place, will take place, and are taking place.”

With the ad hoc tribunals winding down, the prosecutors’ roundtable, moderated by Dean Scharf, took on a more retrospective tone than in previous years, focusing largely on the legacy of the tribunals and the challenges that remain for the entities that succeed them. There was general agreement among the current prosecutors that the overarching legacy has been the development of a body of law and practice that can serve as a legal foundation for future international and national prosecutions. In addition, Sheila Hollis noted the positive and unexpected role that the Special Court for Sierra Leone (SCSL) has played in helping the people of Sierra Leone to rebuild their country and achieve reconciliation. Hassan Jallow cited the equally unanticipated impact of the ICTR in helping restore a functioning legal system to Rwanda, paving the way for domestic courts to assume responsibility for future prosecutions. For Serge Brammertz, a primary lesson of the tribunals is that international justice can function only where there is the requisite political will. Thus, he attributed the relative success of the ICTY in obtaining the arrest of fugitives to the unanimous support of European Union nations—and the difficulties the ICC has faced in obtaining cooperation to the absence of a comparable consensus. Finally, Nicholas Koumjian of the Extraordinary Chambers in the Courts of Cambodia (ECCC) observed that one of the legacies of the international tribunals is that “despite the many limitations, the limited reach, the limited number of people that can be prosecuted in these international courts, international justice has become part of the conversation.”

The final substantive session was a roundtable discussion led by Leila Sadat on the background of the Srebrenica massacre and the significance of the trials for the development of international criminal law. The panelists discussed the importance of such early cases as *Erdemović* and *Krstić* in defining the legal basis for the charge of

genocide, establishing culpability, and determining what sentence is appropriate for those convicted of such crimes. They also considered the international political response to Srebrenica—in particular, the failure of the Security Council to adopt a resolution commemorating the genocide. Bill Schabas also observed that although Srebrenica was unquestionably the worst episode of ethnic cleansing committed in the former Yugoslavia, it was not the only one, and the singular focus on Srebrenica fails to acknowledge the victims of atrocities that took place elsewhere.

The Dialogs concluded, as always, with the signing of a declaration by the current and former chief prosecutors, calling upon the international community to reaffirm the Nuremberg Principles and to work to ensure universal accountability and an end to impunity for the gravest crimes.

Appendices

Appendix I

Agenda of the Ninth International Humanitarian Law Dialogs

Sunday, August 30 through Tuesday, September 1, 2015

Sunday, August 31

Arrival of the Prosecutors & Participants

2:00 p.m. **Screening of the film “Seeking the truth in the Balkans”** at the Chautauqua Cinema.

Monday, August 31

7:30 a.m. **Breakfast.** Athenaeum Hotel.

9:00 a.m. **Welcome** by President of the Robert H. Jackson Center and President of Chautauqua Institution.

9:15 a.m. **Katherine B. Fite Lecture** (Sponsored by IntLawGrrls) by Patricia Viseur Sellers.

9:50 a.m. **Impunity Watch Essay Contest Award Ceremony** presented by Andrew Beiter and Kyle Herda.

10:00 a.m. **Break.**

10:30 a.m. **Reflections by the Current Prosecutors.**
Moderated by Dean Michael Scharf.

12:15 p.m. **Lunch.** Athenaeum Hotel.

1:00 p.m. **The Clara Barton Lecture** by Caludia Paz y Paz, introduced by Federico Barillas Schwank.

- 2:30 p.m. **Round Table Discussion: Srebrenica Massacre.**
Moderated by Leila N. Sadat. (Panelists:
Prof. William Schabas, Hon. Patricia Wald,
Hon. Mark Harmon.) Fletcher Hall.
- 4:15 p.m. **Student “Porch Session”:** A conversation with the
Prosecutors and students, moderated by Andrew
Beiter and Kate Elci. Athenaeum Hotel.
- 5:45 p.m. **Reception.** Athenaeum Hotel.
- 6:30 p.m. **Dinner.** Athenaeum Hotel.
- 7:30 p.m. **Keynote Address** by Henrike Claussen,
introduced by Dr. Douglas Neckers.

