

THE AD HOC TRIBUNALS ORAL HISTORY PROJECT

An Interview with

Larry D. Johnson

International Center for Ethics, Justice and Public Life

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Session One

Interviewee: Larry D. Johnson

Location: New York, NY

Interviewers: David P. Briand (Q1) and
Leigh Swigart (Q2)

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Q1: This is an interview with Larry D. Johnson for the Ad Hoc Tribunals Oral History Project at Brandeis University's International Center for Ethics, Justice and Public Life. The interview takes place at Columbia Law School in New York City on February 18, 2015. The interviewers are Leigh Swigart and David Briand.

Johnson: My involvement was the creation, the establishing, the drafting of the secretary-general's report, which had the statute in it, and sort of watching what happened—not watching it, being involved in it. After that, I didn't have really anything much to do with the tribunals. Once it started running, I didn't want to hear about it for a while. [Laughter] I was not involved in Rwanda, for example, establishing that. I teach it in class, how different that process was and how it raises some very interesting legal issues—the difference in the way it was created.

Q2: Not the content of the statute but the way it was created?

Johnson: Both.

Q2: Both, okay.

Johnson: I think the way it was created influenced the content of the statute. In fact, my colleagues who then did a report of the secretary-general [SG] on the Rwanda tribunal after it was established noted the difference. The secretary-general was asked to prepare the ICTY [International Criminal Tribunal for the former Yugoslavia] report with a draft statute, did the explanation, and in that report the SG says the Security Council basically is not there to establish new law because it's bound by the principal of legality—you can't hold somebody criminally responsible for something that wasn't a crime at the time.

Q2: Right.

Johnson: Okay. Therefore the ICTY statute did not include A, B, C, did not criminalize Common Article 3, and did not include the additional protocols. So that was explained. Then a year later, Rwanda was established with no secretariat involvement, but a working group of the Security Council headed by the New Zealand permanent rep—he founded the Security Council report; his name will come to me in a minute [Colin Keating]—and the American legal advisor in the mission, Bob Rosenstock. They added substantive provisions of the law to be applied in the ICTR [International Criminal Tribunal for Rwanda] that were not in the ICTY.

Then for some reason—and again I was out of this issue; it was not on my plate anymore—but the then director of the Office of the Legal Counsel [OLC], when he was doing a report to the Security Council that we were supposed to do on where to site the tribunal in Africa, between Arusha and Nairobi and other places, they included a section

that basically said, "Since we haven't commented on the substantive text of this—it's already been adopted—we will now do so," even though they didn't ask the SG to do so. So the legal office put in a comment that basically said, "It's very interesting that in the case of the Rwanda statute the Security Council has decided to go beyond existing law and has put in there provisions which are not accepted under customary international law."

Q2: That's interesting. I thought that the statutes were essentially identical. I had never heard that. Did that create problems for the appeals chamber?

Johnson: I don't know. [Laughs] In some ways the secretariat was so picky in ICTY to make sure that we would not be accused of violating the principal of legality and to make sure we weren't purporting to push certain things. The Americans and the UK [United Kingdom] had not accepted the additional protocols and still don't accept both to this day, I believe. Then the American puts them into the ICTR statute, and that's no problem. Put it in there and the ICTR judges can apply it. For a litigator, it's giving the defense a beautiful argument on a silver platter to go before the judges and say, "How can you charge my client for this? The secretary-general says it wasn't even law at the time." Oops. So I don't know whether they thought about that.

Q2: And was it?

Johnson: Yes, I think so. I haven't researched it, but I think it was raised in the first appeals of [Jean-Paul] Akayesu, but I haven't checked it—

Q2: That's interesting. We're interviewing—

Johnson: This is [Antonio] Cassese in operation, so I'm sure they must have said, "Look, the principal of legality. You have to throw out these charges." I don't know if they charged him with criminal—Common Article 3 or the additional protocols—but if they did, the defense counsel would have said, "You have to throw that out." Whether or not they pleaded it or not—maybe even in [Duško] Tadić he did—without even looking at the difference in the statutes, Cassese said, "All this law that the SG didn't throw into the original ICTY statute is all customary international anyway." So then they began applying the additional protocols and I think in addition Common Article 3, even though it wasn't in the ICTY statute, but it was in the ICTR one.

Q2: We're interviewing a defense counsel from ICTR tomorrow, so she may have a lot to say about that that. But maybe we can back up a little bit.

Johnson: Anyway, I teach it. I could show you the document because there's a citation for the document. [S/1995/134]

Q2: Yes, I would be very interested to see that.

Johnson: The document is a report of the secretary-general to the Security Council basically on logistics and establishing the tribunal. But in it, he goes on—not too long, but about a half a page or a page—on this very interesting legal point which comes to what you bring up in law school—can the Security Council enact law, make new law? For ICTY we said, "No," or at least we're not going to purport to do that.

