

Official Transcript: Lee Muthoga (Full Interview)



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Interviewers:	Robert Utter Donald J Horowitz
Videographer:	Nell Carden Grey
Interpreter:	None

Interview Summary

Lee Muthoga compares the cases of Casimir Bizimungu and Mikaeli Muhimana, reflecting on the difficulties of determining the guilt of implicit political action as opposed to explicit individual action. Muthoga discusses the unique challenges posed by a hybrid jurisprudential system, stressing the need for judges to have investigatory capacity as typical of civil law systems. He calls for mandatory induction courses for new Tribunal personnel and notes that many staff may require counseling as a result of their work.

The transcript of the interview begins on the following page.

Part 1

- 00:00** **Robert Utter: For the record my name is Robert Utter. I was a Judge in Washington State for about 34 years – on the Supreme Court for 24 and their Chief Justice for a while. I’ve been involved in international judicial education for quite some time. I retired in 1995 and have taught in, I think, 15 different countries, mainly in central Asia and central Europe in that time.**
- 00:30** **RU: It’s been my privilege to teach judges from Iraq in three different sessions and I gained respect for judges all over the world and it’s a privilege to be here with you today, sir. For our record, what is your full name and how do you prefer to be addressed?**
- 00:49 Well, my full name is Lee Gacuiga Muthoga. For, for spelling purposes Muthoga is M-U-T-H-O-G-A and Gacuiga is C-A-, G-A-C-U-I-G-A. Lee is simple, like General Lee – L-E-E.
- 01:13** **RU: That’s good.**
- 01:14 And I’m a judge at the Criminal Tribunal for Rwanda from Kenya. Before becoming a judge, I was, I practiced law for 32 years as a legal practitioner, in which period I established a law firm called Muthoga Gaturu & Company Advocates. It’s still operating even now today. I’m still a partner in that law firm on leave of absence for this period.
- 01:46 And, I don’t know that, whether I will go back to practice. By the time I, I leave here I will be about eight months before retirement, so my partners may well think I will add nothing to, to their practice. But other than th- I have, than that, I have in my time been President of the African Bar Association, Chairman of the Law Society of Kenya.
- 02:15 I have, as you have seen in my résumé, been a member of the International Bar Association and of the Chartered Institute of Arbitrators. I’m, I am a fellow and I have held a few other things some, some ()-, inconsequential, others not so inconsequential in the national legal life of the republic of Kenya.
- 02:44** **RU: I noticed you have a distinguished career in individual and civil rights law as well. How did you become interested in that?**
- 02:54 My civil rights and, and human rights experience starts off I think in the early 80s when I was, when I was elected to the Office of President of the African Bar Association in 1981. That was a time when one of the principal functions of the association was to intervene for persons who had been detained under the Preventive, (), Deten-, Detention Laws that had been enacted all over the African continents – in Kenya, in Ghana, in Sierra Leone, in all these countries.
- 03:51 And it was my job as the President to lead delegations to various presidents petitioning for the release of people, especially lawyers who had been detained for violating what was considered to be security laws of the time. Largely for things they said about – in opposition to draconian legal regimes that existed at that time. And from then on I did a fair amount of it in child rights.

- 04:31 I participated in the preparation on the Convention on the Rights of the Child and eventually worked with the UNICEF in creating the African Charter for the Rights and Welfare of the African Child and did a lot of other things which then predisposed me towards human rights and, and, and international criminal law issues.
- 05:04 I, I can't kind of figure one single event that I can call the beginning of it except the involvement as, as a, a leader of the bar in those issues that really provoked my mind into thinking more about putting into effect some of the things I had learnt in my studies at university.
- 05:30 RU: We share a great deal in common. I spent my first five years as a judge working with children; in a children's court. I tell people I learned more about human beings there in five years than I did at any other time. Was time I, I consider well spent.**
- 05:48 RU: I notice another thing in your CV or biography that's interesting to me, you chaired a tribunal investigating allegations of corruption against the High Court judges in Kenya, as I understand.**
- 06:03 Yes, just before coming here, when the new government came into office in the year 2002, one of its objects was elimination of corruption in the courts. And, and the, the government intimated or set out a committee to look into allegations of corruption amongst the judges. That committee reported and charged or alleged that a considerable number of judges and magistrates had been involved in taking bribes.
- 06:47 And the judges se-, section of those persons – the, the magistrates were dismissed from office, the judges couldn't be dismissed from office so it was necessary to appoint tribunals to investigate them for the purposes of determining whether the allegations made against them were, had any substance or not.
- 07:12 Out of the 23 that were mentioned, a good number of them resigned rather than face the tribunals. But there was 11 or so that did not resign, and – no, eight eventually because some three eventually did – eight remained that decided or all-, alleged that they were not guilty.
- 07:46 And so tribunals, two tribunals were set up – one to investigate judges of the court of appeal, and one to investigate judges of the high court. I was charged with the responsibility of chairing the one charged with investigating judges of the high court.
- 08:06 Unfortunately I only did about nine months of my time in that and it was time to come here and I couldn't have fit in the time with those so I had to resign in order to take up the appointment at this tribunal.
- 08:21 RU: And someone else took your place?**
- 08:22 Someone took over my . . .
- 08:23 RU: And wrote a report...**

08:24 Another, another judge, j-, former Chief Justice of the Republic was appointed to replace me – Justice Cockar. He has since completed – of those eight he has since completed five, found three judges guilty, and two, recommended their removal from the high court, and found two others not guilty and therefore they were not removed. The others are still pending.

Part 2

00:00 RU: What generated your interest in the ICC-, TR?

00:06 I think I came here more accidentally than by design. I came here when the first set of, for replacing judges wa-, was set out, I saw the application. Then I was completely fed up with what was happening in Kenya at the time, the former regime and I (___), needed very badly to do something different and something out of Kenya if possible.

00:38 So I applied for, for the appointment, for the, the appli-, appointments that had been advertised but I was somewhat unpopular with the government of the time and I, they were completely unwilling. They were unwilling to say they don't support my candidacy, but they were unwilling to support it either.

01:07 So my application was left to lie from – I presented it in May and I think the applications were closing on September 15th or something like that. But it got to New York on 17th of September, two days after closing time. So it was not considered.

