



Voices from the Rwanda Tribunal

Official Transcript: Mandiaye Niang (Full Interview)



Role:	Senior Legal Advisor
Country of Origin:	Senegal
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Location:	Arusha, Tanzania
Interviewers:	Batya Friedman Eric Saltzman
Videographer:	Patricia Boiko
Interpreter:	None

Interview Summary

Mandiaye Niang describes the early years of UN investigations and procedures, and recounts being traumatized by his initial experiences in the field listening to the stories of witnesses. He claims that these experiences increased his sensitivity to the needs of Rwandan people. He notes that the Tribunal's capacity building initiatives have helped strengthen Rwanda's judicial sector, indicating that these initiatives have transformed attitudes of Rwandans from initial distrust and criticism to feelings of ownership and support.

The transcript of the interview begins on the following page.

Part 1

- 00:00** Batya Friedman: So I'm Batya Friedman, a professor from the University of Washington. I'm here with Eric Saltzman, who is a founder of Creative Commons and we are interviewing you, Mr. Niang . . .
- 00:12 Yes.
- 00:12** BF: . . . on October 8th, 2008. And so the first thing I'm going to ask is could you very clearly pronounce your own name for us?
- 00:22 My name is Mandiaye Niang.
- 00:25** BF: Great. And what is your role here, your title here at the ICTR, currently?
- 00:32** Note: Gap in interview (Approx. 30 seconds in duration.) Gaps occurred due to interruptions during the interview, technical issues, or corrupted data files.
- 00:39** BF: And what is your role here at the ICTR?
- 00:42 So, I am currently the Special Assistant to the Registrar, so meaning an adviser. So, I don't have any specific scope of advising; I advise him in running the administration of the tribunal.
- 00:59** BF: Great. And you've been here a very long time.
- 01:02 Yes, in fact tomorrow will be the anniversary date of my 11th year with the tribunal. So, I joined the tribunal exactly the 9th of October, 1997. So I was then appointed as an investigator for the Office of the Prosecutor. So I spent there two years and a half before being appointed as a legal adviser to the judges.
- 01:31 So then, I came here to Arusha to advise the judges. I was then a coordinator, supervising the work of a team of three lawyers. That I did for also three years, and then I was appointed as a Special Assistant to the Registrar. That was in 2003.
- 01:53 So I performed those functions until early 2006 and then I was appointed to go back to the chamber but in a higher capacity as a Senior Legal Advisor, so which I did also for two years. And then the Registrar recalled me so I went back to his office to advise him again. And this is what I'm doing currently.
- 02:18** BF: Fantastic, so you have a very broad view . . .
- 02:21 Yeah.
- 02:22** BF: . . . both of the roles and then also the time of the tribunal. Yeah.

- 02:24 Exactly. I think that, yeah, I'm one of the longest serving staff members of the tribunal. And I have almost done everything but defense. I haven't been a defense lawyer here, but apart from that, I think that I have almost done everything. Yeah.
- 02:39 BF: So, if I could just take you back to the spring of 1994, think back in your mind. What were you doing then?**
- 02:49 So, I should tell you that in 1994, I was in my country in Senegal. Because I am a judge by training, in fact. So, in – I was in my office in '94 as a young judge performing his, his duty in the, our Supreme Court. I was a, a junior lawyer in our Supreme Court in Senegal. That was what I was doing.
- 03:16 BF: So were you, were you a lawyer or were you a judge in the court?**
- 03:19 Yeah, I, I was a – in fact you know that in our system, in the Senegalese system, so prosecutor and judge have exactly the same training. So being a judge or a prosecutor is just a matter of assignment or appointment. So I started my career as a judge, as a young judge until 1990 when I was appointed as a junior prosecutor.
- 03:47 In the last four years I spent now in, in Senegal up 'til, from '93 up 'til '97 was in fact in the Office of the Prosecutor General in the Supreme Court. Yeah, so I was technically a -, a, a, a Prosecutor.
- 04:04 BF: So then, when did you first hear about the, what was going on in Rwanda?**
- 04:11 So like, like everybody because I follow the news, so it was just from TV. It was every evening, of course. You know, during dinnertime I watch TV. And I saw – at the time also I used to listen quite often to Radio France International, which is quite popular in my country.
- 04:33 So of course, when the war started and those slaughtering and killings went on, of course I heard about it through the radio and the, the television, through the news. But I should confess that it was a little bit far away from my daily business, yes.
- 04:54 BF: So what happened that you decided then to come work at the Tribunal?**
- 05:00 So I think that, you know, the first time I decided was that our Minister of Justice circulated a, a, a paper requesting interest, expression of interest. And at the time, it was not even about the tribunal. It was just about going to Rwanda and advising Rwandan judge to adjudicate over many, many cases. That was the original idea.
- 05:32 And of course, you know for a young judge who has barely ever left his country to travel you know abroad, there wa-, there, there was this interest of going abroad and sharing

experience with other people. But I should tell at the time just to indicate you how far away what was happening in Rwanda was to us.

- 06:00 I remember that when I expressed interest to, to go to that UNDP experience, my then President of our Supreme Court called me and told me, “Okay, you know that I cannot forward this, this paper.” I told him, “Why?” Because he told me, “Okay, what are you doing there? What are you going to do there? Huh? These, these people killing each other. You are young. You have your future. Why can’t you just stay here because you have a bright future here? I can’t understand. I cannot forward this paper.”
- 06:33 And of course that was the end of that first experience. And I should say luckily, I happened also at the time to have been working with the, one of the Senior Prosecutor in that Supreme Court who was also very well acquainted with the international environment. In fact, he was even an expert of the, of many commissions o-, in, on human rights.
- 07:01 And then, when the tribunal was, was set up, so he stood to be elected for a, as a judge. And of course, since I was one of his very close aide, so he told me “Okay, if I go there, I’ll have to take you with me.” So finally, he was the one – in fact, he happened finally to have been the first President of this tribunal, Laity Kama.
- 07:24 In fact you will see that even one of our courtroom, you know, has been named after him after he passed away in May 2001. So in fact, it is thanks to Laity Kama that I joined the tribunal because he asked me, “Okay, you have to come with me.” But here again strangely enough, when I came, that was not to serve him as his legal assistant, as that would be expected.
- 07:49 So I found myself in Kigali doing investigation. At the time, he was already here in Arusha before the first cases started. So this is my story how I joined this tribunal.
- 08:02 So, and I should (_____) that it was really very good for me to have started with Kigali because that gave me the insight to understand really the sociology of Rwanda, to learn about the story also, to understand really what happened, what took place in Rwanda.
- 08:21 Because yet I – yes, I was following the news but I did not have that grasp of all the details as to what happened in Rwanda. So having been there, having done investigation for a full year, so, gave me really that, that insight I needed to understand really what was at stake.
- 08:42 BF: What were some of the things you saw or experienced during that first year that you feel really helped you understand what was going on in Rwanda?**
- 08:50 Yeah, a, a lot of reading first because of course to – I had to, to go through many documents to read all material available in respect of Rwanda, but I think that what was the, what was really, really, interesting for me was that going almost every day into the field and sharing the experience of the victims because that was basically what I was doing.

09:19 I remember that when I arrive in Rwanda, three days later I found myself in Butare with a team of investigator going into houses, interviewing victims, you know, many people who are maybe the only people left in their huge family. So that, that helped me but I, I could say that also that traumatized me because that was also a very painful experience for me.

09:51 So there are things I still don't want really to remember because you know, it, it, it really traumatized me to a certain extent.

Part 2

00:00 BF: When you first came to the tribunal, what kinds of ideas did you have about how the tribunal was going to work? What goals did you have? What did you think it was going to achieve?