Tuesday, September 1

- 7:45 a.m. **Breakfast with the Prosecutors.** Athenaeum Hotel.
- 9:00 a.m. **Drafting of the Ninth Chautauqua
Declaration.** (Private – Prosecutors only.)
- 9:00 a.m. **Year in Review** presented by Mark
A. Drumbl. Presbyterian Church.
- 10:30 a.m. **Break.**
- 11:00 a.m. **Porch Sessions with the Prosecutors:** The Legacy
of International Military Tribunal at Nuremberg,
Prof. William Schabas, Mark David Agrast. The
Legacy of the ITCY, Prosecutor Brenda Hollis,
Prof. Valerie Oosterveld. The Role of the ICC
in the Middle East, Prof. Jennifer Trahan, Prof.
Michael Newton. UNSC Impasse to Justice? Dean
Michael Scharf, Prof. Paul Williams.

- 12:30 p.m. **Lunch.** Athenaeum Hotel.
- 1:00 p.m. **Luncheon Address** by Hon. Patricia Wald,
introduced by Prof. Diane Amann.
- 2:30 p.m. **Issuance of the Ninth Chautauqua Declaration.**
Moderated by Elizabeth Andersen.

Appendix II

The Ninth Chautauqua Declaration September 1, 2015

In the spirit of humanity and peace the assembled current and former international prosecutors and their representatives here at the Chautauqua Institution...

Recognizing the continuing need for justice and the rule of law as the foundation to international peace and security, and cognizant of the legacy of all those who preceded us at Nuremberg and elsewhere:

Commemorate the late Sergei Magnitsky as the seventh recipient of the Joshua Heintz Award for Humanitarian Achievement for his important and impressive service to humanity;

Note the seventieth anniversary of the opening of the International Military Tribunal at Nuremberg;

Note the imminent completion of the judicial mandate of the International Criminal Tribunal for Rwanda and commend its contribution to the development of international criminal law, and to promoting peace, reconciliation, and accountability for crimes in Rwanda;

Note that concerns expressed in past declarations remain to be addressed, namely:

The failures of states and international organizations to fulfill their obligations;

The upsurge in violence against civilians, the general lack of accountability for these crimes, and failures to enforce international humanitarian law;

The continued prevalence of sexual- and gender-based violence and crimes against children, and the lack of accountability for many of these crimes;

On occasion of the twentieth anniversary of the genocide at Srebrenica, deplore the targeting of groups based on ethnicity, nationality, race, and religion;

Condemn the increased destruction by armed groups of cultural and religious objects, which are the common heritage of humanity, and emphasizing the need for accountability for these serious international crimes;

Recognize the importance of the residual mechanisms to carry out the continuing legal obligations of the international tribunals and courts as they close or approach closure;

Remind the states of their obligation to ensure the effective functioning of the international judicial institutions they have created;

And now do solemnly declare and call upon all members of the international community to keep the spirit of the Nuremberg Principles alive by:

Ensuring universal accountability and equal application of international criminal law to all;

Ending impunity for the gravest crimes by refusing to countenance amnesty or immunity;

Ensuring accountability for all crimes, especially sexual and gender-based violence and crimes against children;

Ensuring that domestic institutions have the necessary legal framework, capacity, and will to discharge their primary responsibility to investigate and prosecute international crimes;

Discharging their international and treaty obligations to cooperate with the international criminal courts, tribunals, and residual mechanisms and in particular to locate, arrest, and to surrender all fugitives accused of international crimes;

Providing sufficient resources for all international courts, tribunals, and residual mechanisms to achieve their respective mandates, including the ability to meet their obligation to protect and support witnesses and those made vulnerable by their cooperation, and to ensure justice is done and seen to be done.