01:29 So, but fortunately the tribunal – the, the, the United Nations then decided to establish the positions of ad litem judges. And when it did, a-, at the same time the government changed in, in Kenya so this time I put in an application and it was able to get in to New York in time. And that's really how I came here – I, I, I must say I came here running away from Kenya rather than by deliberate determination to go.

02:09 When the tribunal was i-, initially set up in 1994, I, I was involved in advocating for its being set up. But the president of Kenya at the time made very disparaging remarks about the tribunal and threatened to arrest any investigators who may be found in Kenya.

02:42 RU: Oh my.

02:43 And Kenya was then one of the countries that were being talked about as the places to establish the tribunal. So because of that speech, the United Nations turned it round against Kenya. And my interest in the tribunal just came down largely because I then knew of course there was no chance at all for a Kenyan to get into the tribunal.

03:11 So I forgot about it and forgot about it altogether now until, you know, five, six years later when I thought perhaps that the, the Kenya political establishment had changed its thinking on that. So that, that's really how I got here.

- 03:34** RU: Tell me about the work you are presently doing; how the panels are formed and where your work is with the panel? I might add before we have that, I am here with the University of Washington project; an information heritage saving with the ICTR.
- 03:56** RU: And that's my role; totally unofficial and completely unpaid so we simply volunteered to do this. But let me get back to your role here and for the record tell what you do, and . . .
- 04:10** Yes. As you probably have heard from the judges you have interviewed, the co-, the tribunal is comprised of three chambers; that is Chamber 1, Chamber 2, and Chamber 3. And each of those chambers has got permanent and ad litem judges. And courts are organized into trial chambers of three judges each. Every case is assigned to some three judges.
- 04:47** When I came here, I came initially on the assignment in the case of the Prosecutor versus Bizimungu and others, which is – we started in November of 2003 and it's still in progress.
- 05:07** The evidence phase has now been completed some three months ago and we are now waiting for the final submissions to be delivered on, from the 1st to the 5th of December after which we shall enter the judgment – deliberations and judgment writing phase.
- 05:33** After coming here, then I was assigned to another trial called the Prosecutor versus Mika Muhimana which I did between 19-, 2004 and 2005. It was a single accused trial, where I sat with Judge Khan and Judge Short. And Ma-, Mika Muhimana was as you probably know also convicted on all counts and sentenced to life imprisonment.
- 06:14** And he appealed against that judgment and the appeal court upheld the judgment. He is now either being moved on to some prison or is waiting – I'm not, I'm not aware of his present circumstances – to serve his, his term.
- 06:34** And subsequently I was assigned to another trial called the Prosecutor versus Zigiranyirazo, Protais Zigiranyirazo. And that trial is now, has completed the evidence phase and we are in the middle of judgment writing.
- 07:01** We were hoping to deliver judgment in the course of last month but for some various reasons it wasn't possible to do so. We are hoping now to deliver a judgment later in the year, hopefully in December. And I'm still working on the Bizimungu trial.
- 07:24** I have been assigned to another small short trial called the Prosecutor versus Nshogoza, which has not started yet. It was supposed to start on the 27th of September but again for certain reasons, it wasn't possible to start it and it is now scheduled to start on the 9th of February, 2009.
- 07:49** It's a short trial which is expected to take a couple of weeks, both sides – the prosecution and the, and the accused. It is not a genocide trial; it is contempt of

tribunal trial. So we don't expect it to be a long trial. So those are the trials I have been involved in.

08:12 RU: And when you say contempt of the tribunal, what is he alleged to have done?

08:18 He's alleged to have taken part in getting witnesses to lie to the tribunal and assisting witnesses to falsify their, their testimony and also bribing witnesses for that purpose. And he was previously a defense investigator in, in one of the tribunal, one of the courts, trials being carried out by this tribunal and it's alleged that in the course of that work as a defense investigator, he organized witnesses to lie to the tribunal.

09:09 It's all on allegations. It has not been heard. He's probably as innocent as they come, but he, he could also be guilty. That's what a trial is about.

Part 3

00:00 RU: Which of these cases that you've heard has been the most difficult for you?

00:08 I guess Bizimungu will prove the most difficult, largely because it's a long trial with four accused, former ministers in the government of, of Rwanda and it has taken a long time. It started – the hearing started on the 3rd of November 2003 and ended on the 29th of May 2008. That's when the evidence phase concluded.

00:40 But it hasn't really concluded because we haven't heard the final submissions. So that of course means that there's a lot of material as you can see behind you. It's a lot of material, which needs to be – we need to go through.

00:57 I think there are 48 or 49,000 transcript, pages of transcript waiting and, and so forth. And it is also a, a trial when we are trying people more for what they did not do than what they, they did.

01:20 As ministers in the so called Abatabazi government, they are charged of course with all manner of things but there are not, there are no allegations that they got up and went out there in the killing fields and, and murdered people, but that they were the government and they were as such government involved in or had policy decisions that related to the genocide and, and so forth.

01:53 And they didn't do things they might have done and so on and so forth. It's a lot more difficult in determining than when you have somebody like Muhimana, who is – there is testimony that he was seen doing this and doing that and doing that and doing that and so on and so forth. Because there it's a matter of, "Do you believe this witness or do you believe this one?"

02:16 And if you, if you believe then the out-, the outcome is this, if you don't believe the outcome is that. In the, in the other case it is more how you understand, there you interpret the actions of the people and what they did, what they didn't do and what they could do and what they couldn't do and, and so on and so forth.