Q1: "Purport."

Johnson: Yes, and then the next year the SG openly says to the Security Council, "Well, it looks like you tried to do it." Interesting, huh?

Q2: So when the ICTY was proposed and then it was created, you at that time were working in the Office of Legal Affairs?

Johnson: Right, in what's called Office of the Legal Counsel, in the Office of Legal Affairs.

Q2: And who was the legal counsel then?

Johnson: Carl-August Fleischhauer.

Q2: Oh, Fleischhauer, right. So what was your experience in, if any, in international criminal law?

Johnson: None.

Q2: None, because it didn't really exist in practice then.

Johnson: Nobody had any—

Q2: So what was it like for you to be set this task?

Johnson: Bizarre.

Q1: You had some grounding in international law in law school, right?

Johnson: International law, yes, but none of us had—I don't think any of us that were involved in drafting it had much criminal, because UN [United Nations] doesn't do criminal up until then. The last time there was an international criminal tribunal was Nuremberg, though academics such as [M. Cherif] Bassiouni out at DePaul were talking about it and trying to push it forward. In the early years of the International Law Commission you had proposals for an international criminal court in the late 1940s, so there would have been some people from the old days that might have looked at the interesting criminal issues. That got stuck because of the definition of the crime of aggression and they never went back to it until after our tribunals were created. Then they picked it up to do what became the Rome Statute.

Q2: Who were you working with on the statute?

Johnson: Fleischhauer and his deputy, Ralph Zacklin, decided to have a team, and I think it was called the 808 team because 808 was the resolution in which the Council decided in principle to establish a criminal tribunal because Bassiouni and his crowd of investigators—whatever that commission was called—had recommended that. In the end, the Americans and the French were the ones that were basically behind this, the engines, and they said, "Yes, let's do it." I don't remember when that was—January or February? Something like that. In 1993, 808 said, "We're going to have a tribunal."

They asked the SG within sixty days, I think it was, to establish, to draft—maybe it was ninety; I think it was sixty—to come up with a statute. It was clear that it had to be all-embracing—don't leave any holes in it, no blanks, nothing delegations can fool around with to delay. Give them something they can adopt and run with it right away. The fear was delay, delay, delay. Then the legal office had to deal with it, and so he established a team of lawyers that were from different parts of the office. I suppose expertise from different units—even though none of us really had any criminal.

Q1: How did you get put on that team?

Johnson: Well, he picked two from Office of the Legal Counsel—actually he together with Ralph Zacklin, who was his deputy. One was Winston Tubman from Liberia, and

myself. We were on from Office of the Legal Counsel, plus of course Zacklin and Fleischhauer.

The other two—one was Daphna Shraga, who was Israeli. At that point she was in the General Legal Division; later she came to OLC and really became the tribunal expert in the legal office. At that stage, she was still in General Legal Division, which was non-public law—more contracts and that kind of thing—and administrative disputes. She had been an Israeli military lawyer. She was an expert in IHL [international humanitarian law]; she came with international humanitarian law experience having been with the Israeli military—a legal advisor in the occupied territories, I believe. She really had more of that kind of experience, not necessarily domestic criminal. The sixth one was Virginia Morris, who was in the Codification Division and still is to this day. She's the only one that is still in service.

Q2: So nobody had even domestic criminal experience?

Johnson: Not that I recall. Maybe the others did, but I don't remember anybody saying, "Oh, I've done this before," not even Daphna.

Q2: How did you sit down and do that? What was your process?

Q1: You were given this great task.

Johnson: I didn't think of it at the time; I only later realized that putting these things all together was like putting the body parts together in *Frankenstein*. [Laughter] You take 1907 and you put that in for The Hague law, and then you take 1949 [Geneva] Conventions, and then you grab genocide, and then you have to deal with crimes against humanity, which is a pain in the neck because that had not been set out anywhere, so we had to put that together. So you cobble this whole thing together, right, and then you put the body on the slab, and then you take it up to get the lighting. Do you remember the movie? You get the bolt of lightning—that's Chapter 7. [Laughter] Then he comes down, and proceeds to terrorize the whole community, and that was the tribunal.

We had lots of people that came in with proposals because part of the 808—I think 827 is when they adopted it—so 808 was where the Security Council asked anybody and everybody—states, academic institutions—to submit proposals or ideas to us. So we got lots of drafts, and there were previous drafts, so basically we had to figure out—and I don't remember the process by which we said, "Okay, we have three or four basic core crimes." I think we did think about other things, and I have that in those papers—whether we were going to add the 1954 Cultural Property Convention. We didn't do that, and then there were some other things we didn't add.

Q2: So it was just war crimes, crimes against humanity and genocide?