00:12 So, I think that this was two-fold. As I told you in the beginning, the first thing was that my own eagerness as a young lawyer to go abroad; also that was a United Nation experience. From my perspective, United Nation has always been a prestigious institution. I was joining the UN. And also I was a, a young lawyer. My, my dream was also to expand my experience and share with (___).

00:49 But of course when I, when I went there, there was also some level of disappointment in a sense that, you know, coming from a developing country, you know, joining the UN for a UN tribunal, I was expecting to f-, to find something quite functional, quite (___) very well set.

01:09 So the tribunal, of course, was an institution in the making. It's a lot of chaos. Not everything working. To some extent, I was even missing my, my old office in, in the Supreme Court in Senegal which is a very nice place, well set into the Atlantic Ocean.

01:31 So there was th-, that mixed feeling of, you know, participating in a, in an extraordinary venture, but also when I arrived on the spot some level of disappointment; with just chaos, people really searching their way. So but at the end, it was really a very good experience, so.

01:55 BF: What were some specifics of things that just, that disappointed you or just felt like they weren't working yet when you got here?

02:03 So, no, it's just about the level of organization at the time. So I was in a team of investigator. I should say that I come from a civil law back-, ba-, background. I am used to things being done in a certain way. Having for example – when you have to prosecute a case, (___), you have a prosecutor who is directing the investigation, so.

02:40 So I found myself with a team of investigator with n-, no link with the legal team, directing them specifically, yet we were dealing with very specific crimes like genocide and so on. For

example, as a lawyer, I quickly learned some of those basic concepts but I was also working with many non-lawyer, for people who have just a police background.

03:08 They may have been very good investigator but they did not necessarily have any clue as to, you know, what specifically you need to look for when you investi-, when you take a statement. So that kind of chaos, of course, was a little bit of a disappointment for me.

03:26 BF: Do you feel that at that time, people had a clear idea about what genocide meant? What kinds of evidence you needed to collect for genocide to support a, an indictment of genocide? Or do you think that is that something that changed in your experience over time?

03:45 No, I thi-, think that, you know, there was not a, there were obviously people who clearly understood it but what was a little bit of a disappointment was that the lack of connection, strong connection between the legal team and the team of investigator – because I think that this also comes a little bit from the background even of the, the tribunal.

04:16 From what I learned, what happened was that when the tribunal was set up, they did not have readily everything available. And the, the tribunal institution was to a large extent reliant on, on the goodwill of some state. I know that state like Canada, or Netherland, they sent their own policemen. They sent them on mission to come and help the Office of the Prosecutor.

04:45 The problem of course was that, you know, not all those people receive that adequate training in respect of those very specific crimes. And, for example, for the Dutch people, you will see people who would even take statement which was not usable at all because of the poor language – because English or French not being their language.

05:06 There would be very poor language and to the extent that once now those statement – because the tribunal, the way it was functioning was the following: You have statement taken by investigator and then those statement now will be made available to the team of lawyers who would now translate them into indictment after all the analysis was done.

05:32 But it has happened time and time again that the team of lawyer were not in a position to make use of the statement being made available to them.

05:43 So, they have sometime no choice but just to send back the statement, “Okay, would you contact again the witness and so, try to elicit this type of evidence? We will really need to, to lay the ground for those specific cri-, crime,” which was of course a, a waste of time.

06:01 But I think that it has, you know, it has to be understood in the context of how the tribunal started operating. Because before I left Kigali, of course, now things had improved. You would see a team, legal adviser now directing specifically, you know, a team of investigator, which unfortunately was not the case when I first joined the tribunal.

Part 3

- 00:00 **BF: And, so you've been working here at the tribunal for a long time . . .**
- 00:05 Yes.
- 00:05 **BF: . . . you know, sort of 11 years. Is there something from your – just reflections of that time that, before we go off onto other pieces of the conversation, that you would, would like to share, that you would the world to know, not just now but 50 or 100 years from now?**
- 00:22 Yeah, no, as, as I told you, I think this (_____) was really something wonderful in a sense that it has completely changed my life. It has completely changed my life in the sense that, you know, I was, you know, like many people, you are in a small country in your small town doing your routine business and even happy to do so. And all of a sudden so you discover a completely new world.
- 00:52 So, I never, you know, before that time, I, in my previous life I have never even seen a dead body, for example. All of a sudden, not coming across that but seeing people who have lost everything. And I spent a great deal of time at the time just trying to translate those to my own family.
- 01:16 For example, speaking to someone who tells you, "Okay, you know in, in my family we were 27. My auntie, my mom, my brother. I had six brothers," and so on, so forth. And then, after the genocide, they remained alone. So I translated that into my own life because I have also a mom, brothers, sisters and so on.
- 01:42 And that was q-, quite traumatizing but also, what, what it created in me was a huge understanding, or even a certain level of complacency, with Rwandan people because at the time I remember most of the thing I was telling to myself is that, "Okay, I think that if what happened to them had happened to me, I would be someone spending the rest of his life trying to avenge my family.
- 02:15 Maybe carrying a gun just like in that famous story of Mack Bolan, that people, that Vietnam soldiers whose, whose family was killed by the mafia and who devoted the rest of his life just, you know, trying to track down member of the mafia.
- 02:33 So for me, that was a traumatizing experience and also, I, I found that really people in fact, that life is something which always comes back because even when I go back to Rwanda now, you see people also smiling, living almost a normal life. Also that, that's also a lesson, you know, I will never forget because, you know, you may be inclined to think that some of the people, after what they underwent, they will never come back to normal.

- 03:09 But now, you see, you go back to Kigali, you see that – okay it’s one of the cleanest town in Africa. Life has, you know, life is back and people are smiling, living almost a normal life. So that’s also really something what, that struck me and which is I’m living still with.
- 03:28 **BF: So when you talk about the way you felt traumatized, or you put yourself in other people’s positions and you felt that – how did that change how you did your work here at the tribunal? Like have you, are there ways in which it entered into different aspects of the work that you did or how you thought about things or, you know, that that became a part of who you are, and . . . ?**
- 03:54 Definitely, definitely. That, that, I think that that gave me also a kind of sensitivity in respect of everything here, in my, particularly in my current capacity because I think that what it did was that you know, this drive, for example, in the Office of the Registrar to always be involved in capacity building, for example, I think that, that, that is a direct result, result of that experience.
- 04:27 Because now, since I joined the Office of the Registrar, we have done almost everything with Rwanda now. We have really – there was a huge gap in terms of communication, in terms of trust building. You, you, you would see that in the beginning, Rwanda, there was so, they had so much resentment against the tribunal. Always it was about criticism.
- 04:53 But I think that because, you know, some of the Rwandan also felt that, you know, they had in this tribunal people who are very supportive of them. And how I did translate that was that I was involved in every part of the capacity building. Up ‘til now, for example, I have with the help of the Registrar created this framework whereby now we send our lawyer to go to Univ-, National University of Rwanda to teach international humanitarian law.
- 05:24 In fact, just two weeks ago I was there teaching. And now, when I go to Rwanda I find a lot of friends, many friends who have now completed the university because for the last five years I’ve been there teaching with some other lawyers here and I think that this also has dramatically changed.
- 05:45 That’s a small thing because we are just a few people doing it, but it has changed quite a lot because even now with the Registrar, when I go to Rwanda, for example, attend a meeting, I see beside me an adviser to the President or adviser to Minister or Prosecutor who has been my student in Rwanda.
- 06:04 And this I think that has helped a lot build confidence and because of those small things now, Rwandan, who was kind of very dismissive about the tribunal now, even if you look at now, they’re still very critical and sometimes they are still expressing anger.