- 02:37 So it's technically a more difficult deciding to do than when you are deciding a trial where, which involves actions of, of, of the individuals before you.
- 02:53 And jurisprudentially too I think it's wider than the other cases but as I said, we have not even begun deliberation in it. Maybe when we begin deliberation we will find it running smoothly, easily, easily. But I, I doubt it, but it is a possible, it is possible. So in that way I would say that is the more, is a more difficult one.
- 03:23 The other two trials had both single accused – the Zigiranyirazo one and the Muhimana one. Muhimana was good because the allegations, there are witnesses who say they saw and so on and so forth and it's much easier when you are looking to see whether this person did or did not do that. It's more difficult when you are going to be, tried going to the mind of the person to see whether he was thinking this way or thinking that way.
- 04:00 Zigiranyirazo again is another one. It has certain element of which are easy to determine and certain that are more difficult to determine. But since we haven't determined that one I would rather not speak too much about it.
- 04:17 RU: (____), of course, of course. What case has been the most satisfying for you? In terms of having reached what you believe was a just result.**
- 04:31 You see I have only one decided case. The others are not yet dec-, decided.
- 04:36 RU: That's an easy, easy answer.**
- 04:37 So, and well, there is, there is some – it's a difficult decision always when you have to decide on the lives of people . . .
- 04:48 RU: Yes.**
- 04:48 . . . people who lost their lives and people who are before you waiting to be found guilty or not guilty of it. It is always a difficult one. But in carrying out the role that we do, we do it in the hope that what we do today will contribute in making sure that never again will humanity be faced with a situation similar to that.
- 05:17 And to that extent, I, I feel satisfied that we have been able to make determinations which have been found – affirmed and confirmed by the appeal court in matters relating to the offenses say facing that Muhimana faced and such.
- 05:39 And I do hope that other people who might be inclined, w-, would have been inclined to act in that way will be restrained from doing so by reason of what we did. So that is the satisfaction.
- 05:58 And, and this tribunal succeeds or fails depending on the extent to which it contributes in the management of impunity. If, if when we have wound up this tribunal the world remains prone to genocide the same way it was before, then this tribunal will just have been a mistake in fact.

06:28 I am hoping that when we do finish, when eventually posterity looks at us, it will agree that what we did here contributed in making genocide and other crimes against humanity, and other mass offenses less likely than, than, than it would have been if this tribunal had not happened.

07:00 RU: And the cases you try here, are the most difficult obviously in terms of the type of crimes alleged to have been committed.

07:07 If for instance we, the cases that we are doing which involve ministers in government, the outcome of those, (___), that kind of cases I think could send messages that is, the fact that you're in government shouldn't provide you with com-, comfort that what you do will never have consequences. And as you know this, this tribunal has already tried the Prime Minister of Rwanda.

07:39 RU: Yes.

07:41 And, and that means the fact that a minister or Prime Minister can be tried – acquitted or not acquitted – but tried, means that other ministers and prime ministers and other managers of power in managing it will know that whatever they do can come to the determination or come to investigation by international trib-, court or tribunal and can have consequences.

08:12 And that I think will go some way in reducing the possibility that impunity will survive.

Part 4

00:00 RU: As we talk to other persons about the work of the tribunal, some of them from Rw-, Rwanda, some from here, there are some themes that seem to re-occur; I'm talking about concerns they have about performance of the tribunal – delay, cost, location of the tribunal. Do you see any of those as factors involving the search for justice in these cases?

00:32 Let me – I have lived through this tribunal . . .

00:35 RU: Yes.

00:36 . . . the last five years. And as an East African, I have, have been conscious of its existence and aware of the work it's doing all the way from its formation. There are people who have said this tribunal was a mistake because it has spent so much resources and has only done so little work, looking at the whole size of the genocide trials.

01:08 But I think myself that the correct argument is not that – the correct reading of it is not that this tribunal has not been useful. The correct tribunal is this – one, determination of international crimes, crimes committed in far, far places, crimes investigated (_____) and crimes such as genocide which is a crime which involves everybody, either as a victim or as a, or as a perpetrator.

- 01:48 There is no one in Rwandan society of 1994 who can properly say, "I was not involved in this genocide." Everyone was involved either because he or others related to him suffered or were killed or lost their lives there. Or because he and others went out to kill others, or because services and other things were made un-, unavailable and not receivable because of it, went through hunger and all those. So it is a crime which involves them.
- 02:27 Now resolving those disputes that arise from that must mean that it is something that cannot be done as quickly as resolving other private disputes might be done.
- 02:42 And two, when you are investigating these crimes, the investigation is being carried out by foreigners; by people who were not, who, who were not part of it or who are not in that cultural background – it, that also delays time.
- 03:02 The location of this tribunal, I do not, I do not expect it could have been located in Rwanda. I think I agree with the arguments that were put forward in rejecting the possibility of, of locating it in Rwanda. Because I do not see how it could have been located in Rwanda and managed to s-, to be seen, to be seen as anything other than a victor's court.
- 03:32 I am almost certain that if it had been located in Rwanda, everybody would have been looking at it as the victor's court. Because to, for it to function it would have required the support of the then gover-, or the gov-, the government in Rwanda which was the section of the Rwandan society that, that prevailed in the conflict. And, therefore, its respectability as an international tribunal would definitely have been seriously undermined.
- 04:04 Two, I do not also see how it would have been possible even to secure the kind of witnesses that we secure and give them the independence and the freedom they need to be able to tell us what actually happened. I don't see that it could happen.
- 04:22 Now anybody who tries to compare us with the Gacaca courts or even with the Rwandan criminal justice system is making a comparison which is not appropriate. It's not comparing, comparing like for like. It is completely – we are completely different animals.
- 04:45 Gacaca proceedings are designed not so much to inflict criminal sanctions but to bring about reconciliation and understanding between the communities. And that is why they are, they are totally informal, they are easy going, they accept apologies, regrets and all that, and forgiveness, and all that. It is part of their system.
- 05:11 And they are necessary too for obtaining reconciliation in a society which has suffered, suffered genocide. We are not such a, a tribunal; we have rules of, of conduct, we have rules that govern what we do and we are judged at a scale much different from Gacaca. We are supposed to function and to carry out our function in accordance with international standards of administration of criminal justice.