Johnson: Right, but the war crimes we split into two—The Hague law, excessive suffering, weapons and conduct of warfare, that first article. I don't have the text in front

of me. Then we reproduced 1949 Geneva. It was two articles but in fact it's all "war crimes." Another core crime was genocide, and then crimes against humanity. We all had sort of different assignments.

Q1: What were you focused on?

Johnson: I remember I was doing crimes against humanity and kept going back and forth, and then later there was a discussion about why certain things were put in and why certain things were left out. Some of it was just haphazard, and we have to get it done, let's just finish—I don't know if you want to talk about that now, but—

Q2: Sure.

Johnson: —about crimes against humanity, because in the text—and it doesn't help that I didn't bring those texts, sorry, but in the text it says, "Crimes against humanity," I think, "whether committed in international or non-international armed conflict."

Later, the human rights and international criminal law people had a fit and they said, "Wait a minute, this implies not in peacetime too. Why are you doing that? You're implying that crimes against humanity are only in times of war." The answer was—I don't know how much this was ever published—we weren't doing a general statute for peacetime or wartime. This was because we were so enmeshed in the legal basis for the thing, which is as an enforcement measure under Article 41—a rather odd one. I think the

Americans and the French had come up with that legal basis. We agreed with it and so we put it into the report that nothing bars the Security Council from establishing a judicial organ as an enforcement measure to enforce its prior binding decisions, which is to stop the bloodletting and the ethnic cleansing, the horrible things. Article 41 is not exhaustive, so we're thinking of course we're dealing with an armed conflict; that's the legal basis for what we're doing.

Q2: Right, so why was there an objection that it—?

Johnson: Well, because people thought—would pick it up and try to look at it as if this is the definition for an international criminal court, which would be whether it's peace or war. The whole tribunal is imbedded in the Yugoslav armed conflict itself, and there's nothing in the Yugoslav statute that talks about reconciliation. That's in Rwanda.

Q2: Yes, it is.

Johnson: That's because it's after the conflict. For Yugoslavia it was right in the middle of it and there was no talk about getting all these people to sit around and sing "Kumbaya." No, this was more punitive and deterrence, and threatening to whack them over the head that you're going to be held to account for what you're doing, so you better stop it. It wasn't with a view to being a truth commission and all that other kind of thing. It was really embedded in the armed conflict.

Q2: What do you think about that? The ICTR does have as part of its mandate this reconciling the parties, but is that a proper aim for a judicial institution?

Johnson: No, but there's still debate on that. You've talked to Ted [Theodor] Meron, who said no. Most judges, particularly real judges—the judges that had been judges in their domestic systems—would say no. No, their job is limited to you have a charge against an individual and you have to see whether the prosecution beyond a reasonable doubt proves that the guy did what he's charged with doing. The rest is added benefit; if the rest of it contributes to the history and the narrative or peace and reconciliation, that's all to the good. If it doesn't, too bad, but that's not our primary task—whereas the Rwanda crowd would say, "Ah, but it is in your mandate." That was a little difficult for them, and it affected financing too because for outreach programs in both tribunals I think it was voluntary, where in some ways Rwanda folks could have argued it should have been part of the core because it's in the mandate so they should have funded it out of the regular budget.

Q2: Their outreach started sort of late.

Johnson: Yes, and ICTY and ICTR were compared to what happened in Sierra Leone, which was wonderful. In Yugoslavia it was never—I don't know who to blame for that, other than they just still hate each other and hate the tribunal for whatever it does, so the outreach was never very successful in the Balkans.

Q2: You created the statute very quickly. I know that the statute was amended many times—or is it the rules of procedure that were?

Johnson: I think it's the rules of procedure. Sometimes the statute was amended, but more or less that was to add things like *ad litem* judges—I mean a major change. Over the years, also a number of things were done and the decision was made—you don't need to amend the statute, don't go through that tiresome exercise. You could take a decision by changing the rules.

Q2: It was the judges—

Johnson: Things like the completion strategy.

Q2: The judges were the ones who were amending the rules of procedure.

Johnson: Oh, yes, that was all judges, or all the judges in the judicial conference or whatever it was called—some of which were policy decisions like the completion strategy or 11 bis, the procedure by which you transfer—I would always say "down" but that was maybe not the way to put it. I should say from the international level to the domestic level, you transfer cases that the tribunal had that had middle or lower level accused or that didn't rise to the gravity of what the completion strategy called for—most responsible for the most serious—and then you transfer those cases to a domestic court. That's not in the statute.

Q2: Right.

Johnson: A bunch of things are not in the statute.

Q2: Was there anything that you think ended up being a huge gap that you just didn't anticipate?

