



Voices from the Rwanda Tribunal

Official Transcript: Asoka de Silva (Full Interview)



Role:	Judge
Country of Origin:	Sri Lanka
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Location:	Arusha, Tanzania
Interviewers:	Donald J Horowitz Robert Utter
Videographer:	Max Andrews
Interpreter:	None

Interview Summary

Asoka de Silva describes the challenges of coming from a common law background to the ICTR hybrid system that incorporates both common and civil law traditions. He notes that despite stark differences, the two legal traditions share a common goal: the impartial administration of justice. De Silva reflects that while the Tribunal might have benefited from being located in Rwanda, this could have compromised the possibility of fair trials. De Silva comments on the process of convicting and sentencing defendants.

The transcript of the interview begins on the following page.

Part 1

- 00:00** Donald J Horowitz: Good afternoon, my name is Judge Donald Horowitz . . .
- 00:01 (_____), good afternoon.
- 00:04** DJH: . . . and I am a member of the ICTR information heritage project and I'm here to interview you which is – you've, you have volunteered to do so. And we will be asking you some questions and the first question – would you please give us your full name and your position at the I-, at the International Criminal Tribunal for Rwanda, and the country you are from.
- 00:32 My full name is Joseph Asoka Nihal de Silva and I am attached to the trial chamber three at ICTR and I preside over few cases.
- 00:47** DJH: Okay. You preside over a few cases, are you on other cases as a member of the, of the three judge panel?
- 00:53 I have always been presiding, since I came here.
- 00:59** DJH: Okay. Let me ask you a bit about your – oh excuse me, go ahead.
- 01:04 Yeah, you wanted to know about my position in, way back in Sri Lanka? (____).
- 01:10** DJH: I was about to ask you that. Okay.
- 01:12 Okay I am from Sri Lanka, I'm a member of the highest court of the judiciary there, that is the Supreme Court.
- 01:19** DJH: How long have you been a judge . . . ?
- 01:21 I was promoted to the Supreme Court in the year 2001.
- 01:26** DJH: Okay.
- 01:27 And I came here in 2004 September.
- 01:34** DJH: And are you on then a leave of absence from the Supreme Court (____)?
- 01:38 Yes.
- 01:39** DJH: Is it called the Supreme Court of Sri Lanka? Okay.
- 01:41 Yes. What happened was really there was another judge who was from Sri Lanka called Judge Gunawardena. He was here from the inception of the court. And I think due to ill health he resigned in 2004, and I came here as his replacement.

- 02:07 DJH: And what was the process by which you replaced him? Did you have to be voted on by the Security Council and so forth?**
- 02:15 No-, not in my case because my predecessor was elected for the second term. So he could, once you're elected you can go on for three years, I think. Since he, since his second time election he was here only for one year. So when he resigned on health grounds instead of going through the election process again, Secretary General of the UN nominated me from my country.
- 02:54 DJH: And y-, to serve out the balance of his term?**
- 02:56 Balance, balance of his period.
- 02:58 DJH: Okay and have you finished the balance of his period?**
- 03:01 Yeah, it was long time back that I finished it.
- 03:04 DJH: Okay.**
- 03:05 I was, I had only two and a half years to complete. From 2004 September, maybe 2006 May or July, but the circumstances have now compelled me to stay on for some more time.
- 03:24 DJH: Do you have an, an inde-, an indefinite period?**
- 03:27 No, now they have fixed, now they have fixed it till December 2008.
- 03:34 DJH: Okay. Which is pretty soon.**
- 03:37 Not soon . . .
- 03:40 DJH: Like a month from now?**
- 03:40 2009, sorry.
- 03:41 DJH: Oh I'm sorry. Okay . . . okay.**
- 03:42 2009, yeah.
- 03:44 DJH: Very good. Before you were a member of the Supreme Court of Sri Lanka could you (_____), give us a brief outline of your education and legal experience and, and judicial experience?**
- 03:56 Yeah . . . yeah, I will start with my university career. I don't have to say all where I studied and all that.
- 04:02 DJH: Sure, sure.**

- 04:03 Yeah, I did my law degree in Sri Lanka, that was in 1967. Thereafter once you complete the law degree, I, we can't practice with that degree unless you go through the law college.
- 04:22 So I entered Sri Lanka Law College in 1971 and took my oaths as an advocate in 1972. Thereafter, I practiced for a short time in an official bar and I was called to the Attorney Generals Department in 1974 February. I worked in Attorney Generals Department for nearly twenty, 21 years and rose to the position of Deputy Solicitor General, starting with State Counsel or Crown Counsel you call it.
- 05:04 And I was the most senior Deputy Solicitor General when I was appointed to the Court of Appeal. Our Court of Appeal is the second highest court in the island. Earlier it was a little different because we, we had an appeal to the Privy Council, but with the establishment of the republic we have now severed connections with the Privy Council and we established our own Supreme Court. And started with a Court of Appeal . . .
- 05:43 DJH: Mm-hmm.**
- 05:43 . . . and now the Court of Appeal, appeals are going to the Supreme Court instead of going to the Privy Council.
- 05:51 DJH: So you have 2 levels of appeals court . . .**
- 05:54 Yes.
- 05:54 DJH: . . . and then below that I assume the trial court.**
- 05:57 Yes, and I was, I came to the court of appeal in 1995. There I was six years and in my sixth year, I was the President of that court . . .
- 06:11 DJH: Okay.**
- 06:12 . . . before I was elevated to the Supreme Court.
- 06:14 DJH: Have you ever sat as a trial court judge . . .**
- 06:16 No.
- 06:16 DJH: . . . before, before this?**
- 06:18 No, I have prosecuted, that's all.
- 06:20 DJH: Mm-hmm. I, I noticed on your resume that you attended the University of Illinois in Chicago . . .**