- 05:41 Which if you ask the Gacaca judges to do the same, they would take the rest of this century to carry out the, the determinations that they have carried out. So we doing a task, we are carrying out, undertaking a task which, to be undertaken correctly, has got to be undertaken deliberately slowly, and so on and so forth.
- 06:10 Secondly, this tribunal was established from zero. It did not exist as, as such. It is, it had to be brought together, gather people from all over the place, create personnel, create physical facilities.
- 06:28 It was situated here in Tanzania away from international communication system and took years to find, even to fine tune and provide the necessary technological support that a tribunal would require.
- 06:44 So its start (), its starting was slow, understandably slow. And I think, I'm not sure, but I think the first trials were, took place in 2001. So, and of course that investigation, that whole period of investigation was inevitable. It is possible also that it could have moved much, much faster if more resources were allocated to it.
- 07:15 When I came here there were three trial chambers, trial court rooms, which means that only three cases could proceed at the same time. And they were all proceeding back to back so that some are sitting in the morning, others in the afternoon, and so on so forth.
- 07:36 And since then, I think the government of Sweden and the United Kingdom – is it Sweden or Norway? Either Sweden or Norway and the United Kingdom provided some funds for establishment of a courtro-, courtroom number four, which then made it possible for, for more courts to take part.
- 08:00 The program of ad litem judges did, did not start until 2003 when it was possible now to virtually double the, the number of judges available, with certain regulations which require that a court be presided over by a permanent judge, and so on and so forth.
- 08:26 So that the ability for the court to function as quickly as people looking from outside there might want, it has not been there. We have not always been judged by those who know all about us. I think we have been judged more by people who don't know enough about us to judge us fairly.
- 08:50 So, yes, we have been criticized. Yes, some of that criticism is valid, a lot of it is not valid or is made from inadequate information, or sometimes even misleading information. And again some of it depends on who is making the criticism.
- 09:17 **RU:** I have so many more things I'd love to talk to you about but the day is long, my fellow friend and judge has some other questions . . .
- 09:26 **Donald J Horowitz:** ().
- 09:27 **RU:** . . . and so what I would suggest is perhaps we stand, take a maybe five minute break.

Part 5

- 00:00 **Donald J Horowitz: Judge Muthoga, I am Judge Donald Horowitz from King County Superior Court which is, was a trial court. And I was a judge there and I will be finishing, conducting the second part of the interview.**
- 00:13 **DJH: I'd like to talk a little bit about your experience prior to becoming, previous to becoming a judge here because you've had a long career as a lawyer and did, and I'm interested in the kind of work you did.**
- 00:28 **DJH: I, I, obviously you did work in human rights, which you've told Justice Utter about. But what's the nature of your practice, generally speaking?**
- 00:36 My practice has a history; a history in the, in the sense that it began as a one-man practice in, on the 15th of February 1972, which is when I reti-, resigned from my former law firm.
- 00:58 I was formerly employed as a, as a lawyer in a white practice called Hamilton Harrison & Mathews; and there were some differences, perhaps not really professional, but differences about remuneration and things like that. And so I decided to give a, give in a resignation.
- 01:27 And on the same day I resigned I also set up a law office. It was called Muthoga Gaturu & Company Advocates. I was the sole practitioner. I had, initially I had no employee. Then I, I got one employee. And then I was joined by a clerk who was working for my former employer who also resigned and decided to work for me gratuitously, (__) without payment.
- 02:00 So, for about four months I had only two members of staff; one who was on the payroll, and the other one who was working gratuitously, and myself. So that's the way the firm started.
- 02:17 It is not a firm which was, existed before that time. And after about three years I was joined by another practitioner and we merged the two law, two firms and formed one law firm called Muthoga Gaturu & Company Advocates.
- 02:35 And we then were practicing – we were a general practitioner. We were practicing contracts, civil law, criminal law, anything that we could find. And, and we had to do that because neither of us had what you'd call a prosperous family heritage or, or something that could enable us to choose our, our, our field of law. So we were doing whatever came.
- 03:07 Eventually we ended up by abandoning criminal practice; almost virtually abandoning cri-, criminal practice or restricting it only to people who were otherwise our clients, or employees of companies that were our clients when, when they got in trouble.

- 03:28 But very little off the street criminal work, and became civil practitioners and I think eventually, now we just doing transactio-, trans-, transaction work and corporate work but we've done all this other work before.
- 03:49 **DJH: And this firm that of course has grown, and some of the very first parts of your description of the firm remind me very much of my own history, when you are happy to have a client and you say, "Now I am glad they chose me," and so forth.**
- 04:09 **DJH: But, but you also apparently, I mean, from what we see of your résumé and so forth, the firm whether gratuitously or not did other, other kinds of work; consulted in human rights areas, and so forth and so on. And we call it, a lot of it we call, in the United States pro bono, yes.**
- 04:28 Pro bono, yes. As a rule, our practice rule was that one third of our work shall always be pro bono, unlike other law firms. And the reason was that our firm grew as a response against foreign law firms, because at that time our law firms in Kenya were either European-owned or Asian-owned. There were only two other black . . .
- 04:59 **DJH: African.**
- 04:59 . . . black African lawyers and very naturally the greatest need of pro bono work is African. And the European law firms and the Asian law firms did no pro bono work or very little. Sometimes only the proper briefs which they were doing it, doing, using their younger lawyers for, more for learning experience than for satisfying that client.
- 05:32 There was no legal aid in, in the country, either civil or criminal. So when I started off, both my partner and I were committed to some pro bono work.
- 05:48 So we kind of decided that there is a client, there is a segment of clients who cannot pay for their work. We will do it to the extent that it is possible, so that our firm does not just appear like the firm for the rich, and, and, (___). So we carried out pro bono work.
- 06:14 Then I personally got myself involved in a lot of child rights work. A lot of it which was really for pro bono. And, and, and I had to do it because I liked doing it and because I have the Christian commitment to doing work for God a-, a-, and, and so forth.
- 06:41 So yes we, we spent about one third of our work on pro bono all the time. That has changed over time. My present partners are less generous in that way than, than I am. Well, they, they start it differently now; they don't have to do it now and they have, they have the capacity to choose a lot of their work which I didn't have at the time.
- 07:12 But they still also do some fair amount of pro bono work but not, not as much we did at the time. Or put it this way, the work of the firm has grown bigger now that pro bono work has become much less than it used to be.
- 07:32 **DJH: It sounds to me like, there's a biblical saying which I'm sure you know, "Cast thy bread upon the waters and it shall be returned sevenfold." The work that you did pro**

bono has contributed to your success and the success of your firm. And hopefully perhaps the newer members of your firm will be reminded of that at some point.