Signed in Mutual Witness:



James K. Stewart (for) Fatou Bensouda
International Criminal Court

Serge Brammertz
International Criminal Tribunal
for the former Yugoslavia



David M. Crane
Special Court for Sierra Leone



David Kinnecome (for) Norman Farrell
The Special Tribunal for Lebanon



Richard Goldstone
International Criminal Tribunals
for the former Yugoslavia/Rwanda



Brenda J. Hollis
Special Court for Sierra Leone



Hassan B. Jallow
International Criminal Tribunal
for Rwanda



Nicholas Koumjian
Extraordinary Chambers in the
Courts of Cambodia

Appendix III

Biographies of the Prosecutors and Participants

Prosecutors

Serge Brammertz

Prosecutor Brammertz assumed his duties as the Prosecutor of the International Criminal Tribunal for the former Yugoslavia in 2008. Prior to his current appointment; he served as Commissioner of the United Nations International Independent Investigation Commission into the assassination of former Lebanese Prime Minister Rafik Hariri, as the first Deputy Prosecutor of the International Criminal Court where he was in charge of establishing the Investigations Division of the Office of the Prosecutor, and initiated the first ICC investigations in Uganda, the Democratic Republic of Congo and Darfur.

Andrew T. Cayley

Prosecutor Cayley was appointed as international Co-Prosecutor of the Extraordinary Chambers for the Courts of Cambodia in December 2009 and served in that position until September 2013. He previously served as Senior Prosecuting Counsel at the International Criminal Court where he was responsible for the first Darfur case. He also served as Senior Prosecuting Counsel and Prosecuting Counsel at the International Criminal Tribunal for the former Yugoslavia and as a defense attorney before the Special Court for Sierra Leone and the International Criminal Tribunal for the former Yugoslavia. Prosecutor Cayley is a Barrister of the Inner Temple and holds an LL.B and an LL.M from University College London.

David M. Crane

Prosecutor Crane is a professor of practice at Syracuse University College of Law. From 2002 to 2005 he served as Chief Prosecutor for the Special Court for Sierra Leone and indicted former Liberian

President Charles Taylor for his role in the atrocities committed during the Civil War in Sierra Leone. Professor Crane was the first American since Justice Robert H. Jackson and Telford Taylor at the Nuremberg Trial in 1945, to serve as the Chief Prosecutor of an international war crimes tribunal. He founded and advises Impunity Watch (www.impunitywatch.com), a law review and public service blog. Professor Crane serves on the Board of Directors at the Robert H. Jackson Center.

Richard Goldstone

Justice Goldstone served as the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia and for the International Criminal Tribunal for Rwanda from 1994 until 1996. After working as a commercial lawyer, the South African government appointed him to serve on the Transvaal Supreme Court from 1980 to 1989. In 1989 he was appointed Judge of the Appellate Division of the Supreme Court of South Africa. From 1991 to 1994, he served as the Chairperson of the Commission of Inquiry regarding Public Violence and Intimidation which came to be known as the Goldstone Commission. In 1994 he was appointed Justice of the Constitutional Court of South Africa and after returning from The Hague, he took his seat on the Constitutional Court, which he held until retiring in 2003. From August 1999 to December 2001, he also chaired the Independent International Commission on Kosovo. In 2009, Goldstone led a UN Human Rights Council fact-finding mission to investigate human rights violations related to the Gaza War.

Brenda J. Hollis

Prosecutor Hollis was appointed Prosecutor of the Residual Special Court for Sierra Leone in February 2014 by the Secretary-General of the United Nations, having served as Prosecutor of the Special Court for Sierra Leone from February 2010 until its closure in December 2013. She had been extensively involved in the training of judges, prosecutors, and investigators for work with the International Criminal Tribunals. She served as Senior Trial Attorney from 1994 until 2001

at the International Criminal Tribunal for the former Yugoslavia, and assisted the Office of the Prosecutor at the International Criminal Tribunal for Rwanda. Prosecutor Hollis served for more than 20 years in the United States Air Force, retiring in 1998 with the rank of Colonel. Prior to her Air Force service, she served as a Peace Corps volunteer in West Africa.

Hassan Jallow

Prosecutor Jallow serves as the Prosecutor of the International Criminal Tribunal for Rwanda, a position he has held since 2003. Since 2012, he is concurrently serving as the Prosecutor of the Residual Mechanism for International Criminal Tribunals. Prosecutor Jallow previously worked in the Republic of the Gambia as the State Attorney from 1976 until 1982, when he was appointed Solicitor General. In 1984, Jallow served as Attorney General and Minister of Justice for the Gambia, then, in 1994, he was appointed as a Justice of the Supreme Court of the Gambia. From 2002 until 2003, Prosecutor Jallow served as a Judge in the Appeals Chamber of the Special Court for Sierra Leone.