- 06:28 Yes.
- 06:28 DJH: . . . can you tell us about that.**
- 06:29 Yeah, that was because the, the Asia Foundation sponsored members of the Attorney Generals Department to go to Illinois and follow courses there. That was because the Vice Chancellor there, Dick Bir-, Dick Ward, when he came to Sri Lanka, I think those people negotiated with him to give us some exposure in the, the western world.
- 07:04 So I went there in 1987 for about a year and followed some graduate level courses there.
- 07:14 DJH: (____) . . .**
- 07:14 . . . including international criminal justice, Islamic justice and then sentencing policies. Like that . . .
- 07:28 DJH: Very good.**
- 07:28 . . . on various areas we were . . .
- 07:31 DJH: And you've talked about the 1990s but I'm going to ask you a specific question about the 1990s. Where, do you remember where you were in April 1994? A date that, that has come to have greater meaning for you since that time, which is when the problems in, I guess the, th-, the genocide occurred, started in, in Rwanda?**
- 07:57 I was in Sri Lanka.
- 07:58 DJH: Okay and you were, do you remember that day or some, or when you first heard about what was happening in Sr-, in Rwanda?**
- 08:06 Yeah, but only thing is we heard that there was a conflict between two tribes. All that we could get was from the television and what appeared in the papers. So it was projected as a conflict between, tribal conflict bet-, in Africa.
- 08:27 DJH: Mm-hmm.**
- 08:27 So, but I, the onl-, we, I didn't take any special interest in that because everyday you find some problem somewhere. So because of that I didn't pay much attention to that.
- 08:43 DJH: When did you first begin to pay some special attention to this?**

- 08:46 Yeah, when a judge from Sri Lanka was appointed to this court, then I was wondering as to wh-, what, I thought that there must be some interest in the world, and with the UN taking over, then, then only I started, thought of going into details of these matters.
- 09:10 DJH: Can you tell us about when that was that you began . . . ?**
- 09:13 Yeah, that was in '97 or so . . .
- 09:16 DJH: 19?**
- 09:16 . . . yes 97, (___) with the establishment of the ICTR, yes.
- 09:19 DJH: Of the tribunal. And, and tell me again the name of the judge . . .**
- 09:23 He was my namesake, Asoka Gunawardena.
- 09:27 DJH: Okay. I know about Asoka. (____) . . .**
- 09:32 He died unfortunately. He died after, soon after he retired, he died.
- 09:37 DJH: And how long did he serve on . . . ?**
- 09:39 He was here for nearly five and half years.
- 09:41 DJH: Okay. Now, since you've been here you've, this, it's the first time you've been a trial court judge, I think you said.**
- 09:53 Yes. Yes.

Part 2

- 00:00 DJH: When you first came, were you given any special orientation or training or anything of that sort?**
- 00:09 No, because as a counsel for the (_____) department, I used to do the appeals. So we do appeals from the trial briefs.
- 00:19 DJH: Right.**
- 00:19 So I, we, we knew what to look for and what to present to the appeals court.
- 00:24 DJH: Okay, okay.**
- 00:26 Apart from that I didn't have any experience in, as a trial judge. But of course I will say something; I have also functioned as judge advocate.

- 00:39 DJH: Okay.**
- 00:39 Yeah, sometimes because they, there of course you have to address the, the panel and guide them to come to a conclusion. That, how, how that happened was they used to, the army, navy and air force, whenever they have cases they used to get a member from our department as a judge advocate. So I have functioned as judge advocate in about two, three cases, that is the only way I have attended in trial matters.
- 01:14 DJH: Okay. Is the Sri Lankan court system a common law system or a civil law system?**
- 01:20 Common law system. Same as Tanzania, India, Malaysia . . .
- 01:26 DJH: And I assume America?**
- 01:28 Yeah.
- 01:30 DJH: And when you came here you found that there was a different sort of procedure.**
- 01:35 Ye-, yeah this is hybrid system.
- 01:38 DJH: Can you tell us what that means?**
- 01:40 That means you get, both systems are amalgamated here in this, so you get the civil law system as well as common law system. Some features are put together and that is how they have created the procedure, procedure here.
- 01:56 DJH: Okay.**
- 01:57 So sometimes it's a little bit confusing for us.
- 02:00 DJH: Mm-hmm. And perhaps it would be confusing for a civil law judge too because of the common law.**
- 02:05 Same, same problems I think they, they too have.
- 02:08 DJH: And that's one of the reasons I asked about the training or, or orientation but there was no-, apparently . . .**
- 02:12 Yeah . . . there was nothing, beca-, I came as a replacement so simply walked in . . .
- 02:17 DJH: Yeah . . . (____), but you've seen other judges come too in the ordinary fashion. Have they had any . . . ?**