07:57 DJH: I understand that personally very well and I applaud, I applaud your work. Both in terms of pro bono and in establishing so importantly an African presence in the bar which, without which it would mean very little, the bar would mean very little in these countries. And I'm telling you what you already know and I apologize for saying the truth that you already know.

Part 6

00:01 DJH: You, you were not a judge before you were a judge here but you had arbitrated a great many cases and that gave you, of course, a certain kind of judicial experience. Had you ever sat in a criminal case before?

00:16 Yes I had. You, you probably missed it out in my CV.

00:16 DJH: Ah.

00:16 For about ten years I was what we call a, a "Commissioner Oversize."

00:30 DJH: Yes.

00:30 A Commissioner Oversize is, has the rank of a high court judge . . .

00:34 DJH: Ah, okay.

00:35 . . . but comes to do only largely criminal appeals because the criminal appeals require a two, two judge bench and sometimes the chief justice finds that he hasn't got enough judges to carry out the load of criminal (____), so he appoints Commissioners Oversize. Strictly speaking under the law they can do anything; they can try any case that any high court judge can be, can try.

01:04 And we did try some civil cases but mainly we were utilized in the criminal appeals. That is appeals coming from the magistrate courts to the high court, which are either certified to require three judges or to require two judges. And so I did a lot of that work.

01:25 DJH: That's an appeals court, is it not?

01:28 No.

01:29 DJH: Okay.

01:29 When it is doing criminal appeals it is an appeals court . . .

01:33 DJH: Okay.

01:33 . . . from the magistrates. When it is exercising original decisions it is a trial court of the high court.

- 01:38 DJH: Okay, so you have experience then in sentencing people for crimes that have, for which they have been convicted.**
- 01:45 Act-, actually I had the experiencing of reviewing sentences because we did not have original criminal jurisdiction.
- 01:57 DJH: Okay.**
- 01:57 The high court's original criminal jurisdiction was only in murder, and it was not usual for the court to al-, assign murder to Commissioners Oversize because their period is indeterminate, so they are given the work that runs quickly which is appeals.
- 02:20 So in dealing with sentences, we were more dealing with, looking to see whether the sentences are lawful, they are illegal; they are too, too heavy or too light for the offenses.
- 02:29 DJH: Okay, well the reason I, I am following this line of questioning is because obviously you have to make sentencing decisions in this court . . .**
- 02:38 Yes.
- 02:39 DJH: . . . when somebody is convicted. And sentencing for crimes such as people are here generally charged with, would seem to me to be a, a little different, than, than . . .**
- 02:49 Yes, it's extremely heavy I can tell you that.
- 02:53 DJH: Yes, and I, I want to ask you about that. I know that you haven't had a lot of experience sentencing be-, because you only completed one case, but in terms of your, what you think about and, and the sentencing decisions, how, how is it different or how is it the same? What, what considerations are there? You of course do not have the death penalty . . .**
- 03:17 That is, which is a blessing, a great blessing because you don't ever have to make that decision. And it's not the same as having to make it in decision; of course in the work that I did as Commissioner Oversize, occasionally I had to look at capital offenses because the magistrates also try capital robbery as offenses for which they can sentence someone to death.
- 03:55 But I will readily admit that I have only, I had only one instance reviewed a sentence of death from the magistrate's court. And I was reviewing whether it is illegal, not its, not the, its extent. Both the judge sitting with me, Mr. (_____) so Justice (_____) and myself agreed the sentence was illegal so we reversed it and sent the case back for trial.
- 04:27 But to answer your question, it's a very heavy responsibility coming to the appropriate sentence.
- 04:35 DJH: In this – in the ICTR?**

- 04:36 In the ICTR.
- 04:38 DJH: Tell us about that.**
- 04:39 It, it troubled us quite a bit when we were trying, sentencing Muhimana. I think, in fact, we were locked in differences for more than, than a week. We were, we were having sentence combinations that we were not able to get unanimity for some time and we had to do a lot of searching.
- 05:10 And the reason is this: You have the maximum sentence, which is life imprisonment. A person is charged with rape, with, with genocide, with crimes against humanity, with all those other crimes and you have to tell yourself, "Which of these offenses is the more, the more severe, more serious offense than the other one?"
- 05:47 And really it is, you have to look at the enormity, you have to look at the involvement, the quality of involvement because in trying genocide, you will have people who have been involved in it for various reasons.
- 06:03 One, they may be involved because they are (_____) genocidaire in their decision. They are the ones who went hunting and looking for people to go and "work," as they called it. Then the others who were found to go and work, they, they would never (__) had the initiative to go and do anything.
- 06:23 They even thought it was a bad thing but it was a situation where either you go and do it or you get killed yourself so a lot of them went to get, to avoid getting killed. Or so they said when they are, they were eventually brought before you.
- 06:38 And the others who were doing it out of duty – "I am the local administrator here, it is government policy that these Tutsis be eliminated and there is a job, we go and do it," and so on and so forth.
- 06:56 And they are (____). So all these kinds of things, these motivations come into your mind when you are thinking about what to do with the person you have found guilty. And I would think to myself, my mind is this – that unless I am satisfied that the involvement was 100% voluntary, that it cannot be but, but 100% voluntary, then I wouldn't go for the maximum sentence.
- 07:35 But what sentences I would give after that depends really on the extent of that involvement, the callousness of the activity. Sometimes the, the way in which the, the accused acted tells you volumes about what his thinking was and, and so forth.
- 07:58 The other consideration in sentencing of course is the crime. The sentence should fit the crime, the victims should feel they have been, there is some atonement, there is, something has been done for them.
- 08:18 The community should see that the activity, the person, the guilty have been punished or adequately punished, and so on and so forth. Those are all the things that come in the mind of a, of a judge as he determines the sentence.

08:34 But it is the most difficult part of the whole process. The trial itself, the determination as to guilt or innocence is a much, much easier process than the determination once you have found a person guilty as to what sentence you should award.

Part 7

00:01 DJH: In 1994 April, where were you?

00:09 I was in Nairobi. Let me give you, tell you my first contact with the Rwanda genocide.

00:19 DJH: Please.

00:23 One of, one of my friends, a lawyer called Muite, now a member of parliament – also previously a member of parliament but that time just a practitioner – was working in a law firm called Waruhiu & Muite.