David Kinnecome

Prosecutor Kinnecome is a Legal Officer within the Legal Advisory and Appeals Section of the Office of the Prosecutor (OTP) of the Special Tribunal for Lebanon (STL). Prior to this post, he was the Appeals Counsel in the STL OTP. Before joining the STL in December 2010, Mr. Kinnecome was a Legal Officer within the Chambers Support Section of the International Criminal Tribunal for Rwanda (ICTR), where he worked as a legal adviser to Trial Chamber Judges from August 2006 to November 2010. Prior to joining the ICTR, Mr. Kinnecome worked in private practice in Boston and New York City.

Nicholas Koumjian

Prosecutor Koumjian has served as the international Co-Prosecutor of the Extraordinary Chambers for the Courts of Cambodia since

October 2013. He worked as a prosecutor for twenty years in Los Angeles and since 2000 he has served in various International Criminal Tribunals. He was a prosecutor at the International Criminal Tribunal for the former Yugoslavia and later at the State Court of Bosnia and Herzegovina. He headed the UN-staffed Serious Crimes Unit in East Timor and was Principal Trial Attorney at the Special Court for Sierra Leone in the trial of Liberian President Charles Taylor. He was also Director of a US-funded human rights programme in Colombia, working on anti-corruption initiatives in Central and Eastern Europe. Additionally, he has represented both defendants and victims before the International Criminal Court.

James Stewart

Prosecutor Stewart serves as the Deputy Prosecutor of the International Criminal Court. In 1979 Mr. Stewart joined the Downtown Toronto Crown Attorney's Office as an Assistant Crown Attorney, where he handled criminal trials. In 1985, Stewart served in the Crown Law Office Criminal division. Prior to his 2012 election to the ICC, Stewart worked as General Counsel in the Crown Law Office within the Ministry of the Attorney General, in Toronto. On leaves of absence from the Crown Office; Stewart worked at the UN International Criminal Tribunals. Stewart served as Senior Trial Attorney in the OTP at the International Criminal Tribunal for Rwanda, as Chief of Prosecutions in the OTP at the International Criminal Tribunal for the Former Yugoslavia, and as Senior Appeals counsel and then Chief of the Appeals and Legal Advisory Division in the OTP at the International Criminal Tribunal for Rwanda.

*Panelists and Speakers***Mark David Agrast**

Mark David Agrast is Executive Director and Executive Vice President of the American Society of International Law. He previously served as deputy assistant attorney general in the U.S. Department of Justice's Office of Legislative Affairs from 2009 to 2014. Prior to joining the Justice Department, Mr. Agrast was a senior vice president and senior fellow at the Center for American Progress from 2003 to 2009, and from 1992 to 2003 he held senior staff positions with the U.S. House of Representatives. Mr. Agrast previously practiced international law with the Washington office of Jones Day. He also has served in numerous leadership capacities in the ABA, including as a member of its Board of Governors and its Executive Committee, a longtime member of the ABA House of Delegates, a past chair of the Commission on Immigration and the Section of Individual Rights and Responsibilities (now the Section of Civil Rights and Social Justice), and he currently chairs the Commission on Disability Rights. He serves on the Council of the ABA Section of International Law and is a member of the Board of Governors of the Washington Foreign Law Society. Mr. Agrast co-chaired the National Lesbian and Gay Law Association (now the National LGBT Bar) and served as that organization's ABA Delegate. He has also been a leader of the World Justice Project since its inception and has played a central role in designing and implementing its Rule of Law Index, a quantitative assessment measure of the extent to which countries adhere to the rule of law. Mr. Agrast is a member of the American Law Institute and a life fellow of the American Bar Foundation. He graduated summa cum laude from Case Western Reserve University, pursued his postgraduate studies as a Rhodes Scholar at the University of Oxford, and received his J.D. in 1985 from Yale Law School, where he was editor in chief of the *Yale Journal of International Law*.