- 06:22 But what I have experienced is that now because they know that many people are supportive of them, they are now claiming a kind of ownership of the tribunal.
- 06:34 And there is a shift even in their criticism. You can see that now, when they would, they used to say, “Okay, this tribunal is completely worthless, full of incompetent people, not caring about us.” They would ask for more. “Okay, why don’t you send more people to us, to help us? Why don’t you train more people, for example?” You see, it’s a shift. It’s now a kind of ownership.
- 07:03 And I remember also, even before I joined the Office of the Registrar, I think that, that experience I had in Rwanda also even helped me better assist also the, the judges. Because I, in, in the beginning, for example, you know, when you speak with some legal officer and so on, their perception of what happened was quite abstract because it’s just on transcript on paper.
- 07:36 Not only because you know, sometime you have witness to come to court but it is, our procedure are so cumbersome that by the time you write the judgment or you do anything, you know, a huge amount of time has already elapsed.
- 07:52 So you just face cold transcript. And I think that, you know, knowing the context also can help you better understand what is really at stake. In that sense also this has I think that helped me a lot.

Part 4

- 00:00 **BF: So, just to – there’s so many ideas that you’ve put out there.**
- 00:04 Yes.
- 00:05 **BF: Just following up a bit on the relationship – or the way in which you feel the Rwandan people have responded to the tribunal and that there’s been this shift. Can you talk about that a little bit more? I mean, what are some specifics that help you feel like there’s been a shift in, in, in how the Rwandans are viewing the tribunal?**
- 00:28 So I think that that shift – first and foremost, (__) you, you need to look at the beginning of this tribunal. What happened in the beginning was that Rwanda first requested for the creation of the tribunal. (__), it, it was not something which was imposed upon Rwandan people. That was a move from the Rwandan government to request for an international tribunal to be created in the model of the former Yugoslavia.
- 00:59 But immediately thereafter, because at the time Rwanda was sitting as a member of the Security Council, they voted against. They voted against because they say, okay, what was given to them was too little.

01:17 **BF: And too little in what way?**

01:19 Too little in a sense that – okay, that was, you need to understand that was still in the year '94, so the wounds were quite fresh. They wanted death penalty; so the UN tribunal would not uphold death penalty. So, even the timeframe, because if you look at our statute also, our tribunal has jurisdiction to, to adjudicate over only what happened during the year '94.

01:51 So. And the Rwandan government position was, okay this genocide, which occurred starting in April '94, was prepared for quite a long time. Crime occurred and there were recurrence since '90, at least to say the least.

02:07 **BF: What is your opinion about that?**

02:10 So I think that, you know, it's, it's, it's very difficult. I think that, you know, what they say, there were crime committed and even this tribunal, and now later crime have been committed in '90, before '94, but the problem was that, okay, where to draw the line? It was very difficult to do, find. You see, for example, in Burundi, they have a similar issue but they can never now agree on a tribunal because of this very issue.

02:39 They say – because you know, in those country where they have a cyclic violence, you know, sometime a group is targeted and some other time another group is targeted. For example, in Burundi they say, "Okay you have to take into account what happened in 1973" and you will see the other ethnic groups say, "Oh, and how about what happened in 1970?"

03:02 And other would say even, "How about 1959?" So I think that at one point you need just to, to draw a line. So that may never be good enough but that, that would be just a political decision.

03:16 In the Rwandan context particularly, what happened was that okay, there were two faction at, at war, the RPF which attacked and there were negotiation. But when the plane of the President were downed on the 4th of April, that was what triggered large-scale massacre which we call the genocide.

03:38 So that happened in April '94, and it only stopped when the RPF won the war the 6th of July the same year. So in the international community, I think the result was to punish what happened during that period.

03:57 But because of Rwandan claim, a kind of agreement has been reached in the, within the Security Council to expand a little bit, to expand, for example, of, to apprehend the preparatory act which may have started from January, but that was just a compromise. But that compromise of course, you know, the government of Rwanda would not accept it.

- 04:21 **BF: So from where you sit now, right, hindsight is so much, but from where you sit now, what is your opinion on having chosen those dates, just the year of 1994?**
- 04:33 **BF: Do you think that looking at it overall, that that, that those were good dates, or that it would have been better to have expanded them a small amount, or – I mean, you have so much more knowledge now obviously than when the decision needed to be made, but what insights?**
- 04:49 Yeah, I think that, you know, I, I, I don't think that there is anything wrong in limiting it to that genocide because that's what – what triggered really is that international communities resolved with what happened from April. I don't mean to say that you know, what happened before should be just dismissed or disregard.
- 05:13 In fact, when legally speaking now, when you look at our jurisprudence, in fact what Rwanda was claiming for and which was formally refused by the statute in fact was given by our jurisprudence in a sense that from the first judgment we have here, it has always been decided that, "Yes, even crime committed before '94 may be referred to in our judgment."
- 05:44 So what is not permissible is to find someone guilty of that. But sometime, when you, when you, when you describe a (____), you can't just decide to stop or to start from this. You just start from the very starting point. That's why now the Prosecutor here in making up his case, in most of the cases, they have made re-, even reference to crime committed before.
- 06:09 But what is required for them to do to convince the judges is to show continuity. If the mindset w-, started before '94, the judge admit the evidence, but of course now the only limitation is that they cannot find someone guilty.
- 06:28 But in – what I mean to say is that in the tribunal practice, you know, in fact we are reconstituting the history of the genocide. But, and in doing so, we are not necessarily stopping at the starting point which is fixed by the statute.
- 06:46 **BF: So was that a change that happened over time, to begin to look earlier and allow that continuity to carry forward, or do you think, or was that there from the very beginning?**
- 06:55 No, from the very beginning it was there, but at one point, of course this point has been litigated. Because the defense says, "Okay, so you are in breach of the statute." The statute says specifically that the only charges that can be brought would be charges starting from, or element, even factual element you should be referred to would be the element from 1st January '94.
- 07:18 But then, that would be, that point was litigated and we had a decision from chambers and as that went up to the appeal, appeals chamber, and the appeals chamber say it's okay to

do that. So long as it's just sometime to show continuity or to show intent, it's okay to do that, but it would not be permissible to find someone guilty for act committed prior to '94.

Part 5

- 00:00** **BF: So while we're talking about the statute, you know, imagine someone came to you and said, "We have need for another tribunal somewhere and we'd like you to take the lead on that." And you have responsibility for drafting that mandate.**
- 00:15** **BF: What would that mandate look like? I mean, what way would it be similar to the kind of mandate that is for this tribunal and in what ways would you change things based on your experiences here?**
- 00:27** I think that I would borrow quite a lot from the current setting. When I first came here, I had – you know, if you had posed this question to me years before, my re-, answer would have been different, par-, particularly in respect of my civil law background.
- 00:49** **BF: Oh, so tell us about both, what you would have done at first and what you would do now.**
- 00:52** Yes, definitely, because when I first came here – I come from a civil law background, meaning that all the investigation are done by an investigating magistrate. You have a judge, a neutral judge who investigates the issue both for the prosecutor and for the defense.
- 01:16** And that, that case file, which is now put before a judge, and you call upon the parties, the prosecutor and the defense, just to make use of that case file already gathered by a neutral organ.
- 01:29** So that's quick. And if the investigating magistrate, he does very well his job, so that's good. That's fair enough and that doesn't involve a huge amount of money because that will be just a, an international civil serv-, civil, civil servant doing the whole investigation. And of course now party will be called upon to make up their case.
- 01:53** Our tribunal have been modeled according to the common law pattern, so meaning that, you know, it's up to par-, the party to make up their case. The prosecution does his investigation. The defense on his side will do also his own investigation. They will make up the case before judges who are only basically umpire, just sitting, listening to the evidence and making up their mind based on what has been put forward before them.
- 02:23** So that's of course a very lengthy process. It's naturally lengthy but, you know, there are now some other factors, which compound that length when you are in an international environment. Because witnesses are scattered around the world. If every party has to go

around to the United State, to Belgium, to France, to Philippine to look or to fetch witnesses, you can see that, you know, why it is so expensive.