00:23 This law firm had employed a Rwandan secretary to one of the partners. Now and I'm driving out on one of those Saturdays and I find this secretary of this firm on the roadside and, and I stopped.

01:12 And she is crying. So I thought somebody had attacked her and so I stopped to ask her what's the matter and she would not be able to tell me what, what is the matter. I told her, "Come in, come in, come in."

01:32 I looked, there was nobody chasing her or anything like that and she's broken down. And then I waited for her to get composed and it is after she got composed that she told me she had just received information that her whole family has been wiped out in Rwanda.

01:56 And we had of course heard about the genocide in the, in the media but, you know, it, it was still very theoretical. That was the first not so theoretical encounter of it. And I dropped this lady at where she was staying and I looked her up a couple of times after that finding her then they told me the stories about how people had been butchered and so on and so forth. And that's how I first got into some contact with the genocide itself.

02:39 DJH: Did you continue to have an interest in – you did a lot of human rights work.

02:44 Yeah, but I didn't ha-, do any work relating to this particular genocide.

02:48 DJH: To the Rwanda (___). Had you been to Rwanda yourself previously?

02:51 No I hadn't. In fact I only . . .

02:53 DJH: Just to visit? Yeah.

02:54 No, no, no, I went to Rwanda just for the purposes of the Zigiranyirazo case last year.

03:03 DJH: Was that a site visit?

- 03:05 Yes, a site visit and the first time I was in Rwanda on Rwandan legal territory. I had been to Rwanda but on the air side because I had travelled aboard a, a royal air – Royal Swazi aircraft long time, in 1981 or something like that through Kigali and we did stop a couple of hours there. They, they had a problem with the aircraft and we stayed at the airport. So that’s the only other time I had been in Rwanda.
- 03:42 DJH: Ah ha. So – and, and when you did the site visit, you went to one of the sites where something was alleged to have occurred is that . . . ?**
- 03:50 Yes, we did.
- 03:50 DJH: Okay. And you saw that site and the appropriate structure as?**
- 03:52 Yeah. Yeah.
- 03:56 DJH: Yeah, okay. Alright and it’s interesting you mentioned Royal Swazi. I was once on a Royal Swazi plane in 1986.**
- 04:04 Oh.
- 04:05 DJH: And, and the king, he was 18 years old or something and was on the front of the plane. The plane got treated very well. I thought, I didn’t think the red carpet was for me.**
- 04:17 He was travelling on the same?
- 04:19 DJH: He was on; he was on the front . . .**
- 04:20 Oh okay.
- 04:21 DJH: . . . so we had to sit in the back. By accident we were on the same plane. Anyway, that’s, that’s a, that story is very difficult story. Has the, has the – I’m jumping around a little bit because you said something. Has the Kenya gover-, government changed its attitude to ICTR; in other words (____) . . .**
- 04:45 Yes of course.
- 04:46 DJH: Th-, they are assisting (____) with people who might (____).**
- 04:48 (____) . . . yes they did, they did change, yeah, a couple of years later.
- 04:52 DJH: Okay, so, okay, and obviously they did support your candidacy.**
- 04:59 Yes.
- 05:00 DJH: Yeah. For this, for this court.**

Part 8

- 00:00 DJH: Ha-, you’ve been in practice, and that’s important. You know what good presentation is and what not so good presentation is on the part of lawyers.**

- 00:12 **DJH: I'd like to get an assessment from you of, of the quality of representation both from the prosecution side and the defense side and whether it has improved, whether, what, what could be done to make it better, etcetera, if you don't mind, to the extent you're, you know, you're willing to share that with us.**
- 00:35 The quality of presentation before the courts, before the tribunal here is a rainbow; it varies. It's a very good presentation I have seen, there is not some not so good and some even bad. And I think . . .
- 00:53 **DJH: Okay. Whether that's prosecution or defense.**
- 00:56 Whether prosecution or defense. I think largely it more depends on, I think, jurisdictions. Although again, I have seen some good practice from the same jurisdiction as I have seen bad, bad practice so it can't be exactly jurisdictional.
- 01:22 But some very good lawyer, very, very fine lawyers have appeared before us, some not so fine. Easy, less easy-going lawyers have also appeared before us.
- 01:32 **DJH: Do you think that additional training of the lawyers, whether again prosecution or defense, would be helpful in terms of the present-, the court presentations?**
- 01:45 For now it depends on what will be being (___), done, because on the basis of the workload that is still left to be done, one has to make the assessment whether really you can really do meaningful improvement on the people already here.
- 02:06 **DJH: And maybe I wasn't clear in my question which, because I'm thinking more about if there were a future tribunal.**
- 02:12 Yes, if they (___) future tribunal there is a lot of improvement. I, I personally would probably decree that no one becomes, no one is allowed to practice in the tribunal unless he has had an induction course of at least three weeks in minimum, but probably better six weeks.
- 02:34 An induction; a course which seeks to refocus him from wherever he is coming, whatever jurisdiction he is coming and bring him to the practice as it is practiced here so that you, you don't end up in a position that Judge (_____) was talking about where if, if lawyers for instance who doesn't-, who don't know or appreciate that if one lawyer is speaking, the others should sit down.
- 03:08 That you should never have two people standing concurrently in the, in the courtroom and, and so forth. And also that you, in, in presenting your testimony to the court, you should be presenting this kind of form, make this kind of copying, and all those things.
- 03:29 Because a lot of delays we have had here has been because a lawyer has not prepared his presentation well enough, so we end up with not adequate copies of documents made, documents presented in this way and those other things which cumulatively slow down the process quite, quite a bit.