Diane Amann

Professor Amann is the Associate Dean for International Programs & Strategic Initiatives at the University of Georgia School of Law. She also serves as the International Criminal Court Prosecutor's Special Adviser on Children in Armed Conflict. Before entering into academia, Professor Amann served as an Assistant Federal Public Defender, a clerk for Judge Prentice H. Marshall of the U.S. District Court for the Northern District of Illinois, and a judicial clerk for U. S. Supreme Court Justice John Paul Stevens. Professor Amann previously served as Vice President of the American Society of International Law and Chair of the Section on International Law of the Association of American Law Schools. In 2013, she received the Prominent Women in International Law award from ASIL. She also received the 2010 Mayre Rasmussen Award for the Advancement of Women in International Law from the Section on International Law of the American Bar Association. Professor Amann was the founding contributor to IntLawGrrls blog and now serves as Editor Emerita.

Elizabeth Andersen

Ms. Andersen was appointed Director of the American Bar Association Rule of Law Initiative in 2014. She previously served as Executive Director of the American Society of International Law (ASIL). She serves on the governing boards of the Friends of the Law Library of Congress, the International Law Institute, and Williams College, and she is an adjunct professor of law at American University Washington College of Law. She has served as Executive Director of the American Bar Association's Central European and Eurasian Law Initiative, as well as Executive Director of the Europe and Central Asia Division of Human Rights Watch. Ms. Anderson has served as a law clerk to Judge Georges Abi-Saab of the International Criminal Tribunal for the former Yugoslavia and to Judge Kimba M. Wood of the U.S. District Court of the Southern District of New York.

Andrew Beiter

Mr. Beiter, a Social Studies educator, serves as Director of Youth Education at the Robert H. Jackson Center, as well as Director of the Summer Institute for Human Rights and Genocide Studies in Buffalo, NY. He also serves as co-Director of the Educators' Institute for Human Rights, which recently led a conference for Rwandan teachers in Kigali. A Regional Education Coordinator for the United States Holocaust Memorial Museum, Mr. Beiter also serves as a Teacher Fellow for the Lowell Milken Center for Tolerance in Kansas, and as a consultant for the Holocaust Resource Center of Buffalo.

Henrike Claussen

Ms. Claussen received her Master's degree in Modern History, History of Arts and Archaeology from the University of Cologne, Germany. She worked as an academic staff member for the Documentation Centre Nazi Party Rally Grounds (Nuremberg, Germany) and the White Rose Foundation (Munich, Germany). In 2007 she became the project coordinator for the establishing of the new permanent exhibition "Memorium Nuremberg Trials" in the Nuremberg courthouse. Since its opening in November 2010 she has been serving as the exhibition's curator and was recently appointed as the new director of the Memorium Nuremberg Trials. She has written articles and given lectures on various topics ranging from national trials against nazi criminals, German culture of remembrance since 1945 and questions of jurisprudence. Currently she is working on a book "The Nuremberg Trials: Origins—History—Legacy" to be published in 2016.

Mark A. Drumbl

Professor Drumbl is a Class of 1975 Alumni Professor and serves as Director of the University's Transnational Law Institute. Professor Drumbl's research includes public international law, global environmental governance, international criminal law, post-conflict justice, and transnational legal process. Prior to becoming a Professor,

Drumbl clerked for Justice Frank Iacobucci of the Supreme court of Canada. He was appointed co-counsel for the Canadian Chief –of-Defense-Staff before the Royal Commission investigating military wrongdoing in the UN Somalia Mission. In 2012 he was appointed to the Global Engagement Advisory Committee of the Association of American Law Schools. Professor Drumbl has also served as an expert in ATCA litigation in the US federal courts, in US immigration court, as defense counsel in the Rwandan genocide trials, has consulted with various organizations, and has taught international law in a plethora of countries.

Kate Elci

Ms. Elci serves as the Program Director, International Programs, of the International Peace & Security Institute. Kate holds a B.A. in anthropology from Kalamazoo College and an M.A. in International Peace and Conflict Resolution from American University’s School for International Service, where she was the Mustafa Barzani Graduate Peace Fellow. Kate has extensive experience in curriculum design, training and facilitation, specifically in the areas of negotiation, human rights and conflict resolution. She has also designed and facilitated a variety of multilateral simulations based on conflicts in Syria, Turkey, and elsewhere. Before moving to Washington in 2009, Kate worked and studied in Germany and Turkey for over six years; she speaks German and Turkish.