Johnson: Oh, yes. Well, in terms of defense—maybe because we were not criminal defense lawyers ourselves it didn't cross our mind particularly. Then even in our own domestic systems that we would have some familiarity with from law school, to what extent is legal aid part of a court? If it's not really part of a court, it's maybe part of a prosecutor or administration? I don't know where it's situated in various legal systems. The defense lawyers squawked right away and said, "This is inequality of arms. You've thrown that out the window because your prosecutors are full of UN staff with benefits and six week vacations and good salaries, and we're left out." Nobody ever really thought about that at the beginning and nobody to this day has a defense counsel office of permanent defense counsel because it's a little bit more difficult I think to consider them fungible like prosecutors.

Q2: Why, though?

Johnson: I don't know. It's the nature of the beast in terms of if you're a lawyer defending one person or one group, you are engaged in that and it would be hard to be defending another case or another person at the same time. Prosecutors can do a little bit of mixing and matching, I think. But I don't know. That's a good question. They tried a little bit in the—

Q2: Sierra Leone has it.

Johnson: Sierra Leone and then Lebanon too. In Lebanon we made the—I was involved in Lebanon too; that was the only other tribunal I was involved in the creation of. There we created a separate defense office, but basically the defense office is there to deal with initial motions and initial appearance, pleading, checking credentials of possible defense lawyers and helping the individual pick a lawyer, but not to be the defense lawyer throughout the whole case.

Q2: I think there's been a lot of turnover in that defense office too.

Johnson: I can imagine. I think the defense offices are as a whole—in Sierra Leone and in Lebanon—troublesome in practice as I understand it. Again, you should talk to [David] Tolbert because he was registrar of Lebanon as well.

Q2: Yes, he would be an excellent person to talk to.

Johnson: Another person who would be interesting is Herman von Hebel, who's now registrar of ICC [International Criminal Court], but who was previously deputy registrar in Sierra Leone, and I think he was deputy in Lebanon too.

Q2: I think he was, yes. The circulation and the—

Johnson: Oh, yes, it's very incestuous. [Laughs]

Q1: You started at the UN in 1971?

Johnson: Yes.

Q1: University of Nebraska, then Harvard Law.

Q2: Nebraska?

Johnson: Yes. [Laughter]

Q2: I'm from Peoria, Illinois, so—

Johnson: Oh, okay, very good.

Q1: Then you went right to Harvard Law, and then the Kennedy School of Government, and then right into the UN?

Johnson: Right.

Q1: Okay. And then—

Johnson: You could do that at that time. Now you have competitive exams and so on, but at that point they'd hire people right off the street.

Q1: Is that what happened to you? [Laughs]

Johnson: Yes, more or less, the P-1 level. I applied and they said—I was an intern the year between law school and Kennedy School, so I got to know a particular office and people, and they said, "Don't call us, we'll call you." Then a New Zealander happened to leave the following six months and they said, "We do have a slot that would be okay"—you know, a westerner could fill it—"do you want to join?" So, I said, "Yes, okay."

Q1: What was your interest in it at that point? What brought you to—?

Johnson: I was always interested in international law and politics, whether as an undergraduate or even in law school. I did well in law school courses that were

international law and in that area, so I figured you should do what you do well in and do what you like.

Q1: Right. Even in Nebraska too?

Johnson: Oh, yes, in Nebraska. It was all very far away but still very interesting, I thought. I was curious.

Q1: You'd been in the UN since 1971 and you were still there twenty-three years later.

Johnson: Yes.

Q1: What was the reaction or the environment there when the news came out about Yugoslavia in the early 1990s? What was the environment in your offices and in that community?

Johnson: My portfolio didn't cover peacekeeping operations, but no doubt my colleagues who were involved with UNPROFOR [United Nations Protection Force] and all of that would have been looking at the collapse of this, that and the other thing. The irony is the following year, in 1994, I did go to Yugoslavia as part of UNPROFOR, as a chief of staff of [Yasushi] Akashi. But before that I didn't have any peacekeeping experience.

Q2: What was it like to go there and be there on the ground?

Johnson: Oh, it was very interesting.

Q1: What brought you to that excursion?

Johnson: Even then people were thinking—and now it's a real policy—that you need rotation between offices and also in the field in order to get promoted. Kofi [Annan] began it and now it's continued even more with Ban Ki-moon. But even then it was like, if you're going to be advising, you should know what it's like in the field. Sometimes managers didn't like that because of course all of a sudden, if you're of any use to the manager, he didn't want you to go, and this created a problem for Fleischhauer at some point. Earlier in the Namibia peacekeeping operation, everybody was very excited about that—it was real positive and this is going to be terrific and so on. They were asking for all the staff to apply for it. Fleischhauer had more or less let it be known, "No, we need the lawyers here. I don't need my horses out of the stable; I need them here working."