- 02:20 Yeah . . . I'm not sure; (___), I, I, I have not heard anything about them getting any kind of orientation or training.
- 02:30 DJH: Okay. Was there any help that other judges would, you know, give, informally?**
- 02:37 Well, I came here on the 7th of September. I started the case on the 10th.
- 02:45 DJH: Okay.**
- 02:47 Others also didn't have much time to guide me.
- 02:50 DJH: Okay. How, how many, how many cases, can you tell us, have you sat on to conclu-, to conclusion?**
- 02:58 I am still doing the very first case I have started. In between, I have done Muvunyi, Rukundo, and there was another case where that person tendered a plea. Rugambarara . . .
- 03:20 DJH: Okay.**
- 03:21 And two other cases where I did the initial appearance, I can't remember the-, remember these names.
- 03:28 DJH: So the two cases, other than the one that's been going on for some time, the two cases that you heard through to conclusion . . .**
- 03:35 Yeah.
- 03:36 DJH: . . . were they one-, one-defendant cases or were they multiple?**
- 03:38 Yes.
- 03:39 DJH: They were one-defendant cases. (_____).**
- 03:40 Single, single accused cases.
- 03:42 DJH: And, and will you . . . ?**
- 03:43 This one is four accused, and those cases its very difficult to conclude because there are four people, four accused, four counsel, cross examination done by all counsel, so that takes a (___), big amount of time.
- 04:04 DJH: What is the name of the case which is the, the one that's going on?**
- 04:06 This is known as – this is known as Military 2.

- 04:10** DJH: **Military 2. Yes, okay.**
- 04:11 Military 2.
- 04:12** DJH: **And who are the other judges on the panel?**
- 04:16 I have one judge from Korea, Judge Park, and another lady judge from Jordan, Judge Taghrid Hikmet.
- 04:25** DJH: **Okay and have you all been on the case throughout?**
- 04:29 Yes, from the beginning.
- 04:30** DJH: **Alright.**
- 04:31 They too came on the same day with me in this tribunal.
- 04:36** DJH: **Okay, so you got, formed a little community.**
- 04:39 Yeah, so if I had someone who had little bit of experience here it would have been okay, but all three had to start on the same day.
- 04:47** DJH: **Okay and are, is the case getting – without getting into the, what, what all in the ca-, is the case getting somewhat close to conclusion?**
- 04:56 Now we are at the tail end, but even today I had only one witness.
- 05:02** DJH: **Okay.**
- 05:03 We started at 9 and got down at 10:30, this is how the progress is. We can't say anything because the, always the defense says, "Well, we want to have a full defense so you must give us time." And we started this session on the 8th of September, and I think we may not have concluded even ten witnesses, for this session, because of lack of witnesses, due to lack of witnesses.
- 05:44** DJH: **You're in the defense side of the case.**
- 05:46 We are on, on the defense that is why we have to be careful otherwise whenever we say, "No, you must finish it," they say, "No, we have to – you have to give us time. We have to find our witnesses, they are very difficult." It is also true that it is difficult for the defense to get witnesses. So otherwise their complaint is that, "Well, we are not getting a fair hearing," so in order to overcome that we have to sort of bend backwards.
- 06:21** DJH: **Okay. When did the case first start?**

- 06:25 It – I said 10th September.
- 06:28 DJH: You said this session.**
- 06:30 No, th-, this, this case started on the 10th September of 2004.
- 06:35 DJH: Oh 2004 . . .**
- 06:36 Yes.
- 06:36 DJH: . . . you didn't say the year. Okay, okay, okay, that's right, right, shortly after you came. Okay.**
- 06:42 Yeah, just three days after I came.
- 06:45 DJH: Okay, so it's a little over four years now.**
- 06:46 Yeah now it's over four years.
- 06:47 DJH: (___), and, and you are hopefully . . .**
- 06:50 Prosecutor finished his case in two years.
- 06:53 DJH: Okay.**
- 06:54 After leading 72 witnesses, he has listed 115, but ended up with 72.
- 07:04 DJH: Okay.**
- 07:04 And thereafter the defense wanted time to prepare for the defense and to look for witnesses. And when I gave the first accused, he said he need six months to look for his witnesses and bring them. With the greatest difficulty, we managed to start in about three months' time. I said, "Whilst we prolong, you better get organized and come with your witnesses." And somehow or other he took about a year to conclude his 42 witnesses.
- 07:39 DJH: Is this any (___) . . .**
- 07:40 They also start with about 115 in the list, but then as we go on, one witness per week, like that, so unless you put an end to it, say that, "Well, we give a timeframe, this is all the time that you get to bring any witness you have, you will not be given any time beyond this."
- 08:02 So with that I think I, we managed to finish the first one. Second wi-, accused was a little faster. He also called about seven-, 40 odd witnesses, but he was a little faster

than the first one. Then the third one we started, concluded this session and along with that, sooner to that he finished, got down to the fourth one.