Andrea Gittleman

Ms. Gittleman is the program manager for the Simon-Skjodt Center for the Prevention of Genocide. Previously, she was interim director of U.S. policy and senior legislative counsel at Physicians for Human Rights. She served as an Arthur Helton Global Human Rights Fellow with the Burma Lawyers’ Council in Mae Sot, Thailand. She also worked with the New York University Immigrant Rights Clinic as a law student and has had legal internships with Legal Momentum, the New York Civil Liberties Union’s Reproductive Rights Project, and

Human Rights Watch's Women's Rights Division. Prior to attending law school, she served as a Peace Corps volunteer in Mauritania, where she managed gender and development programs.

Mark Harmon

Judge Harmon is currently an international Co-Investigating Judge at the Extraordinary Chambers in the Courts of Cambodia. Before joining the ECCC, he worked as a senior trial attorney at the International Tribunal for the former Yugoslavia for 17 years. Prior to working at the ICTY, he served as a Federal Prosecutor for the United States Department of Justice in Washington, D.C. and a Deputy Public Defender in Santa Clara County, California. Harmon has taught at the United Nations Interregional Crime and Justice Research Institute and Stanford University Law School. Additionally, he has authored several publications on the ICTY and international criminal law.

Kyle Herda

Mr. Herda serves as the 2015 Editor and Chief of Impunity Watch. Impunity Watch Law is an interactive website that operates as both a law review and news reporting site, with the website serving as our primary publication platform. Impunity Watch was created through the efforts of a dedicated group of students and Professor David Crane, the founding Chief Prosecutor of the Special Court for Sierra Leone. The Journal and website were launched in October 2007 with a very small dedicated staff. Impunity Watch is now comprised of over 40 active law student members.

Joseph Karb

Mr. Karb is a middle school Social Studies educator who also serves as Director of Teacher Initiatives at the Robert H. Jackson Center. Recently selected as the National Middle School Social Studies Teacher of the Year, Mr. Karb is a teacher fellow with C-SPAN, and facilitator of the national human rights video contest sponsored by

Speak Truth to Power and the American Federation of Teachers. His work has also been featured in social studies research studies, PBS Newshour and Britannica Online.

Douglas Neckers

Dr. Douglas Neckers is an organic chemist with a specialization in the photochemical sciences. His capstone achievement in the field was establishing the Center for Photochemical Sciences at Bowling Green State University – a Center targeting studies of the interactions of light with matter. Over 45 years in the academy, he published more than 400 papers, 11 books, edited 3 series, and was the inventor of more than 70 patents. His lab produced 39 Ph.D.s who hailed from 37 foreign countries. In 1990, he founded Spectra Group Inc. Ltd to develop the then-new technology of stereolithography in medical imaging. His labs were the first in the world to print MRI and CT data as 3D models using stereolithography (1988). Doug Neckers has degrees from Hope College and the University of Kansas. He taught at Hope College, University of New Mexico, and for most of his career at Bowling Green State University. He left Bowling Green in 2009 to become CEO of Spectra Group, a position he now holds. He is also Henry T. King Fellow, and Board Chair at the Robert H. Jackson Center.

Michael Newton

Professor Newton is currently the Director of the Vanderbilt-in-Venice Program at Vanderbilt Law School where he teaches an innovative International Law Practice lab. He is also an expert on accountability, transnational justice and conduct of hostilities issues. Professor Newton is an elected member of the International Institute of Humanitarian Law and the International Bar Association. Additionally, He serves on the executive council of the American Society of International Law and previously served on its task Force on U. S. Policy Toward the International Criminal Court. Notably, Professor Newton served as the U.S. representative on the UN Planning Mission for the Sierra Leone Special Court. From 1999 to

2000 served in the State Department's Office of War Crimes Issues and worked as the senior advisor to the Ambassador-at-Large for War Crimes Issues. After a successful military career as an armor officer and a military attorney, Professor Newton served as a professor of international and operational law at the Judge Advocate General's School and Center in Charlottesville, Virginia from 1996-1999.