- 02:54 So in my thinking then was, “Okay, you know, this, this will never end. Why can’t you just appoint the investigative magistrate? He will do all, all the investigation and he will avail the material to both parties. They make up their case. It’s quick. It’s cheaper and it’s fair.” So that was my thinking.
- 03:15 So, but the more I got used to the common law pattern, the more also I, I found lots of merits in the, the way they, they, they conduct business. So I think that now, even in terms of, you know, this, this setting being expensive, my thinking is that it’s, to a large extent, it is a link to the international setting. Anyway, even if you had a investigating magistrate, he will have to travel around the world.
- 03:53 And sometime my experience from the practice of an investigating magistrate is that, you know, that’s not always the best w-, the best way of doing this () – because the, the level of resolve I see here defense lawyer, you know, doing things to protect the interest of the defense, I’m not, no longer sure that an investigating magistrate would put that much of effort to do it.
- 04:20 So now, I am inclined to think that it is fair for the defense to contact their own () because that’s their own fate which is at stake. And you see that, you know, that, that level of proximity they have with their own defense, having this resolve to check everything, not to leave any stone unturned until they get what they think w-, is, is in the best interest of their client.
- 04:49 I am not sure that I will find that resolve with an investigating magistrate. That’s why now I’m inclined of course to () it. But, of course, I would still plead for some improvement borrowing from the civil law system, because the aspect I don’t like very much with the, the common law system is that, you know, that system – which formally is quite fair, which gives a lot of means and discretion to party to put up their case – but this is also a system which permit a clever lawyer to get his own way without necessarily being right.
- 05:34 So you may be wrong but if – because there are lot of technicalities also involved like cross-examination, picking and choosing specific question, eliciting just a portion of information which may help you put up your case nicely. In the civil law system for example, you, you, you can’t do that.
- 05:57 When the witness is at, on the stand, you, the, the question are open-ended. He will tell you everything he has in, in mind. You can’t direct him so specifically just to, to, to, to get exactly what you want.

- 06:15** **BF: So is there a case you have in mind, where you think having had that civil law piece would have perhaps changed the case?**
- 06:22** No, I'm not thinking of any particular case. In fact, I think that maybe I, I have even pushed it too, too, too much because I remember a specific case where we had two judges from the civil law. But you will see that, that their background in fact had a huge bearing on even the way the case was conducted. I refer to the Musema case.
- 06:51** In the Musema case, we have this English lawyer defending the, the accused and we had Judge Kama, that very judge I spoke earlier, who is from Senegal, and another judge, Aspegren who are from, from civil law background.
- 07:08** But I would remember particularly Judge Kama, you know, who was not at ease when for example the defense lawyer, during cross examination, would just elicit portion of evidence for his case. Judge Kama would always interject and say, "No, I want a full response."
- 07:31** So, in fact, this is also permitted by, by our rule. Though our rule are mostly designed following the common law pattern, the judges they have, you know, power, discretion to interject and elicit whatever information they require but of course now, you know, making use or not of that discretion would depend on the judges' background, yeah.

Part 6

- 00:00** **BF: We were talking about how you would change the mandate if you were going forward with a new tribunal and you've talked about the, the civil law component – this mix between common law and civil law. Are there any other aspects you would change?**
- 00:13** Yes.
- 00:14** **BF: And what would they be?**
- 00:15** Yeah, one of the aspect I think I would, the mandate of defense counsel. I think that one of our problem here also is that we don't have – because we have a system of remuneration of counsel which in my view does not foster efficiency. I agree that, you know, accused must be fully defended.
- 00:41** So, but if you have in place a system whereby okay, counsel would pay, will be paid – because, of course you know I should clarify first is that, all our accused (____), you know, are indigent meaning that it's the tribunal which fund their defense.
- 01:04** And it is almost the same for the other tribunal, also ICTY. But with this system, I think that with this system of hourly rate, or even what we call lump sum but which is not really a lump sum system in a sense that it is based on projection of workload, and counsel they determine their own load, workload.

- 01:27 Sometime my feeling is that this does not necessarily, not always foster efficiency, particularly if some of those counsels they don't have much to do when they go back to their town. So, you know that, you know, the more this case is prolonged, the more money we'll be making. So I would, I think that, you know, I would favor a system of flat rate or even an appointment of just people with a salary to, to play that role.
- 02:02 BF: So similar to how the prosecution (___).**
- 02:04 Exactly, yes, to have our own Office of Defense for example. You have, you know, lawyers completely autonomous and hiring, you know, very good lawyers, whatever the salary might be, but they have, they know that they have a tenure. This is their job to defend these people, and then they have their salary.
- 02:25 So, and they have one year, or two year or three year appointment. And if this case finish, you take another one. So, I think that with this system we, we will not be creating in-, in-, incentive of people dragging sometime very small cases just for the sake of, you know, keeping, you know, a good job.
- 02:47 BF: So I want to ask just one more question before we take a break . . .**
- 02:51 Okay.
- 02:52 BF: . . . and that is to return to what you said – that your sense is that there's been a shift in the Rwandan people in their perceptions of the tribunal.**
- 03:00 Yes. Yes.
- 03:01 BF: And I just like to ask you to talk about that a little bit more, what kind of shift, why do you think it occurred, how do you know? What, what gives you this idea?**
- 03:13 Okay, so that shift as I told you, in the origin, Rwanda they were given very little, according to their own ends. Death penalty, they asked for it. They did not get, you know, the jurisdictions, the timeframe, only adjudicating for the year '94. That was very little and so, and convicted person or so, being able to serve their sentence elsewhere than Rwanda.
- 03:42 I think that all that resentment was already there in the beginning and that only continued. And of course the other-, th-, I think that one of the biggest problems also was that after, after the genocide, Rwanda was completely left with almost nothing. All the judiciary people were killed. All those involved in the genocide, they flee, they fled the country and yet they were invited to co-exist with the tribunal, full of means, so to speak.
- 04:17 Millions of dollars invested into a justice system which was kind of foreign to them, which was being held abroad. They even, they barely know, knew what was going on here. So I think that all those (___), frustration were just building up and then they, they could not

- stand it because for example, we would invite witness here, they, you know, starving witnesses.
- 04:43 And so they, they see the staff of the tribunal very well paid and once they know about the cost involved in this system of justice, it just did not fit, bec-, for, for people who even had nothing to eat. So, and time and time again you would even hear Rwandan people okay, t-, tell okay, “So we would be better off without this tribunal if just as a means put there were given to us, to, to alleviate some of our suffering.
- 05:20 We would be better off. For example, hundreds of millions of dollars, why don’t you just give us the money?” Even at the official level, you know, you would s-, hear those kind of comment. But I think that now, the shift also, why the shift is that, you know, as time went by, I think that the wounds also naturally were kind of healing.
- 05:42 And anyway, they knew that you know, the tribunal, you know, was here. Anyway, it’s not because they did not like it that the tribunal will disappear. And they were even cooperating with the tribunal. I think that with that proximity, you know, tha-, that’s when the shift started. The shift started because the tribunal started even using Rwandan resources.
- 06:07 For example, there were some area where we could only use Rwandan, so we were also providing employment to Rwandan. For example, we needed interpreter or translator from Kinyarwanda to English or, or to French because many of the witnesses coming from Rwanda would not speak either French or English.
- 06:30 So, many Rwandan joining, Rwandan citizen joining the tribunal – they become even part of this, the system. So I think that there are a lot of tiny bits to be put together to understand why that shift occurred. And even at the political level at one point also, they realized that, because what you need to know also is that Rwanda, we don’t have exclusive genocide, jurisdiction over the genocide.
- 07:02 Rwanda also in parallel is running its own court to try genocide, which is, you know, their, their main activity. And they had also a tracking team trying to get hold on grave figure of genocide. They realized that also that the level of success was not that great. So then came this idea, or this acknowledgement that if the tribunal were not even here, they would be never successful.
- 07:35 Because if you look at the tribunal record, we are trying high figure – almost all member of the former government or prefect, you know, high ranking military officers. And those people, you know, were, were completely out of reach. And at the end they now acknowledge that if the tribunal had not been here, those people may have just gotten away with their crime.