08:26 And I had given them ti-, time to the 5th of December. And I can see from the way that he's going, he must be having something in mind to ask for further two weeks in January, which I am determined not to give.

08:40 DJH: 'kay. All right. Can you just again, without going into – the nature of the defendants. You said Military 2.

08:50 Yeah this is – first accused is the Chief of Staff of the Rwandan army. Second accused is the, wa-, was the Chief of Staff of the Gendarmerie of the Police. Third one is a Major in the army, 4th one is the Captain.

09:13 DJH: 'kay. And I assume they're charged with genocide and (___) . . .

09:17 Yes, usual charges . . .

09:18 DJH: The usual charges.

09:19 . . . genocide and yes . . .

09:20 DJH: Okay.

09:20 . . . extermination and so on.

09:21 DJH: Right. Et cetera. Okay.

Part 3

00:00 DJH: And then I want to move to, you said there were two other cases that you had tried with individual defendants. Was there any special or unusual jurisprudence? Or issues involved that you feel are particularly relevant that we might want to learn about?

00:19 Yes I can remember, case of Muvunyi was a peculiar case in the sense I was asked to takeover that along with this. So that is because I think there was a problem regard to, with regard to another judge who was nominated there. So I had to do that case along with two other lady judges. So then I said, "Okay," and then we started.

00:48 One week prior to the commencement of the case, that is the prosecution moved to amend the indictment and we didn't permit that. Because that was after so many years of, after maybe about one year after getting the case ready and

marking it ready, on the eve of the trial they wanted to move for a, they moved for a, for an amendment.

01:13 So I said this is not, we all decided that we are not going to permit. And they went on appeal on that and appeal also I think they said that it shouldn't be amended at that stage.

01:31 DJH: It should not or should be?

01:33 It should not be.

01:34 DJH: Mm-hmm.

01:35 So we went on with the case and we convicted him and sentenced him for 25 years.

01:44 DJH: 'kay.

01:45 They went on appeal and at the appeal I think they overturned the decision on the basis that indictment is defective. It's, yeah, (), o-, on the base, that on the main basis, and they also said that they have a no, they have not pleaded certain particulars in the indictment.

02:14 DJH: So was the person set free?

02:16 No, except on one charge. One charge they said that he should be re- tried.

02:21 DJH: Okay.

02:21 So that also Judge Byron wanted me to do it, I said, "No, I don't want to do that case again."

02:29 DJH: Okay.

02:29 That was a charge of incitement or something.

02:33 DJH: Okay. So is that pending now or . . . ?

02:35 Yeah it's pending . . . it's still not . . .

02:36 DJH: It's not . . . in some other chamber?

02:39 No, in the same chamber . . .

02:39 DJH: In the same chamber . . .

02:40 . . . but maybe, maybe some other judge will take it over.

- 02:43 DJH: Okay.**
- 02:44 It is now a very short case because only one charge and a limited number of witnesses maybe . . .
- 02:51 DJH: Okay.**
- 02:51 . . . they have. They now say that it can be concluded in, within a month. I don't know that is how we start.
- 02:58 DJH: (____). And the, the other case that you saw through to conclusion . . .**
- 03:03 Yeah that is also concluded now, we are now in the process of writing the judgment.
- 03:08 DJH: Okay, so you can't tell us about that . . .**
- 03:10 Yeah, I can't talk about it.
- 03:11 DJH: But the nature of the case, what was the nature?**
- 03:12 It's, it's involving a priest . . .
- 03:15 DJH: Ah.**
- 03:16 . . . and his role in genocide, that's all.
- 03:18 DJH: Okay. Well, I guess I – the question I had in mind is almost in some ways redundant. I was going to ask you if there's anything that happened since you came here that surprised you. I think from what you've said, the, the process of trying the cases surprises you.**
- 03:47 Yes.
- 03:48 DJH: And . . .**
- 03:48 It takes a hell of a lot of time.
- 03:51 DJH: Is it (___) . . .**
- 03:51 And I think now even the Prosecutor and the Security Council have realized that multiple cases, multiple accused cases take a lot of time. Otherwise these are single accused cases, I think we may have done a lot more work if we had selected the, the witnesses and taken single cases.
- 04:17 DJH: Okay.**

- 04:17 So that is why most of these cases have now run into about five, four, five, six years.
- 04:27 DJH: Okay. Are there () . . .**
- 04:30 The same problems I told you with regards to the witnesses apply to other cases also.
- 04:37 DJH: Is there any – I guess we'll get to this point a, a bit later. Is there anything that you've done here that you feel particularly – whether it's administrative or, or in the, in the cases – that you feel proud about, that you're, you're pleased that you participated in?**
- 04:56 Well I'm happy with what I am doing.
- 04:58 DJH: Okay. Tell us about it.**
- 05:00 Yeah. And I, I don't take any particular interest or, or over-ambitious with regards to a case. So I, so I don't think that I . . .
- 05:15 DJH: 'kay. When you say you're happy with what you're doing, tell, tell us what you mean by that.**
- 05:20 I enjoy the work I do.
- 05:22 DJH: Okay.**
- 05:22 Yeah.
- 05:25 DJH: Do you enjoy it specially because it's these kinds of cases or this kind of context, that involves human rights, or just, you just like judging and maybe it's both?**
- 05:35 N-, no, since it is involving human rights and the international involvement in this, because of international involvement.
- 05:52 DJH: Okay.**

Part 4

- 00:00 DJH: Have you thought about what proposals you would like to make to solve some of the problems? If, if you were designing a system, what proposals you would like to make to improve the process, to make it better, more efficient, more effective?**
- 00:26 I can tell you about only one area.