- 03:52 But if we had an induction course, it would set up certain standard practices which lawyers who practice before us, either for the prosecution or for the defense.
- 04:03 I expect the prosecution here does have some, some, some training courses for their people. I'm not sure that that is so but I expect they would. I, I don't think I could, I would never be the prosecutor here unless I had c-, courses for my people so I expect they have.
- 04:24 But I don't – because there is no (____)-, uniformity in whatever is done, the presentation isn't. Again, I have seen prosecution teams present very differently. The pr-, the team which presented Zigiranyirazo presented their case much different from the team which presented in Muhimana and a-, and also which (___), presented in Bizimungu.
- 04:52 So there is no (____)-, there is no uniformity even in the prosecution presentation. I have seen very good counsel, prosecution counsel, and I have seen them not so good.
- 05:05 DJH: Okay.**
- 05:06 . . . the kind of people only the United Nations can employ because nobody else would employ them.
- 05:13 DJH: Okay.**

Part 9

- 00:00 DJH: Now I'm going to ask you about judges. Because it's a hybrid jurisprudential system or j-, you know, j, judicial system; common law, civil law, et cetera, people from different, many different countries, would you – if you were designing a tribunal for the future – also suggest that judges have (___), have training or some sort of orientation before coming in and just sitting on the bench?**
- 00:34 I-, i-, it would be mandatory. Not even because of the cross-jurisdi-, jurisdictional necessity, because that can be avoided. I think Judge Møse when he was doing his judge selection almost succeeded in avoiding it.
- 00:50 Like, say, I sat in a tribunal, in a, in a court with a judge from Pakistan, and a judge from Sri Lanka, was eventually replaced by a judge from Ghana. You see that is a Commonwealth, so they all like you to be common law judges.
- 01:06 Of course that is perhaps dictated by language because you will find that those who are from Commonwealth jurisdiction probably will be speaking English only and not F-, not French, or very little French. And others like, say, Karemera the first group of judges was French speaking judges put together, and so on and so forth.
- 01:35 So, but that was, I think, a practical attempt to do it. But if I was designing a tribunal, apart from that, I would have judges also go through a similar orientation course so that there is less, less reason for differences in perc-, in perception of the testimony,

perception of the decision-making process, perception of court, court control and court, court management,

02:08 DJH: Court control and co-, court management, yes, yes, yes.

02:10 Court management yes. And, and also because I think judges ought to know what is in store for them because sitting there in the national jurisdiction and listening this morning a tort case, this afternoon a divorce, a marriage, tomorrow night some broken contract, and so on and so forth.

02:39 You don't get the same weight of, force of weight as you do when you are sitting in there day in day out, hearing about killings and killings and killings and killings and never anything else. A-, and judges ought to know when they are coming here that that's what they will be, they will be hearing.

03:03 That's the kind of life they are going to be leading. And it is extremely stressful. I'm surprised we haven't broken down. It is extremely stressful; it is the kind of thing that requires counseling and if I was, if I was doing it, this thing again I would have a counseling section for, to counsel judges as they carry out their work and as they bear the weight of receiving that, those testimonies.

03:37 I, I recollect in the first w-, weeks when I was here and we were hearing this, this testimony about some of these ma-, mass killing sessions and so forth and seeing those video clips. I didn't sleep well at all for quite some time. So yes, I would orientate judges coming to work here.

04:07 DJH: Well you, you've anticipated, actually your answers anticipated a number of questions I was going to ask which is about the difficulty of hearing these cas-, these kinds of cases day in and day out and, you know, might, and would counseling be of assistance.

04:22 DJH: We certainly have found that, that in other instances, interpreters for example, people who hear, hear this day in day out as the judges do, that there is a stress and, and after a while it grinds you down and, and some help is often necessary.

04:38 DJH: Has it changed you personally, having been here five years and listening to this, if you don't mind sharing some of that with us?

04:48 Do I really know? I think so but if you ask me in what ways I will – it is very difficult to define. But let me put this, say this way, I began hating this work. My first year, year and a half, I just lacked the courage to say, "No gentlemen, let me go back to where I came from." But since then, I have got to like it.

05:20 In fact I have got to appreciate the gravity, the gr-, greatness of the work and the great opportunity that people who work here have got, as opposed to judges who work in the national courts, of developing the jurisdictional, extending the jurisdictional, jurisprudential capacity of international criminal law and so forth.

05:55 Things that I think I will look forward – I will look back to with satisfaction when I leave this tribunal. And I think it has made me a more courageous lawyer than I probably was before. Yeah, I, I don't think I have remained the same.

Part 10

00:00 **DJH: I only have two more questions. And by the way, I, I must say thank you for your candor and I appreciate it very much. We all do. What is – if, again we'll go back to designing a tribunal. If you, if – we hope there would not be, no need for one, but if we look at the world,**

00:24 Yeah. You can't be sure.

00:28 **DJH: I, it's what's going on in Congo now and Darfur and so forth, and . . . if you were designing a tribunal for the future, what other suggestions would you make so that it would do a better job? And that's not to criticize this one; we can always find ways to do a better job. Sounds to me like you've thought about, about it.**

00:49 Not really, but one, one sure thing I would do is that I would find a way of incorporating a certain amount of investigative capacity in the judicial complement. We, we sit as judges but we can't, there is nothing we can find out unless it is brought to us by somebody else. That is limiting when you are thinking about an, an offense like genocide.

01:26 Common law of course is, assum-, assumes that judges do nothing other than wait there and be told by parties what it is and so on and so forth. Civil law doesn't do that and I think civil law is better law for investigating genocide than common law. I think there ought to be something that – a judge who thinks he's being deceived ought to be able to do something to avoid being deceived by, by testimony.

01:59 But as it is now we, you can't, you can – you just hope that somebody else amongst the players will bring testimony to counter the testimony which you feel strongly is probably not correct and if you had correct testimony the position would have been different.

02:20 I think it's in doing offenses or investigating offenses such as genocide or such as international crimes against humanity the, the determining body ought to have capacity, a certain limited amount of capacity to find out or to uncover some certain facts for itself.

02:45 Don't ask me how I would do it but I think I would find a way in which I can incorporate an investigative capacity for courts; courts to be able to demand that this and that and that be looked at and be, be advised, and so on and so forth. Yes I think something like that. The, the way that some of the, the tribunals, investigative tribunals that are set up have capacity to do.

03:20 So that is one thing I would put into the new, in, into the new tribunal. As I said, I would also have an institutional approach to judicial orientation, orientation of judges and

orientation of other legal staff that operates. And probably – what are the other features that I would want to change?