08:03 So that also, I think that has been an element, which they belatedly acknowledged, but which at least make them realize that thi-, this tribunal also is relevant. So I think that that also created the shift.

Part 7

00:00 **Eric Saltzman: Good afternoon again.**

00:01 Good afternoon.

00:02 **ES: Thank you for being with us again. When you were talking earlier, you, you said that early on in your experience as an investigator, that the investigators had no real link to the legal team. Can you tell me a little bit more about that? And, then how was the work directed? How did the investigators know what to do?**

00:21 So, it was a little bit surprising to me. What I meant was that we had a structure. So for example, my-, myself, I was in a, in a team with a team leader. And in fact, there were some decision already made in the sense that the team were divided into some kind of specifics – like government team, military team, you know, political party team because that was apparently at the time the policy.

01:03 The poli-, the prosecution policy. Or some other team were just portraying the administration, the local, local division of the administration, so Butare team or Cyangugu, one of the region of Rwanda. But within that team now – for example, my early experience was that you come, so, and you have kind of a free ride, ample discretion to in-, in-, investigate so long as you are, you remain within those boundary.

01:41 And for example, from, from my own experience was that when, when we first arrived, I know that I was in a government team so I did my own readings. So, of course we had also some brainstorming within the investigation.

01:57 So, and every Monday also we used to have a general meeting and every team leader will report as to what was his achievement or the action taken during the weekend, and the commander could, could redirect.

02:12 But apart from those limits, the team leader had wide discretion to decide which way to go, just go look for witnesses and so on and so forth. So, but at the time, it was just within the investigation team without any link with the legal team, the legal advisor's team.

02:34 **ES: So was it up to the investigators to try to imagine or to figure out what the prosecutors might want? There wasn't interaction back and forth to refine the investigation toward a particular . . .**

- 02:47 No, there was this general framework. But the problem was that, you know, of course the legal team will inherit so to speak the work, the work, (_____) of the investigation, and it will be up to now to the legal team to make an assessment and if they were not happy about that, they may send the work back or redirect the investigation.
- 03:17 So to that extent there was this connection. But my, my only disappointment was that, you know, I would expect that link to be up front – so you come, you find a legal team telling you exactly what to look for. So that was not there in the beginning.
- 03:35 But as I told you, I think that there was some kind of framework in progress. But by the time I left I think that, you know, the structure had changed in a sense that now, every team, or when the, (___), when, when the trial started also, because when the trial started there was still ongoing investigation.
- 03:56 But then, at the time, the investigative team now were linked to prosecution team and then the senior trial attorney could, could direct them (____) as to what they should be looking for.
- 04:08 ES: Okay, thank you.**
- 04:09 Okay.
- 04:09 ES: I saw earlier when, when you were telling us about the, your first experiences in Rwanda and you used the word traumatized and you looked really affected when you were describing to us. Can you tell us about some of your, let's just say take a day or week, but not a typical day . . .**
- 04:28 Yeah.
- 04:29 ES: . . . but an actual day or an actual week that you remember really well and tell us about it.**
- 04:35 That's s-, you know, that's something I'm, I, I don't really want to do because there are specific person, specific moment I remember. But whenever, whenever that I take my mind back to those person or to those days, I think that, you know, it kind of reopen the trauma to such an extent that you know, I find it up 'til now a little bit hard to do it.
- 05:08 Because you know, just a couple of days ago, I was in Rwanda and I was discussing with a former colleague and I have to remember some of those person, and then, of course, you know I almost immediately collapsed and started crying again. So I would not want to, to disrupt also this exercise because whenever I become specific, so, I may immediately collapse or start crying.

- 05:41 **ES: When you talk with your colleagues and your friends here about your work and their work, is that a, is that a familiar experience for others as well? The difficulty of dealing with the subject?**
- 05:56 Yeah, I think that it, it depends. Because I think that most of the colleague I'm working with here, they, they did not experience the kind of exposure I personally experienced – because many of them, I think that you know, it's only, their only experience is somehow on paper.
- 06:18 Of course sometime, we undergo some very difficult moment even in court, because you see when you listen to very vivid testimony, so of course people may, may experience very difficult moment. To that, to the extent that even now I think it is part of the tribunal management policy to, I think, to organize those kind of seminar, inviting psychologist and so on, particularly for some of the people really exposed.
- 06:51 Because even the typist sometime, the, it's, you, one could assume that they are only typing, they don't care about what they even type. But some of them have apparently experienced you know, a difficult moment just because they are listening to some vivid testimony as to what the victims underwent.

Part 8

- 00:00 **ES: You know, I'm not an expert at all in the tribunal so I've been reading and trying to catch up. And one of the criticisms of the tribunal from, from the outside and maybe from people familiar with it is that the, the crimes involving sexual violence have not been as focused, as well prepared.**
- 00:23 **ES: That the, that the identification and perhaps the, the evidence on the sexual violence has not been done as well as could be. So now you've been on the investigative side early on . . .**
- 00:34 Yes.
- 00:35 **ES: . . . and now of course, preparing cases and advising in the courtroom. Can you comment upon that? Help me understand the criticism better.**
- 00:43 Yes, in fact I have even somehow – I think I am among those who have extensively written about that. I have published articles about, you know, the tribunal's record in respect of you know, prosecution of gender-based () violence.
- 00:59 And yeah, I have also read about, you know, some of those criticism and I have also lived it in the sense that I was advising the judges in Cyangugu, the Cyangugu trial for example, when this NGO, NGO of women, NGO based in Canada, they file an Amicus curiae because

they wanted the judges to order the prosecution to amend the indictment and include some sexual assault and rape charges.

01:32 And which it was turned down by the judges but for very good reasons. Because I think that what people forget was that, okay, right from the beginning, in the early – I think that the, the record of this tribunal is not as poor as the people would describe it.

01:51 Because right from the beginning in the Akayesu case which was a real first case we had, the ju-, the judges admit the trial when evidence of rape unfolded, the judges authorized the amendment of the indictment to include charge of rape.

02:11 And in fact, you know, one of the record of this tribunal was that this tribunal has been the first of the kind to decide that genocide, you know, rape can be a tool of genocide.

02:24 ES: Yes.

02:25 So. But what sometime people forget also is that, you know, it's not always easy to be successful for the prosecution in bringing those kind of charge.

02:37 And unfortunately, most of the outsider who make that criticism, they are not in a position to test the quality of the evidence and make a good determination as to the potential of success, because people for example don't – you should remember that in the Musema trial, a charge of rape was brought and even an convictio-, a conviction was obtained, but, but that conviction was eventually overturned by the appeals chamber.

03:11 So what, what does it tell us? It, this tells us that, okay so it may be easy sometime to bring charge of rape but that does not necessarily guarantee success. And when, of course, now you are not successful, this also will kind of backfire in a sense that that will even increase the trauma of those victims awaiting, you know, to be, awaiting justice.

03:39 And I think that one of the difficulty also, people need to remember – and in saying so I am not downplaying the gravity of rape – people need to understand that here we are dealing with very, very serious crime. So y-, you are talking about rape just as an intermediate crime to, to capture genocide.

04:06 But when you look at carefully, so technically speaking, you will see that in fact rape can hardly be a tool of genocide in a sense that what is genocide? Genocide is a crime by which you tend to eliminate a group, to eradicate a group. So, rape is not a tool of eradication.

04:29 So of course there are, you know, that can affect the victim, but usually what happened in Rwanda was that some victim have been raped but eventually they were killed meaning that, you know, the rape, the, the rape has been kind of absorbed by a more radical crime, meaning the killing.