- 00:28 DJH: Okay.**
- 00:30 Now I have found that indictments have been drawn up and served on the accused for a number of years, before it has been taken up for trial, right? And sometimes indictment is drawn up and takes about five years for the case to commence. And what happens is under this system, the defense has to tender their witnesses only once the prosecution cases, closes the case.
- 01:21 So because of that, again the time comes into play. Because they don't do anything with regards to their defenses. Sometimes it may be correct because they must know what they have to answer. If the Prosecutor cannot prove the case there is no point in them looking for witnesses.
- 01:43 DJH: Mm-hmm.**
- 01:43 But I think once the indictment is served on them, they have enough time to see if they have defenses. Look for their witnesses and submit a list of witnesses – list of witnesses, nothing else, for their defense within six months or so. So that the Prosecutor will also know the kind of witnesses they have and with a summary.
- 02:21 Here of course they don't have to do anything; it's a free rolling for the defense. They don't have to give a summary to the Prosecutor; only thing is that the, the chamber orders them to give the names and the summaries, maybe 21 days prior to the trial date. So having listened to everything they bring witnesses and say that, "Well, I was there on the particular day and I didn't hear this."
- 03:02 Normally the tendency is, they say – because hearsay evidence is admissible here – "Well, I didn't hear anything. If that happened I would have known." Like that. So I think with regard to the defense portion there can be some improvement. There should be some improvement on that.
- 03:22 DJH: In terms of the quality of, of the practice before you, can, do you have any comment about that? Whether on either side? The . . .**
- 03:30 Quality of the lawyers?
- 03:31 DJH: Yeah, the quality of the presentations.**
- 03:37 Most of these people are all international lawyers, so they are up to the mark. Only thing is sometimes some people are – some people go beyond the mark, also.
- 03:46 DJH: Meaning what?**
- 03:47 Meaning, they think that they are not subject to any sort of . . . In our own countries, of course, bar counsel can take action against them if they behave in

particular manner or behave in an offensive manner. But here some people try to do that, but what happens is if they are, we, we also can take some action against them by just asking the Registrar to strike them off.

04:26 But certain things are happening here, so if we do that kind of thing, then that case gets – we have to stop the case, because accused has the right to be defended by his choice. So these people are selected by the accused. So if they say, “Well, we don't, we don't want the one who is been nominated,” then it might again contribute to the delay.

05:04 **DJH: 'kay.**

05:04 So those are the difficulties . . .

Part 5

00:00 **DJH: In just a moment I'm going to take a break and turn the next things over to my colleague Justice Utter. I want to ask you, is, do you see your role here as a judge in the same – as having the same duties or the same role as you would if you were back in your national jurisdiction?**

00:23 **DJH: Or is there some special role you think you have here maybe, by because of the statute that starts the tribunal or, or other reasons. Do you, do you see any different role that you have as a judge in this?**

00:36 Yeah as a trial judge, I think the role is quite di-, different.

00:40 **DJH: Okay. In wh- . . .**

00:41 Yeah, when you function as an appeal judge and trial judge; the two roles are quite different. (_____) . . .

00:48 **DJH: Of course, yeah, that I, that I understand, that's not where my, my question was going. My question was going: is your role here, if you were a trial judge at home and a trial judge here, or an appeals judge there and appeals judge here, is the fact that you're in this court with the statute that creates this court, and the context in which the court is created . . .**

01:12 **DJH: . . . is it – do you feel your role is – do you have duties or a role that's any different – that's different from what you would have at home?**

01:20 No, I don't think because in both, both cases we have to do justice.

01:24 **DJH: Sure.**

- 01:25 So in dispensing justice you have to follow the same procedure.
- 01:28 DJH: Okay. (____) . . .**
- 01:29 And... so don't think that – final goal is to do justice . . .
- 01:33 DJH: Okay.**
- 01:34 . . . whether it is there, here or at my home.
- 01:36 DJH: Okay.**
- 01:36 There's no difference.
- 01:37 DJH: There's something in the statute, that, that begins, that formed this particular court, that talks not just about guilt or innocence, but also about reconciliation. Do you – and, a role that the court may have in, in promoting reconciliation. Do, and, and I guess I want to, do, I think – have you seen that in the statute?**
- 02:11 Yeah, that is there but I don't know whether it can be achieved really by coming to this court. Our function is to judge the people who come before us.
- 02:23 DJH: Okay.**
- 02:25 And we have to be, we have to give them a fair hearing and act according to the evidence presented. So sometimes I can see that when people are acquitted, some people are not happy.
- 02:37 DJH: Right. (____) . . .**
- 02:39 So it is (____) . . .
- 02:41 DJH: In, in sentencing f-, for example, do you see . . . ?**
- 02:43 Sentencing of course it's, you, you have to because if it is genocide of course, 'life' you have to give, but if it something less than that then the judges have the discussion to go according to what they think is reasonable.
- 02:59 DJH: Okay. And, and I was going to ask you, is, is reconciliation a consideration when you're thinking about sentencing? Or, or the victim, the victim himself or herself?**
- 03:12 Yeah, dependi-, depending on what he says. If he pleads guilty and regrets for what he has done . . .