Then the African group got wind that this German is not allowing his people to apply for this peacekeeping operation, which was going to be the jewel in the crown, and he got a call from the thirty-eighth floor that said, "No, you're not going to be doing that." I wasn't there, but supposedly the secretary-general called him and said, "No, no, everybody has to contribute. Don't you try to keep your best and brightest to do your work; we need the best and the brightest to make that peacekeeping operation a success." I didn't go, but a good number of people—those who really wanted to go—were able to go. So there was a

little bit of that in terms of peacekeeping—you should get out on the field and see what it's really like.

Q2: Do you agree with that?

Johnson: Oh, yes, I agree with that completely. There is little irony here for the tribunals. In 1994, Graham Blewitt, who was the acting prosecutor before [Richard] Goldstone was named, sent a letter to Akashi and said, "Well, we're just this new thing in The Hague—the tribunal—and we're just getting going. We need to come to visit the region, so we need your help and vehicles and offices, so we look forward to your cooperation." That was read in a morning meeting with Akashi and the heads of units, and I was there. Sergio [Vieira] de Mello was head of Civil Affairs at the time [Laughs] and I remember Sergio said, "Who are these people? Why do we have to help them? We're stretched anyway."

Somebody said, "Oh, they're just the UN bureaucrats from New York yet again. We're busy here, we're all very busy here." Then I had to speak up, because I spent the year before doing the whole thing. I said, "Well, no, they're not exactly just UN bureaucrats. We don't have investigators, and we don't have judges, and we don't have prosecutors. Governments are lending these out, so these investigators might be FBI [Federal Bureau of Investigation] or the French or Australian version thereof, so you can't just pooh-pooh them like they're just people from the personnel department, no. Besides, from a legal point of view, you damn well better cooperate with them." I don't think I said "damn" but

I said, "I think we're obligated to cooperate because they're subsidiaries of the Council. You are a subsidiary." I got legalistic. "Both are subsidiary organs of the Security Council, and just as the UN is telling states they have to cooperate with this judicial organ, we do too."

Akashi and Sergio said, "Yes, but wait a minute. We can't be having people running around with us who are going to indict these people and they're going to say, 'What are you doing helping people that might end up prosecuting us?' We have to go see [Slobodan] Milošević and [Radovan] Karadžić, and [Ratko] Mladić and all this cast of characters, and we need to talk to them and convince them to do X, Y and Z." So the decision was, okay, but they would be in cars without the UN painted on them.

Q2: That's the compromise. [Laughs]

Johnson: The compromise was to try to avoid identification and put them in a building away from the headquarters building. So that was interesting.

Q1: Can you say more about that, that time of—you were chief of staff—

Johnson: Chief of staff, yes.

Q1: —to the special representative.

Johnson: Yes, that's more of a [Laughs] time dealing with a particular policymaker that had particular characteristics. Mr. Akashi made his mark a couple of years before in Cambodia, which was supposedly a great success. Then he was sent to Yugoslavia and got into trouble with the Americans, and NATO [North Atlantic Treaty Organization] to some extent, because he was seen as very weak and accommodating to the Serbs, and not forceful. In some sense that's unfair because being the good bureaucrat that he was, he would always follow what his force commander would advise him, particularly on air strikes.

If somebody called in for air strikes, one of the battalions up in the—in Bosnia basically would call in air strikes, it would have to go through the force commander who was French. Sarajevo was surrounded of course by the Serbs, and that was where the French peacekeepers were located. Some would say the French commander was always meek and timid because he didn't want to subject his troops to attack or capture or being held hostage. Later, after I left, in fact that did happen where the BSA, the Bosnian Serb Army, did hold captive some UNPROFOR troops, and I think they were French. So if a French commander said, "Go ahead with air strikes," Akashi, go ahead air strikes. But if the French commander said no, Akashi did not overrule his force commander.

There was one story, or one incident, involving myself and his personal assistant who was an American woman who had been with him in Cambodia. She had been in the legal office but she wasn't a lawyer; she was an oceans expert. He came in and said—he was reading something about Americans trying to pressure him to act forcefully, aggressively,

and he said, "You Americans are always the same. You're just always trying to bomb people into submission, and that just doesn't work. You don't understand these people. It's just like in Asia. You have to deal with the Serbs and Croats"—he was dealing with [Franjo] Tudman too at the time—"with great subtlety and with great finesse. Be very polite and recognize their status. Be subtle and don't be so blunt and rough with these people."

Either I said it or his assistant said, "Mr. Akashi, you have no idea what you're talking about. The only thing these people care about is if you hit them between the eyes or you pinch them hard. Then they will take you seriously. Whether it's economic, or whether it's political, or whether it's military, the only way they will ever respect you is if you are tough with them." He just said, "Oh, that's just NATO talking," and he walked out. That was a bizarre period of five months, but it was interesting. It was very interesting to observe.