04:51 So that also may explain why, for example, why rape is not that always present, because we are dealing with a cr-, very serious crime which do not necessarily make it necessary to go through rape to achieve what we, we want to achieve.

05:09 **ES: Y-, you've thought about this a lot.**

05:10 Mm-hmm. Yes, yes, mm-hmm.

Part 9

00:00 **ES: So jumping ahead to work you were doing more recently, can you tell me about a day, a real day or an interesting week, say in the work you've done in the last few years? Again, not a typical day, not, "I go to work and I do this" but a real day or a real week. Make it live for us.**

00:20 No, I, I'm not sure I, I get the question.

00:23 **ES: I'm, I'm interested if, if, as if you were telling somebody about your experience, the meat of your work, what you do in a, in a week or a day that's really important and explaining it tied to some interesting case, so something that was difficult in your work, something that, where you made a breakthrough, something where you felt you influenced something.**

00:47 Yeah, I think that in fact, my job is this mixture of always interesting thing, but very interesting but in a sense they are also my routine. And I am so involved that, you know, it's sometime difficult for me to, to be detached and just single out an event or situation. I am, I am in a, an advisory position and what you need to understand here is that the Registry is so peculiar in a sense that who is the Registrar here?

01:27 The Registrar here is the administrator of an international tribunal which is so different from the domestic setting in the sense that, okay, in a domestic setting, you have all these legal, administrative apparatus which may help the judicial process. You have law enforcement agent, everything.

01:52 Here we are just by ourselves. Tanzania has been generous enough to offer us just a, a spot here which, in fact by the way, we rent. But then, we have no authority whatsoever. We have no police. We have nothing. So in, in fact, this tribunal, what it does is just to try and recreate all those ingredients you would find in a country, in a state, in a government to enable a sy-, a judicial system to work.

02:20 And of course now, the Registry is the one now carrying out all those small and important function, which will enable the tribunal to function. My day is just now helping the Registrar every day to run all that machinery. Today, sometime for example, giving you – yesterday, I was early in the morning dealing with budget. We are running out of money.

- 02:49 We have still lot of case to go. We have to prepare a meeting to be in video link with New York, you know. But, five minute later, I find in my desk, you know, a complaint from a witness in Rwanda who came here to testify but upon his return, he was harassed and now he is concerned about his security and safety.
- 03:14 He, he write to the Registrar to ask, "Okay, I want to be relocated elsewhere. I can no longer feel safe in my own country," so, which require major decision. And so before, before I finish providing advice as to how to go about it, the next thing was a lawyer from Washington who wrote and say, "Okay, my case has been very badly presented in the, in, in, in your website. I need that to be corrected." Yeah.
- 03:46 And of course, another lawyer, for example, asking, "Okay, I have a work program in this case. What are you waiting for to allow me to go to New York and visit an expert?" And of course those, those are major but routine decision. And you, you may have to take maybe tens, 20 of those decision every single day, and of course not to mention sometime the Registrar has a conference in the meantime in London.
- 04:16 You have to do some background research about the jurisprudence and so on. You know, those are, that, that ev-, my everyday life is that you know, very diverse thing, lots of things to do – all important but which has now, which have now become my routine.
- 04:35 ES: Tell me what you did with the witness who, in Rwanda.**
- 04:39 For example for the witness in Rwanda, we have here a section. Within the Registry, we have a section, which we call WVSS, Witness and Victim Support Section. For example, when – because this was brought to us for example by the lawyer and of course what I, the assessment I made in respect of the letter, and (___), you know, was that okay, our section may not have done enough to protect the witness.
- 05:10 Because, for example, just to take this specific case, what happened was that, okay, the witness may have been exposed by his own counsel, the counsel behavior. Because we have a framework. We have some kind of operative system of work but he was taken out of that system by the counsel who h-, invited him to testify.
- 05:33 And when I (___) made the assessment that, you know, most of the response was in fact directed, directed to counsel. So my advice was, "Oh yes, counsel may have misbehaved in this particular case but that doesn't warrant us t-, not to give full support to the witness." And we have a bit mechanism of alerting some authorities.
- 06:02 But, of course, sometime also, you need also to investigate first, in the sense that we, the tribunal, we are so successful in some area that, you know, sometime also, many people in Rwanda abuse the system. Very poor people coming here to testify, sometime try also to take advantage of this system, in a sense.

- 06:22 They may want to go to Canada or somewhere. They may not feel very happy about their current life so some of them also, they may take this opportunity just, not necessarily because they are certain as a result of their testimony here, but just because they want to have a better life.
- 06:39 And you know, we have a team in Kigali and some resources to investigate, you know, the truthfulness or at least the, you know, the potential of truthfulness of their claim.
- 06:53 And after a full investigation, so, we, we take the decision which may be to relocate the witness from a village to another one depending also of the nature of the threat, but sometime also it is even a bigger decision, meaning to take the witness completely out of Rwanda, so, if it, it is required.
- 07:17 ES: Did I hear you right that this witness who you said was exposed by defense counsel . .**
.
- 07:22 Yes.
- 07:23 ES: . . . but it really isn't the job of defense counsel to – it could be in his mind but it isn't the job of the defense counsel to protect the witness. So how would, how would you insist the defense counsel (____)?**
- 07:34 Yeah, maybe I need to clarify what happened . . .
- 07:36 ES: Please.**
- 07:36 . . . because what happened is that normally, defense counsel they may in the, in the first place identify the witness they want to call for their client. But their job should stop there, meaning that we have our own mechanism of locating the witness, of course in full collaboration of, with defense counsel or the prosecution as the case may be.
- 08:01 And then, by our own means we bring the witness here. But what happened in this specific case was that okay, maybe defense counsel did not trust enough the system because there was specific requirement. They did not want the witness to travel directly, in a direct flight from Rwanda to here.
- 08:22 So, but instead of just now leaving that at the hand of our unit to handle it, they took upon themselves to travel with the witness by using their own route, so, and of course, you know, this gave rise to some problem because our unit say, "Okay, how can we be responsible?"
- 08:41 Because you, you elected not to choose our own mechanism, so then you, you should expect this to happen. And then of course my advice to the Registrar was that, "Okay, okay,

(___), yes our unit is right that counsel did not behave properly but still, you know we have to take charge.”

09:01 ES: Did, in this case, did defense counsel take the private route with witness so that he could effectively sequester the witness from prosecution?

09:12 No, no. I think that the problem was not so much in respect of the prosecution. I think that in this particular case, their security was – they did not want some people in Rwanda to be alerted about the trip of the witness and they say, “Okay, if that witness take your, you t-, tribunal Beechcraft, that will be known,” so they decided to take another route.

09:40 But that, that – because we also do that, but the only problem was that in this case, defense counsel elected to do it by himself and not resort to our own mechanism.

09:51 ES: Okay, I un-, I understand.

Part 10

00:00 ES: All this is so interesting to me, I’m learning a great deal. Help me understand this – in the normal situation in a city or country, in Dakar or New York, you have a certain number of crimes. You have certain resources. You can only prosecute some fraction of them and you have the prosecutorial discretion.

00:17 Yes.

00:18 ES: You have the opinion or, or, or procedure that the Prosecutor wants and you go after these cases. In, in this one, you have 800,000 or more deaths even leaving aside other cases . . .

00:35 Yes.

00:36 ES: . . . you have such limited resources. Can you help me understand how those decisions were made, the strategy and even the philosophy behind them?

00:42 Yes. I think that here, it has been clear right from the beginning that the tribunal would only be able to handle a minimum of cases, you know. The ambition of the tribunal has never been to adjudicate over all cases but though our statute does not make it very clear, because if you read our statute, you know, defining our jurisdiction, it only say some person responsible of some crime within a certain timeframe and within, you know, in a certain venue.