- 03:19 DJH: Right.**
- 03:20 . . . and if he also tenders that even though the charge is committing murder that he has helped people, those are the matters that the court takes into account and in deciding the sentence. So in this respect the sentencing policies that we have followed, comes into play.
- 03:44 DJH: Okay. Have you been to Rwanda?**
- 03:48 I went on a private visit.
- 03:50 DJH: Before the, the c- . . . ?**
- 03:52 No, during a vacation. During a vacation just to see what this, what, where, I, I was curious to see what had happened there . . .
- 04:00 DJH: Mm-hmm.**
- 04:01 . . . so I went there but I think there is an application before us by the, by both sides to visit the scenes.
- 04:10 DJH: To, to make a site visit with, with the, in a case?**
- 04:11 Yes . . . yes.
- 04:14 DJH: With, with counsel, et cetera, there? Okay.**
- 04:15 Yeah, yeah, so we have not yet . . .
- 04:18 DJH: Okay.**
- 04:19 . . . we have, we have said that we will give a decision later on that.
- 04:22 DJH: Okay.**
- 04:22 Maybe next year or (___) . . .
- 04:25 DJH: In, in your home court of course, when something is tried or appealed, you're near the people, you're near the people who are affected et cetera, et cetera, et cetera. This is of course in another country. Do you have any thoughts about, about that?**
- 04:39 Well, human beings are human beings, wherever they live, so I don't think that you should . . .
- 04:46 DJH: No, what I mean is it's not in Rwanda, the court is not in Rwanda. It's not where, where, where the events occurred and of course a lot of Rwandan people**

were involved. Do you have any thoughts about whether the court should in some way connect, or be closer either physically or otherwise to the Rwandan people?

05:03 To Rwanda. Yeah, it would have been better if the court were established there, but then of course on the other, other hand, the defendants will not get a fair trial because they can't get witnesses there.

05:18 DJH: Okay.

05:18 Even if they have, they might not come forward to give testimony. So in a way it will help the people who are there, then there are advantages and disadvantages. That is why this was based here, which is closer to Rwanda, to give a balance to both sides.

05:37 DJH: Okay. I'm going to take a break now and my colleague will finish the questions.

05:41 Yeah, (__) thank you.

05:43 DJH: Okay.

Part 6

00:00 Robert Utter: Your honor it's a privilege to be here with you today, and I will try and follow some of the questions my colleague has asked, and perhaps explore a few new ones myself.

00:12 RU: I'm fascinated by the combination of the civil law system and the common law system. I'm wondering how this is applied and discussed in the burden of proof that a state must have in proving the defendant guilty, are they the same or . . .

00:31 The burden of proof, of course in criminal cases, I think it's beyond reasonable doubt. That is the standard that we always apply here.

00:40 RU: Is there a lesser standard in the civil law system or do they agree with the common law system?

00:48 I'm not very familiar with the civil law System.

00:52 RU: But you know which one you apply, that's beyond a reasonable doubt?

00:54 No, it is generally beyond reasonable doubt. So that is the, that is the, that is the standard way of burden of proof here.

01:06 **RU: Have you had a case where your panel has found that a case is not been proven beyond a reasonable doubt?**

01:12 Yeah, in a charge in an indictment there are so many charges.

01:17 **RU: Yes.**

01:18 So some charges we a-, acquit them and some charges we convict. We acquit on the basis that it, those charges have not been proved beyond reasonable doubt.

01:29 **RU: And how often does this happen?**

01:31 That happens in every case I think. It's very rarely that you (___), you can get the conviction on all the charges that the Prosecutor has presented. Maybe, or at least one or two cases (____) charges I think, they also don't press sometimes.

01:47 **RU: The prosecutors are the same in our countries, then, they're over charged. Yes.**

01:51 Yeah, we have to load all the charges and send – but if it is not proved, it is not proved. So not convicted.

02:00 **RU: I was interested in . . .**

02:01 . . . not only proved, it has to be proved beyond reasonable doubt.

02:04 **RU: Yes, yes. I was interested in going over your CV, to see that you've taken a course in criminology in the United States. Was that before you became a judge?**

02:15 Oh yeah, this was in 1980s, '87.

02:19 **RU: What led to that interest?**

02:21 Well at that time I was doing criminal law, I was doing the appeals for the Attorney General. So since it was criminal law, I, they nominated two of us to go there and we went there and followed it.

02:39 **RU: And it was worthwhile?**

02:41 Yeah, yeah. And it – the, the interesting aspect was that we had a chance to look into the, the Muslim law aspect also.