Q2: That's how long you were there? You were there for five months?

Johnson: Just five months.

Q2: And you were based in—?

Johnson: Zagreb.

Q2: In Zagreb, okay. What was it like living in Zagreb at that time?

Johnson: Zagreb was fine. There were lots of ex-pats, UN, and agencies around, so there was a lively social life. Akashi didn't like me to travel too much because when he was traveling I was supposed to be in charge of the office. But every once in a while I did get out and travel around with the deputy force commander in various places, in Bosnia, to see the devastation and so on. I was never involved in negotiations with the Serbs. A couple of times we thought we were going to get shelled but we weren't. It wasn't too far away.

We heard about so many different—lots of stories about dealing with these people. One time I was supposed to arrange for—because I think he was going to be away—the visit of—I was involved in the visit of the Turkish president to Sarajevo. That was always a little difficult, a little touchy to have outsiders on UN planes. The Bosnian Serbs, in one of their million agreements with the UN, had given the airport to the UN in order for humanitarian assistance to land for the people in Sarajevo that were surrounded and couldn't get anything in over the roads. This was the airlift kind of thing. But under the agreement the UN agreed that all these airplanes—the UN airplanes, of course. Nobody else, just the UN airlift planes—all for humanitarian assistance only. The Bosnian government of course said, "We have an ambassador that wants to come in so we need you to help us. We're the government that the UN has recognized, so we're a legitimate government and we need your help."

So over the years or months, the UN began allowing these official visitors to the Sarajevo government to come in on these otherwise UN humanitarian trips, but they would always tell Karadžić so there was no surprises. So Akashi called them and said, "The president of Turkey is coming in on a plane next week. We're arranging to meet people there," and Karadžić said, "Oh, thank you for telling me. We'll be sure and shoot him down." [Q2: Laughs] And everybody laughs, like you just did, and being contaminated by being in law school, so you think worst-case scenario, I said, "Was he kidding?"

He said, "I'm not sure."

And I said, "Maybe you should go back and check with him."

I don't recall if it was Sergio or somebody else said who said, "They've let other people in too. Why would they just do that with that one?" Susan Woodward was there as sort of a—she's at CUNY now. You should talk to her—no, that's not tribunals, that's peacekeeping. Susan Woodward is at the City University of New York, I think, as a peacekeeping, peace-building expert. She was the expert from academia in the office and she might have said, "No, the Turks are always the enemies of the Serbs, so I'm not sure." So there was some discussion that maybe he meant something here, so they called him back and Karadžić said, "No, I wasn't kidding. The Turks are the sworn enemy of the Serbian people." In fact I think in the Serbian language the word "Muslim" is the same as "Turk," from the history. So he said, "I couldn't prevent my people from shooting if they know that plane has the Turkish president."

Akashi apparently said—and I wasn't in the room—but apparently he said, "But you didn't shoot down the prime minister of Turkey and you didn't shoot down the prime minister of Pakistan," who were both Muslims who were coming to pay official visits. Karadžić said, "Well, we'd never shoot down women." And both of those individuals were women—[Benazir] Bhutto and [Tansu Penebe] Çiller—she was prime minister of Turkey for a while. So we had to cancel the trip. We cancelled the trip because what if they had shot him down? Then there was a document circulated in the UN from the Bosnian government protesting how we had folded to Serb pressure, blackmail. Again, we were accused of being in the pockets of the Serbs.

Q2: That's an interesting comment about not shooting down a woman because there were certainly enough crimes against women in the former Yugoslavia.

Johnson: Yes, go figure. So those were one of those things in my [Laughs]—I'm trying to make files from all my years, and one of them is, "He said what?" [Laughs] I think that goes in in that file.

Q1: I bet you were glad you had somebody check into that.

Johnson: I would have thought they would have been happy about it, but some people might have said, "Oh, they wouldn't shoot him down anyway. You just folded because of the pressure." But with our kind of training it's like, what happens in the one in a

thousand chance that they do shoot him down? You've just let a UN plane with the president of Turkey and the guy has just warned you that this might happen and you let him go through? I mean, whoof.

Q2: What was your reaction years later when Karadžić was finally located and arrested?

Johnson: Oh, that was great. That was a great relief, even though he was right under their noses. But Milošević I did see in the tribunal. I was only in court once when Meron—because Judge [Richard George] May died—no, he resigned, and then he died shortly thereafter. So there was a procedure of replacing a judge and the president has to ask the defendant first if he would consent or not.

Q2: Oh, is that right?