03:59 This may be just this tribunal. This tribunal, this tribunal has not got a team spirit. It's, it's not exactly one institution. It is in fact several institutions. I am not sure that that separation is necessarily helpful in the judicial determination. I think the individualism that is in this, to be found in this tribunal is probably, it derogates from performance rather than helps performance.

04:47 If you ask me now ten questions about what happens in another trial, you will be, I will be lucky to answer one or two. Even to answer the names of the accused persons in other trials except the ones I'm doing. That is probably inevitable but I think there ought to be more congeni-, congen-, . . .

05:13 DJH: Congeniality.

05:13 . . . congeniality in our work than there is, there is now. And I think that if I was designing a tribunal I would make sure that there is some capacity for developing that congeniality, so that the team spirit is better utilized than it is at this tribunal.

05:32 DJH: In, in a certain way what you're also saying I think is you, you, you're trying to understand the context, the, the more universal context in which you are operating within the cases that are assigned to you.

05:44 DJH: So, you have a sense of the court itself and the, your colleagues and what they are doing, so that maybe that can give you greater perspective or et cetera, et cetera. Now I hope I'm not putting words in your mouth?

05:56 It's more or less that. And, like now, we, we never as a tribunal for instance ever do a postmortem of any trial.

06:09 DJH: Huh. Okay.

06:10 Right. If I was running this place or any place, I would say when the trial is finished and it's all gone and so on and so forth, judges will remain. There is who were there – those who did it and those who didn't do it – ought to be able to look at it and say, "Now what is it we didn't do right here?"

06:28 What is it, what did this, what is the appeal court saying when it says we are doing this and that and that?" As a group. And then you interact and you, you do mental cross-fertilization and so on and so forth – things that can help (), both to develop the spirit of the team, and also to improve the quality of, of the work. Because if I do a mistake now, hopefully the appeal court will pick it up some time.

07:01 Sometimes, not always; they don't always pick up those mistakes but sometimes they do. And that I will see it and I know what they – I will ask myself what I think they said. But if, if, if we were sitting together with all the judges and looking at the appeal,

appeal chamber's decision on Muhimana, it then becomes easy to see that we did this and did that and did that and did that.

07:33 The, the concept is fully appreciated. There are some decisions that I see here which come from the appeal court and I say to myself, "If I had this judge with me, I would ask him a few questions about why I think this can't be the correct position."

07:50 But there is no opportunity to do that until I become a professor of law in some university and I do critical analysis of judicial decisions of the appeal chamber of the International Criminal Tribunal for Rwanda. That may be in the year 2025.

08:12 **DJH: Maybe sooner.**

08:14 **RU: God willing.**

08:15 **DJH: God willing is right.**

08:16 God willing.

08:17 **DJH: I would, I would like, I would like to see some of that.**

Part 11

00:00 **DJH: You know I, I didn't tell you the truth, I thought I was only going to ask one more question but I, I want, I want to – the ICC, as it has been designed, has added something about victims.**

00:13 Yes.

00:13 **DJH: And I, we haven't discussed tha-, that and I, I would be interested in your views on how, whether or not you feel that, or the victim should be given a greater place in the, in the tribunal.**

00:29 Yes, I think so. In fact I (____) somehow almost contemplate something like it but it doesn't materialize because I think there is no resource capacity to do it. There ought to be resource capacity to do some of these things. Sometimes one wonders. Yes, resource capacity – what resources, where are those resources going to come?

00:55 And institution like this one is funded by voluntary contributions of states. Are they going to be able to do that? But I think there ought to, we ought to find a formula by which a resource bank is developed over time which would be resort-, would be resorted to when a need arises. And I see that the ICC has that concept, but do they have a budget line for it?

01:25 Do they have something that exists on a perpetual basis which will be, make it certain that victims can be assisted? Now the t-, this tribunal has been trying to do some work in, in Rwanda in a way of attempting to, to, to develop Rwanda's jurisdictional capacity and all those things as an expression of the victim. But it is, it is so generalized and so community; it doesn't touch that much the individual victim.

- 02:11 I think it's something one would be thinking. If you were making – if you were not ma-, when you're making a post-event tribunal, it is difficult to think about those things.
- 02:25 DJH: Yes.**
- 02:25 When you're doing a prev-, pre-, one in anticipation, then you can think about those kinds of things. So, but as long as these things are going to be ad hoc and they are going to be dictated by a situation which has existed and therefore are going to be created by politicians, you can forget it.
- 02:46 Because I don't think politicians have experience in their conceptual thinking for that kind of philanthropic activity. They, they, they, their, their cost benefit operation is so short that they can't, they can't do that. But yes, I agree if we were to do a tribunal and whatever it is, it would be nice if we could input in it capacity to soothe the wounds of those who got injured.
- 03:21 DJH: My last question. Right now you are speaking to the future. This film will be available one year, two years, five years, 50 years. Your grandchildren, your great grandchildren will say "That's my (_____)" . . .**
- 03:41 I hope they say, I hope they say it so proudly.
- 03:43 DJH: Well that's . . .**
- 03:44 Not in a way covering, "Oh, oh . . ."
- 03:47 DJH: Well, I, if you, you're speaking to the future, and there is no, no structure to this question. As you would like to say – if there's anything you'd like to say to the future, this is your chance to say anything that comes from your heart and your mind, both.**
- 04:10 The International Criminal Tribunal Rw-, of, for Rwanda was the, the interna-, the international community's response for its inactivity with regard to the genocide. The genocide was not inevitable; it was more a result of neglect from the international policeman.
- 04:50 Unless the international, the community, international community comes together and organizes a system of policing the world ahead of the happenings of genocide, there will be other genocides.
- 05:11 And I do hope that a system will be devised which would enable the international community to come together to stop a genocide or to prevent a genocide than having to come together to oversee one or to overcome one.
- 05:34 Yes, the ICTR has done what it could do in the circumstances. It was something that can only be called better than nothing in the face of the inaction of the international community even when it was made clear to them that a genocide was in the offing.
- 06:03 And especially shortly following what had happened in the Balkans. So I hope humanity will find the courage that is necessary to establish institutional capacity to monitor and

police occurrences of possible genocide so that we can always stop them from occurring.

06:35 DJH: Thank you very much, Judge Muthoga.

06:37 Thank you.