02:55 **RU: Ah. Let me ask some general questions.**

03:00 When I say Muslim I mean Islamic law.

03:02 RU: Yes, yes. Some general questions now. One of the things we're trying to do in this project is to compile information that will be relevant to people 25, 50, even 100 years from now, and preserve it in a way that gives some reality to what's occurring here.

03:23 RU: We're trying to, I think capture the humanity of the judges who sit, as well as the court personnel. So it's something more than just the writing in the book. Along that line, I'd be interested in what you feel have been the most satisfying parts of your job here?

03:48 It's a little difficult to answer . . .

03:51 RU: Yes.

03:51 . . . because you, you don't get any satisfaction by listening to horrible stories.

03:55 RU: Yes, of course, of course.

03:58 So it's a, witnesses come and say various things. Only satisfaction is, if you think that you have done justice that is the satisfaction that you get after the case. That is if you can, you can look into your heart and say, "Well, I have done what I thought was correct."

04:18 RU: Have you had any cases where you had a question about that?

04:22 No, I mean every case as I said earlier, every charge; we look into every count we go through and take a decision according to evidence.

04:38 RU: If you were to say something to say to a tribunal that may occur 50 years from now, involving somewhat the same facts, do you have advice that you would give them at this point?

04:59 My only wish is, this sort of thing should not happen, genocide.

05:06 RU: Yes.

05:07 So no tribunal should be established for that purpose. I don't think that they should encourage this type of thing to happen in the world.

05:18 RU: Do you think by having a tribunal it discourages this type of activity?

05:23 That (___) I am unable to answer, that has to be felt by the people who are there.

05:28 RU: Mm-hmm.

Part 7

- 00:00** **RU: I notice as we go through the halls and the downstairs part of this building, that there are posters that say "no impunity." I assume that means that everybody should be responsible for their criminal acts. Do you feel . . .**
- 00:16 (___), only thing what is happening here is only the leaders are taken in and punished. The others are dealt with at the local level.
- 00:27** **RU: Do you feel at the local level enough provision has been made to hold people accountable?**
- 00:35 I think they have their own justice system so people are happy and what I feel sometimes they come to court and openly apologize and people are willing to forgive them. That is where the reconciliation is, not here.
- 00:55 There are in th-, those courts I think people come and I hear, read and heard, people even the husband is murdered, the wife is willing to forgive them. And the, the accused or the accusees sentenced to eight to ten years time, both sides are happy. That is why the reconciliation really operates there.
- 01:22** **RU: But that's harder to do at, at your level.**
- 01:25 I don't know anywhere; the state interest is only to punish the person. So here it has some, I don't know how, if a person can forgive another person . . .
- 01:42** **RU: That's a difficult responsibility to, to place on a judge's shoulders.**
- 01:47 That's the thing. So we can't, that, if the people here also, if the accused plead guilty, that is what we try to get. To see whether they are any mitigatory circumstances, to enable us to give him a lighter sentence. But the other system is quite okay; they do it openly and before your own people. I think that is a marvelous system.
- 02:16** **RU: What incentive if any is there to plead guilty at your level? Do you have many pleas of guilty at your level?**
- 02:24 I had, I did one, and they don't plead guilty here because the very first person who pleaded guilty got life. So thereafter they are reluctant to, and that was the Prime Minister . . .
- 02:38** **RU: Mm-hmm.**
- 02:39 . . . he got life. So because of that I think the guilty pleas went out. Except there are, exception-, exceptional cases only they plead here.

- 02:49** **RU: In the United States and in some other countries they have what's called plea-bargaining . . .**
- 02:54 Yeah.
- 02:55** **RU: . . . the prosecutor will (_____) . . .**
- 02:55 Yes, but in these cases it's difficult.
- 02:58** **RU: Mm-hmm.**
- 02:59 This type, here it's difficult. But here also there is some kind of plea-bargaining because the Prosecutor agrees with the accused and he agrees with the, with the, the charges and even including the sentence. But even though the sentence is not binding on the judges, there is some kind of plea-bargaining here.
- 03:22** **RU: With the pressure on the court to resolve its cases within a reasonably short time from now, is the Prosecutor proceeding in a way that can speed up the hearing of these cases or . . . ?**
- 03:36 Yes, but it is not the speeding up, because it, it is the system. Now there is, the Prosecutor will call te-, ten, 15 witnesses to prove his case even though there is no burden of proof for the defense. They will call about 75 witnesses. Then you can't, how, when you try to limit also, then they will say, "No, we want all these witnesses."
- 04:02 So those are the practical problems that the tribunal faces. (__) we can limit the Prosecutor will say well, "15 witnesses I will," defense will call, even though the defense witnesses maybe very (__), but the number, I don't know the reason. They keep on calling . . .
- 04:23** **RU: Does that have something to do with the compensation for the defense lawyer?**
- 04:28 I don't know, I don't want to comment on, maybe.
- 04:31** **RU: There's a suspicion that they may . . . That there might . . .**
- 04:33 Yeah, you can look, you can look at it, look at it that way also.
- 04:37** **RU: Yes.**
- 04:38 Unless I think they are now thinking of giving them a block fee, so that, that will prevent them from over-taxing the case.
- 04:54** **RU: Yes.**