Johnson: Yes. Not that he would consent, but his views had to be sought. He didn't have a veto, but you asked his views. So Meron, wanting the show for the presidency as he's presiding over Milošević for this one narrow issue, as otherwise he's in the trial chamber. The president does it alone. Milošević came in and Meron asked him. I was in court at that point. He was asking him what his views were, and of course he just went off on a scree about the whole illegality of the tribunal, a "NATO invention," and Meron kept pressing him—"I need an answer. Do you consent, yes or no?" He wouldn't answer, so what you do then is you say, "I assume your answer is no, so we'll record that as your answer."

Q2: Who did replace Judge May?

Johnson: Judge May was replaced by [Iain] Bonomy, a Scottish judge.

Q2: Oh, right. Yes, of course. I have met him.

Johnson: Very good.

Q2: He had been involved with the shooting down of the Libyan—

Johnson: Oh, yes. Pan Am 103.

Q2: He came to one of our judges institutes [Brandeis Institute for International Judges].

Johnson: Yes, he was first rate.

Q2: Yes. So you were at the tribunal under Meron as the chef de cabinet.

Johnson: Yes, from 2003 to 2005.

Q2: How did you come to have that position?

Johnson: It probably started in 1993, because at NYU [New York University] Meron was the IHL expert and he was always interested in finding out what was going on. I don't know who introduced us but we started corresponding, and then I think I had dinner at his house. He married a French woman who—

Q2: Monique.

Johnson: Monique, exactly.

Q2: Yes, I've met her a couple of times.

Johnson: She's lovely.

Q2: Yes, she is.

Johnson: We had known her in the 1970s and 1980s in Geneva when she was a *précis* writer for the International Law Commission, before she even met Meron.

So he was just, "What's going on? What are you writing?" He was trying to find out what we were drafting. Then we would talk about the statute and everything afterwards, so we just sort of kept in touch. He called at one point and he said—. I did leave the UN a couple of times for academia gigs, so one year I was teaching at—I guess it was NYU, 2002 to 2003. I can't remember. It was after Vienna. Anyway, he said that he was going

to run for president of the ICTY. He was running against Mohamed Shahabuddeen, and if that happened, would I be interested, even though it was at a level beneath what I had been before. But he thought it would be interesting for somebody that had been involved in the drafting of the statute, and besides then everybody can ask me why it reads the way it reads. I said, "I don't know about that," but still—. And they did; they said, "Well, why is it—?" And I said, "I have no idea."

Q1: And you said, "We had sixty days to do it. This is what we got." [Laughter]

Johnson: Yes, and you should be lucky it came out as what it was. It could have been a lot worse. So I said, "Okay." I was thinking—my great political analysis was, here's a guy who had been a former Israeli diplomat, trained as that, for all the good or ill that means. It's a package. Secondly, he is an American. You've already had an American as president, [Gabrielle] Kirk McDonald, and he's running against a guy named Mohamed Shahabuddeen.

Q2: He's from Guyana, right?

Johnson: From Guyana, third world, so what are the chances? So I said, "Yeah, sure," thinking he's a good friend and I don't want to just say no, and besides he's an influential NYU professor so why should I burn my bridges when it's probably not going to happen anyway? So I didn't even tell my wife. [Laughter] Then four months later he called and

he said, "Tomorrow I'm being elected. Shahabuddeen has withdrawn. I have unanimous support, so when can you come?" [Laughter]

Q1: Right. So you hang up you say, "I have to tell my wife."

Johnson: It was another case of, "You said what?" So we went and it was fun. It was interesting.

Q2: What were your duties as the chef de cabinet?

Johnson: Oh, mainly it was UN-related, helping him draft statements.

Q2: To the—

Johnson: Security Council.

Q2: The Security Council.

Johnson: And the General Assembly [GA], or his trips to the capitals of the region—Belgrade, Sarajevo.

Q2: When you're the chef de cabinet you're dealing with his role as president and not as judge?

Johnson: Correct, although I could sit in on all those meetings that I wanted to, and I did to some extent because I saw my role as trying to make sure he didn't go off the deep end, or didn't end up in a situation where he would be severely criticized.

Q2: Which has happened since, yes. What do you think about the way about the president of the ICTY and the ICTR, or any international criminal tribunal, has to balance between being a judge and being sort of a representative and a diplomat in a way?

Johnson: It's difficult. Yes, that's difficult. That was foreseen when the statute was written as well that—

Q2: It was foreseen?'

Johnson: Yes, that he was going to be an administrator, kind of. He did schedule—and that was one of my jobs too—scheduling, overseeing the scheduling of trials and how quick they were. I would go to the various trial chamber presiding judges and say, "How are we doing?" or "Are we on schedule?" or "Are we delayed?" or "Can we speed it up?" or "Why is everybody taking three weeks off vacation?" and things like that. That really didn't happen too much.