Valerie Oosterveld

Professor Oosterveld was appointed Associate Dean (Research and Administration), Faculty of Law, University of Western Ontario. Her research and writing focus on gender issues within international criminal justice. She teaches Public International Law, International Criminal Law and International Organizations. She is the Acting Director of Western University's Centre for Transitional Justice and Post-Conflict Reconstruction, and is affiliated with the Department of Women's Studies and Feminist Research. Before joining Western Law in July 2005, Valerie served in the Legal Affairs Bureau of Canada's Department of Foreign Affairs and International Trade. She was a member of the Canadian delegation to the International Criminal Court negotiations and subsequent Assembly of States Parties. She also served on the Canadian delegation to the 2010 Review Conference of the Rome Statute of the International Criminal Court in Kampala, Uganda.

Claudia Paz y Paz

Dr. Paz y Paz Baily is currently the distinguished scholar in residence at Georgetown's Institute for Women, Peace, and Security. She was Guatemala's first female Attorney General and has worked for over 18 years to strengthen the justice system in Guatemala. She also served as the national consultant to the UN Mission in Guatemala. In 1994, she founded the Institute for Comparative Criminal Studies of Guatemala, a human rights organization that protects the rights of marginalized and discriminated groups during criminal proceedings. From 2010 to 2014, Dr. Paz y Paz assumed leadership of Guatemala's Ministerio

Publico, the prosecutor's office. During that time she pursued cases against organized criminals and perpetrators of human rights abuses.

Leila N. Sadat

Professor Sadat is the Henry H. Oberschelp Professor of Law and Israel Treiman Faculty Fellow at Washington University School of Law and has been the Director of the Whitney R. Harris World Law Institute since 2007. In 2008, she launched the Crimes Against Humanity Initiative and, since then, has served as Chair of its Steering Committee. In December 2012, she was appointed Special Adviser on Crimes Against Humanity by International Criminal Court Chief Prosecutor Fatou Bensouda, and earlier that year was elected to membership in the U.S. Council on Foreign Relations. In 2011, she was awarded the Alexis de Tocqueville Distinguished Fulbright Chair in Paris, France. Sadat is an internationally recognized human rights expert specializing in international criminal law and justice and has published more than 75 books and articles. From 2001-2003 Sadat served on the United States Commission for International Religious Freedom.

William Schabas

Professor Schabas is professor of international law at Middlesex University in London. He is the editor-in-chief of *Criminal Law Forum*, a quarterly journal of the International Society for the Reform of Criminal Law, and President of the Irish Branch of Criminal Investigation. From 2002-2004 he served as one of three international members of the Sierra Leone Truth and Reconciliation Commission. Professor Schabas served as a consultant on capital punishment for the United Nations Office of Drugs and Crime, and drafted the 2010 report of the Secretary-General on the status of the death penalty. He was named an Officer of the Order of Canada in 2006, and elected a member of the Royal Irish Academy in 2007. He was awarded the *Vespasian V. Pella Medal for International Criminal Justice* of the Association Internationale de Droit Pénal, and the Gold Medal in the Social Sciences of the Royal Irish Academy. Professor Schabas has

authored more than 20 books dealing with international human rights law and has published more than 300 articles in academic journals.

Michael P. Scharf

Professor Scharf is Interim Dean and Joseph C. Baker – Baker & Hostetler Professor of Law at Case Western Reserve University School of Law. In 2005, Scharf and the Public International Law and Policy Group, a NGO he co-founded and directs, were nominated for the Nobel Peace Prize for their work. Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for UN Affairs, and delegate to the UN Human Rights Commission. In 2008, Scharf served as Special Assistant to the Prosecutor of the Cambodia Genocide Tribunal. He is the author of sixteen books, and won the American Society of International Law’s Certificate of Merit for outstanding book in 1999, and the International Association of Penal Law’s book of the year award for 2009. Scharf produces and hosts the radio program “Talking Foreign Policy,” broadcast on WCPN 90.3 FM.