Part 8

- 00:00** **RU: Let me ask what effect hearing these cases has had on you as a person. You sat here for about five years now?**
- 00:09 Nearly four and a half, four years now yeah, little over four years.
- 00:12** **RU: They've not been pleasant cases to hear.**
- 00:15 No, no, all are coming, all these witnesses come and say how people were killed. So it is not a pleasant thing to listen to, but then we are compelled to listen.
- 00:29** **RU: And has that had an effect on you as a person?**
- 00:33 At the beginning, yes, but now we are used to it.
- 00:37** **RU: Mm-hmm. And do you notice whether or not this has had an effect on your staff? The court reporters, the clerks?**
- 00:47 I don't know, I don't discuss anything with them, except my close associates, legal associates here.
- 00:56** **RU: Is there any provision for counseling for judges or for staff?**
- 01:03 Not that I know of.
- 01:08** **RU: Would you . . .**
- 01:09 Counseling in the sense with regards to mental aspect or what?
- 01:13** **RU: Yes.**
- 01:14 No, I, I have not heard anything. I think that, that is because maybe most of the judges who come here are on the mature side, so they, you have to prove your mettle also at some stage to withstand all these pressures.
- 01:38** **RU: Yes. Well, as, as a judge for 34 years in the United States I understand what you're saying.**
- 01:47 Yeah.
- 01:47** **RU: But the impact of the cases is still difficult I think on a judge who hears them. Along that line do you have any hope for humanity in the future?**
- 02:01 Yeah, that is why I said that this kind of thing should not happen again.
- 02:05** **RU: Mm-hmm. Do you see some . . .**

- 02:09 It is sad to hear certain stories, it's very sad.
- 02:13 RU: And yet we have the incidents in the Sudan now . . .**
- 02:17 Yeah, and most of these people are all helpless people. You know, when they come out with their stories you really feel sorry. But then that is not good enough for conviction. You must have proper evidence.
- 02:33 RU: Mm-hmm. Perhaps by publication of what you're doing, and the fact that the court imposes sentences, there may be some type of impact on the people in the future.**
- 02:47 I think yes, because they are trying to establish a library also with all these documents and things like that. So it might have some impact on them in the future.
- 02:56 RU: Mm-hmm. And that depends on records of what's happened and publications of what's happened.**
- 03:01 Yes . . . yes, yes, yes.

Part 9

- 00:0 RU: If you could give advice to people in the future who are putting another tribunal together, is there anything that you would recommend to them to prevent some of the problems that you see here? Delay, costs?**
- 00:18 Yeah, this is a costly affair, because most of these cases I think, almost all the accused have, they are getting counsel free. There is no grudge for that because they must be defended by somebody and I think if we can do this in the sh-, shortest minimum time, with less e-, expense I think . . . now I think they are spending very little on the court.
- 00:58 But to maintain the other staff it's going to cost, it's costing more, I think.
- 01:05 RU: Yes.**
- 01:07 Because, and without them also you can't run (___), you must have people to get down the witnesses, to do the investigations. So those things, we have to have people and you have to pay them.
- 01:22 RU: It's unavoidable, unavoidable once you start . . .**
- 01:24 Yeah, yeah, you can't avoid that, yes.
- 01:26 RU: Once you start the snowball rolling downhill, it's just . . .**

- 01:27 Yeah. That's right. So, unless you can fix it, fixing a timeframe is also little difficult because . . . but if you can't start the cases early and finish them, I think like in local jurisdiction. Here as I (___), in our country, of course, sometimes when you start a murder case you go to a finish day to day. And there, there is no system of allowing defense investigations, investigators to do the defense.
- 02:08 It is the police who do the defense work also. They record all the statements and then that is there, so Prosecutor also knows the defense witnesses, defense also know and there is an obligation on the Prosecutor also to disclose what is material to the defense. So that way our methods is quicker. So I don't, that is why I said that they must evolve some sort of method to quicken the process.
- 02:39 RU: Your method in Sri Lanka . . .**
- 02:40 It's the same as in Eng-, England, common law system methods.
- 02:42 RU: Yes, yes. Have the troubles in Sri Lanka had any effect on your reactions to your service here?**
- 02:54 Here.
- 02:55 RU: Yes.**
- 02:54 For, for – yeah, no, no, no, not that one because in the Supreme Court we deal with most of these fundamental rights, or human rights cases. The on-, the only jurisdiction there is a Supreme Court, there is a Human Rights Commission. Apart from that, I think mostly come there.
- 03:18 RU: Judge, you've been very helpful.**
- 03:20 Yes because we have to keep abreast with the latest developments.
- 03:25 RU: And how long is your present term then? Until these matters are completed?**
- 03:31 Here?
- 03:31 RU: Yes.**
- 03:32 Till 2009 I have been given, but I am not going to take any more cases. I want to finish the case that is in hand and then revert back.
- 03:44 RU: Thank you, sir. Pleasure to be with you.**
- 03:45 Thanks, thank you very much.