01:22 Mean-, meaning for example, in Rwanda or in neighboring country. So nothing in our statute say that what type of person we should focus on but I think that the, the policy right from the beginning was we, was just to focus on the most symbolic cases, meaning

member of the government, the prefect which was, you know, the highest, you know, level of administration locality, and the top military, sometime the clergy, head of political party.

02:00 That's how I understand the policy. But, of course, this has not been total-, always followed, but that also needs to be understood because of the difficulty we faced right from the beginning. Because if you have this type of institution, you know the international community has shown a certain resolve to make it work. And everything has been put in place but in the early days we did not have many people to, to try.

02:33 So this in my view explains that why you may sometime find some of those pe-, people arrested in the early days and tried here in this tri-, this tribunal. I can give you some names and example of people who are not high profile people in, in our docket like you know, the trial of Mika Muhimana.

02:57 Some of, some of the people, even in, in Akayesu was the first case we have. Akayesu was not a high profile case in terms of his, his responsibility in Rwanda because he was not more than a bourgmestre, meaning a mayor of a very small, you know, province. But I think that in the beginning also we needed to exist and to exist, we needed to have case to try.

03:23 So those kind of derail a little bit from the, the main express policy which was just to focus on very symbolic case. But finally, when we started getting those big fish, I think that you know, we, we, we kept now focusing on them. You will see the Military One trial, which is really the very top offi-, officers in the military. You have the Government trial. Even the name itself, self-explanatory, those were member of the government of Rwanda.

03:59 And we have even two group of, of trial. In, in two cases, we have member of the government, former government. So I think that that has been the policy right from the beginning. Though for the sake of our own existence, I think that we have sometime derail a little bit to content ourself with small fish.

04:23 ES: I've sat in on part of the Military trial now.

04:26 Yeah.

04:27 ES: Have there been, in, in the exercise of discretion in the choosing of cases, have there been heated arguments within the prosecutorial staff on which cases to choose and where to allocate resources?

04:40 No, I think that no. I think that this has been always the Prosecutor decision himself. I think that, you know, I am not representative of the Prosecutor, though I have worked with them but not even in a level where I would attend those kinds of meetings. But my understanding has always been that you know, there are things which are a matter for the prosecution and the Prosecutor alone to decide.

- 05:05 So. Of course now, there have been meetings but those meetings would turn around some strategic question like, “Okay, should we go for conspiracy theory? Was there a conspiracy? Should we go,” for example, when this new concept also emerged here of joint criminal enterprise, “how to make use of that concept to be more efficient in our prosecution strategy?”
- 05:35 Those are the strategic questions they discuss but when it comes I think that to – when it comes now to decide, I think it is the decision of the Prosecutor. Because I remember that even this Prosecutor we have, you remember that in the beginning we shared the same Prosecutor as ICTY. It’s only from September 2003 that the split was decided by the Security Council. And from that time, we had our own separate Prosecutor.
- 06:05 And of course the new Prosecutor, when he came here, his first decision was to make an assessment but he was pretty new. He didn't know, would not necessarily know the detail of the case. And one of the strategic decision he made was okay, to appoint a team of people very familiar with the case and they, they have brainstorming decision and they made to him a presentation of all the cases with recommendation what case should be dropped.
- 06:35 Just, not dropped in a sense that they will no, there will be no further prosecution but just to be given for example to national jurisdiction (___), just to streamline and focus on the more important cases – because at that time also, we already have a, our docket full of cases. And that committee made recommendation, which helped the Regi-, the Prosecutor decide on which case he should be focused.
- 07:04 ES: Can you help me understand one, one, just one more thing – am, am I right in my understanding that the information to inform ultimate sentencing is not saved for after a verdict but is part of the trial in chief? Am I right or . . . ?**
- 07:21 Yes, in a sense that there has, there has been a change in our rules because as I told you right from the beginning, we are following the common law pattern but with some variation. In the beginning, for the first cases, we used to be consistent with that common law philosophy of separating the conviction stage with the sentencing stage.
- 07:55 People would even bring witnesses, character witnesses or whatever they would like to make their case in respect of the sentencing, but you know that this is not the practice in civil law. And some of the judges, including the late Judge Kama, they pushed for – they found it as a waste of time.
- 08:14 Because how it is done in the civil law system would be okay, when you, you, you put forth your argument, so, you can have a principal argument but of course you can also have some contingency argument, meaning that (___), you can put forward your main argument which is okay, “My client should be acquitted.”

- 08:39 But nothing would de-, deprive you of, from saying okay, “Should my client be found guilty, this is now my second type of defense.” And because of that civil law philosophy, they changed the rule to say that okay, first, when you bring witnesses, you don’t need to split your substantive witnesses with your character witnesses.
- 09:04 You, you put up all your case together, altogether including for that contingency argument. And then when now you, you, you make also your final, you present your final brief and you make your final submission, you put everything together. Yes, so for the last I think that five years, this has now been the practice, just now, not – or even I should say now for the last eight years now, this have been the practice.
- 09:33 So that now counsel are required to put everything together. But this practice, the, old common law practice has only survived in respect of now a guilty plea. When now we are facing a guilty plea procedure, so, or in a plea-bargaining, so, of course, now usually there is a contract between the Prosecutor and the defense and then those two stages are respected.
- 10:01 There is a first stage where you have the decision in respect of the guilt and then people are required now to bring witnesses and make submission separately in respect of sentencing. But that has only survived in respect of a guilty plea.

Part 11

- 00:00 **ES: Let me ask – are you ready?**
- 00:02 **Patricia Boiko: Mm-hmm.**
- 00:04 **ES: Help me understand this first. Tell me the way in which the tribunal can grant immunity to witnesses. Do they, how do they choose which witnesses will have immunity? Does the Prosecutor apply to the judges for immunity from prosecution for witnesses, and is there an actual immunity agreement written so they understand the breadth and depth of the immunity?**
- 00:34 I, I, I don’t think that we have in fact that mechanism in place whereby a witness may be granted immunity here. The only rule to my knowledge we have is –I’m sure you know, you know that because we borrowed it from your system – I think that is this rule against self-incrimination. So, that is what we have in our rules.
- 01:03 When, for example, a question is put to a witness and then in answering to that question he may incriminate hi-, himself, that witness may be advised not to answer that question or if forced to answer that question, then he will have immunity. He can claim immunity when forced to answer a question knowing that his respond will be self-incriminating.

- 01:35 That is the only extent to which we have rule about immunity. But now, of course, the prosecution now has ample discretion and he has in the past use that discretion to enter into kind of bargain with witnesses. I say okay, "This is what I'm prepared to do if you accept to help me out," but that is done only from the prosecution perspective without any involvement whatsoever from, from the judges or any other institution of the tribunal.
- 02:18 **ES: And what, what provision do you have for that witness who is now entering into a situation where there may be jeopardy for the witness . . .**
- 02:25 Yes. Yeah.
- 02:26 **ES: . . . criminal jeopardy? What, what accommodation do you have, do you have for that witness to have advice of counsel, if any?**
- 02:34 Yes, in fact yeah, that's, that's also a tricky question, b-, but in our practice it only arose in respect to – the only witnesses who come to court with counsel are witnesses who are already accused in other cases. Those witness, when they come to court, they have their counsel sitting, holding what we call here a watching brief and if need be, he may interject, particularly in respect of that sensitive area of self-incriminating evidence.
- 03:10 But for ordinary witnesses, they come here without a counsel, so meaning that everything has only to be done under the control of the presiding judge. That will be up to him to evaluate the situation and allow the witness to respond or not to respond, but that would not be done with the assistance of, of counsel.
- 03:31 **ES: So if, if I'm a witness and I am about to testify in an, in an area that may cause me to incriminate myself, is it up to the witness to understand and refuse? Does the judge advise the witness, and if the judge advises the witness does the judge make clear how far the immunity would run?**
- 03:57 So in real, in real life, I have never really experienced that witness and it's a very tricky question in a sense that a lay-, a layperson may not be even understanding all those intricacy. Of course I would understand that even a layperson about to say something incriminating would know. And in fact we have had that situation many times because for the last five or seven years, many witnesses are people who have already been arrested and even convicted in Rwanda.
- 04:35 And those are mainly people sometime brought by the prosecution coming here to testify against some of our accused as even, you know, accomplice of the, those accused. "I did this because you know, this accused requested me to do that." But of course, you know, in that situation, this precaution on self-in-, -incrimination do not arise because those are people already serving sentence in Rwanda.