Federico Barillas Schwank

Mr. Schwank is a Legal Advisor for International Humanitarian Law at the American Red Cross. Previously, Federico worked at International Center for Not-for-Profit Law and the International Criminal Tribunal for the former Yugoslavia. He has assisted civil society groups seeking legal reform and represented indigenous peoples and victims of abuse before the Inter-American Commission of Human Rights and in U.S. asylum procedures. Before moving to Washington D.C., Federico worked representing low-income migrant workers at the Southern Poverty Law Center and led the outreach program at the Hispanic Interest Coalition of Alabama.

Jennifer Trahan

Professor Trahan is Associate Clinical Professor of Global Affairs at New York University. She served as counsel and of counsel to the International Justice Program of Human Rights Watch; Iraq Prosecutions Consultant to the International Center of Transitional Justice; and worked on cases before the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda. She served as an observer for the Association of the Bar of the City of New York to the International Criminal Court's Special Working Group on the Crime of Aggression, as Chairperson of the American Branch of the International Law Association's International Criminal Court Committee, a member of the ABA 2010 ICC Task Force, and as a member of the New York City Bar Association's Task Force on National Security and the Rule of Law. She was a NGO observer at the ICC Review Conference in Kampala, and lectured at Salzburg Law School's Institute on International Criminal Law.

Beth Van Schaack

Professor Van Schaack is a Visiting Professor at Stanford Law School and Visiting Scholar at the Center for International Security & Cooperation. She recently stepped down as Deputy to the Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice of the U.S. Department of State. Prior to that appointment, Van Schaack was Professor of Law at Santa Clara University School of Law, where she taught and wrote in the areas of human rights, transitional justice, international criminal law, public international law, international humanitarian law, and civil procedure. She was a member of the U.S. Department of State's Advisory Council on International Law and served on the United States interagency delegation to the International Criminal Court Review Conference in Kampala in 2010. Professor Van Schaack is a founding editor and contributor to IntLawGrrls blog.

Patricia Viseur Sellers

Professor Sellers currently works at Oxford University Master's Programme in International Human Rights Law. Previously she worked as a Special Advisor for Prosecutions Strategies to the Prosecutor of the International Criminal Court. She also worked as Special Advisor to the UN High commissioner for Human Rights, and the Secretary-General's Special Representative for Children in Armed Conflict. From 1994-2007 Professor Sellers served as the Legal Advisor for Gender Related Crimes and Senior Acting Trial Attorney in the Office of the Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda. Professor Sellers previously served as the Directorate General for external Relations at the European Commission, the Ford Foundation in Rio de Janeiro, and the Philadelphia Defender Association. She is also the recipient of the American Society of International Law's Prominent Women in International Law Award.

Hon. Patricia Wald

The Honorable Wald is a current Board member and former Chair of the Open Society Justice Initiative. Previously she served as a judge for the International Criminal Tribunal for the former Yugoslavia and as the first female Chief Judge of the United States Court of Appeals for the District of Columbia. She also served on the Iraq Intelligence Commission, an independent panel tasked with investigating US intelligence surrounding the United States 2003 invasion of Iraq and Iraq's weapons of mass destruction. In 1977 she was appointed Assistant Attorney General for Legislative Affairs for the US Department of Justice. Judge Wald also helped found the California International Law Centre at the University of California-Davis School of Law.

Paul Williams

Dr. Williams is the Rebecca Grazier Professor of Law and International Relations at American University and the President and

co-founder of the Public International Law & Policy Group. In 2005, Dr. Williams, as Executive Director of PILPG, was nominated for the Nobel Peace Prize by half a dozen of his pro bono government clients. Dr. Williams has assisted over a dozen clients in major international peace negotiations, including serving as a delegation member in the Dayton, Lake Ohrid, and Doha negotiations. He also advised parties to the Key West, Oslo/Geneva and Georgia/Abkhaz negotiations, and the Somalia peace talks. Previously, Dr. Williams served in the Department of State's Office of the Legal Advisor for European and Canadian Affairs, as a Senior Associate with the Carnegie Endowment for International Peace, and as a Fulbright Research Scholar at the University of Cambridge.