- 05:05 And when they, they come here, you know they don't require any type of protection whatsoever. But of course now, one of the problems facing the defense is always the, the level of their truthfulness; whether they have any interest particularly in Rwanda, not here, in charging their client. Were they promised anything? Those are area sometime visited by defense counsel.
- 05:29 But that question never really arose as to whether they require protection from the tribunal because most of those people are already undergoing heavy sentence in Rwanda.
- 05:40 ES: That surprises me because as we know, you, you only prosecuted so many people . . .**
- 05:45 Yeah . . . yes.
- 05:45 ES: . . . but there must be so many other participants who could be witnesses who may be subject to jeopardy themselves.**
- 05:50 Yes, yes, but, you know, the way I have experienced it is just the way I explain – people already sentenced or being prosecuted in, and detained in Rwanda coming here being very forthcoming in every detail as to their involvement, but not seeking any protection whatsoever.
- 06:08 ES: Very interesting. I'm going to stop myself. I'm going to invite Batya to, to, to jump in . . .**
- 06:16 Okay.
- 06:17 ES: . . . but you've explained a lot to me. I learned a lot. I appreciate it.**
- 06:19 Okay, okay, thanks.

Part 12

- 00:00 BF: So, thank you again for all your time. I actually just want to ask you about one last thing. I know you had an opportunity to work with Judge Laity Kama.**
- 00:09 Yes.
- 00:10 BF: And can you tell, tell us a story about him?**
- 00:15 Yes, I can tell you a story about him but I should just make it clear that I worked with him in Senegal but not here. So here, when he was a judge here, at the time I was working with the Office of the Prosecutor, so, but I used to see him quite a lot and I think that one of the, the story I can tell you about is this one, which also I think would show you, you know, the, the level of progress we have made here.

- 00:46 When he w-, as you know certainly, he was the first President of the tribunal and he presided over the case of Akayesu and one of the story was that he came here of course. Judge Kama was never a judge in my, in, in Senegal. All his career, he spend it as a prosecutor so the first time he came here was, you know, he became a judge here.
- 01:13 So, very experienced about criminal procedure, but all his experience was also about you know, the civil law proceedings. And I remember one of the story he told me w-, when, when he was presiding over the case, the first time, you know, there was this U.S. American guy, young prosecutor, Pierre-Richard Prosper. And at one point, the defense was, I think, posing a question and Pierre-Richard Prosper just jumped to make an objection.
- 01:58 And President Kama could not understand what, what is this, and he, he literally shouted at Pierre-Richard Prosper say, "Okay, what is this?" He say, "Dear judge, I'm objecting." He say, "What, what are you objecting about? This is my courtroom. If you want to say anything, you have just to politely raise your hand and it will be up to me to give you the floor and you make your point but I, there is no objection I can ever authorize (___) in this tribunal."
- 02:30 So just to show you, you know, the diversity of, you know, the background of people. Such an experienced judge, you know, had no clue whatsoever as to what an objection would mean. So, for him, the only way to intervene in a courtroom of course, Pierre-Richard Prosper coming from the U.S. also would not understand an experienced judge not accepting an objection in his court.
- 02:53 But luckily, I think that our rules are flexible enough to accommodate and many of the judges and also prosecution have been able to learn quite a lot on the spot here while just doing justice here.
- 03:07 BF: And then did you find his perspective unique, Judge Kama's, among the judges here or at, the kind of view that he brought to the tribunal?**
- 03:19 Yes, I think that yeah, to a (___) because he was very, very unique in a sense that he was not only a guy with civil law background but he has his own way of doing things because when he comes and sit in a courtroom, for him the investigation is part of his duty. He's the one to be, to investigate the case to know the truth, which is a very way of doing things in the civil law perspective.
- 03:51 And to that extent, for example, I remember in the Musema case, he would be sitting with Judge Pillay, but it was stri-, striking to see the difference of approach. Judge Pillay would have very smart questions but she would wait, at one point h-, she would calmly ask defense counsel, "Okay, I hope that you are done with your cross examination because I

have a few question but if you, you intended to pursue this line of inquiry, I will just leave it with you."

04:29 But that also you know, reflect her own background. Judge Kama would just interject and stop counsel. For example, when a question is of interest, he would do by himself all the follow-up question trying to clarify. And sometime in fact he would not leave anything left even for counsel. After he finish, counsel would just say, "Yes, I'm done."

04:54 Okay, and then he would be very satisfied because he would have clarified everything. So that was just-, Judge Kama.

05:04 **BF: Okay, thank you. That's, that's great.**

Part 13

00:00 **BF: And, and then, I guess just one last question, are there any other things that you would want to share with us? You know, as you think about people having access to your thoughts and reflections and experiences, building other tribunals, things that the Rwandan people might want to know now, but maybe also 30 or 50 years from now, that you would want to make sure you have a chance to speak about.**

00:30 Yeah, I think that, that one, one of the things I want to speak about is that about our mandate, the specificity of our mandate. You know that because we have been a creation of the Security Council acting under the Chapter 7, it was said that this tribunal is here to restore peace in Rwanda.

00:53 So, but yet we are just a judiciary operating just as any judiciary, but of course with our specificity. Our specificity is that okay, we are doing justice but in an international setting with a major handi-, handicap. We are a bit remote from those people we are supposed to be giving justice first.

01:20 We are international tribunal dealing with crime against humanity meaning that our justice is relevant to the humankind, so to speak. But in my view, it should be relevant first to Rwanda.

01:34 And it has been a long way. And when I look back as I told you in the beginning so I realized that it has been a long way from almost total antagonism from Rwanda to this kind of cooperation, which is not perfect.

01:54 But I think that now, when people realize what we have achieved in a sense that we have tried a, a whole government, the whole military hierarchy, the clergy, you know the admin-, the high administration, I think that in this regard there is something to be proud of in terms of achievement.

- 02:16 And this setting, we, we, we know now as we are winding down, we know now also how to operate a tribunal, an international tribunal. So, I would remember in the first days we could not even have, you know, accused. Now we know how to bring witnesses from everywhere including, and which is also very interesting, including witnesses who are irregular resident in, you know, every country.
- 02:46 We have tried and succeeded in putting in place mechanism whereby okay, many countries would accept to give provisional travel document to people. They would come here just for the sake of their testimony and then we surrender the document and people would go back to their irregular, irregular status.
- 03:07 I think that there is a wealth of experience we have now acquired, and which will, which cannot, not be lost now because you know, Sierra Leone has been building up on that experience, the Lebanon Tribunal will be building up on that experience, the ICC, you know. And I think that now it will never be difficult again to set up an international tribunal, be it ad hoc or a permanent one.
- 03:34 But of course there are, there will always be some political choices which will only in fact reflect the difference of culture or language, like common law system, civil law system, you know, because of language, also English being close to common law, French or any other German language close to civil law system. There will always be those kind of choice to, to make.
- 04:02 But I think that's a necessary ingredient which can help quickly create a tribunal and make it work. So that will be our main achievement and I think that that lesson will never be lost.
- 04:16 BF: Okay. Thank you very much.**
- 04:18 Okay, thank you.