The judges were pretty conscientious in getting things done, but it depends. Some of them were civil law and some were common law, and the civil law judges were used to

controlling things a lot more than a common law judge, which would say, "I'm in the hands of the parties and they have X number of witnesses so the other side has to have the same number." So things like that, and also selecting *ad litem* judges. I dealt with that. But being administrator and representative functions—yes, it's a different function.

Q2: Is there any reason that the president of a court has to be a judge? That couldn't be a separate position?

Johnson: Nobody every thought of that.

Q2: It does seem like there's independence issues.

Johnson: There are, but I think—on the U.S. Supreme Court, the chief justice does have some representation functions, and I don't know what he does in the judicial conference or things like that. He will make statements about salaries or terms and conditions of work, things like that. So did Meron. He would leave the budget details to the then vice president. [Fausto] Pocar was in charge of the budget, but would weigh in and deal with the prosecutor and so on with the various differences of view where your resources would go, so of course the prosecutor would say, "Why are you developing new chambers posts? What about my posts that I should get if we're going to get this amount of money?" I forget what the name of it is—a tripartite meeting with the registrar present and the prosecutor. I don't know if they still have that. Certainly they used to, and some

of those meetings were quite interesting between Carla [Del Ponte] and Ted, who were real characters. They were personalities.

Q2: [Laughs] Had their own personalities.

Johnson: Yes, and sometimes they were just best of friends, and other times, boy, did they go at it.

Q2: Brandeis has had a lot of contact with both Fausto Pocar and Ted Meron over the years from our judges institute. Pocar has been to every one of them, which is ten of them, and Ted has been to maybe five. He was just at one—we just held one in Malta. It's been interesting. Sometimes we have convened meetings for any presidents or vice presidents that are there, and I know it's the Sierra Leone court where they really felt like the president really had to go and beg for money around the world because they didn't have a budget, and that that was not a good position for the president of a court to be in. I guess the ad hocs really didn't—at least they had a guaranteed budget.

Johnson: Yes, they had the guaranteed budget. As you probably know, in the Sierra Leone case, Secretary-General Kofi Annan and Hans Corell pushed very strongly that you can't run a court with voluntary contributions, but they were overruled by your government and mine and major donors. They said, "Too bad. Just work it out." Then there were several subventions that the GA had to step in and give it money so they could finish Charles Taylor.

Q1: One of the main criticisms of the ad hocs is that they move too slow, or that they're inefficient and they cost too much. You were very intimately involved in the organization of specifically the ICTY. How do you consider those criticisms or respond to them?

Johnson: We certainly had no idea how large the thing would become. And you will see in Cassese's *Journal of International Criminal Justice*, or what's it called—

Q2: Right, I know what you're talking about.

Johnson: There was a ten-year anniversary issue, and in that there were reminiscences by Carla, there's Goldstone, and a lot of early people. I did a little piece on the beginning of the tribunal. Zacklin also wrote, but he was very strong against the inefficiency and ineffectiveness, and especially—

Q2: I remember when that came out.

Johnson: [Sighs] That was pretty rough. But he certainly has views on that point. I don't know what to compare it with. I don't know if you saw—there's a piece by David [Wippmann] that I don't know if you're aware of it.

Q2: I saw you reference that in an interview you had with the *Harvard Law Journal* who compared it to the Oklahoma—

Johnson: Right, and that was in the *American Journal of International Law*. He's currently the president of the University of Minnesota or dean of their law school—Wippmann. He was at Cornell at the time. It is a very good piece to try to say, well, it's not really as outlandish as you think. Bits and pieces of this tribunal are sited or placed in other parts of the federal government or the state government. You look at a court budget in the U.S. and it's apples and oranges compared to a UN court budget—in the UN it's like a mini judicial system.

But length—sure. The answer the prosecutor was always—"Well, these are hard crimes to prove. If you're talking about a crime against humanity, you're not talking about proving one rape, you're talking about widespread or systematic, so you need to have a bunch." Of course, they were criticized by that quite a bit. A number of people asked the prosecutor openly, publicly, "Why do you have eighty-three counts for Milošević?" Probably if you were a domestic prosecutor, you would say you use whatever you can to get him. Out of your three baskets, one was Vukovar in Croatia, one was Srebrenica, and the other was Kosovo, so you say, go for Kosovo, because that's in Serbia and you have a direct line of command. You didn't have to worry about the puppet regimes, so that might have been the easiest. And she would say, "What am I supposed to tell the victims of Srebrenica, the mothers of Srebrenica? That they don't have their day in court because I think I can do the other one easier?" So, no, it's the kitchen sink. That means it's longer.

Q2: That's such an interesting question because the whole idea of where victims come into this process—obviously the ICC has taken a different tack with their victims on representation. I know having heard ICTY judges at our judges institutes that they are really against that. They said, "We had victims. We called them witnesses. That's where our victims have their voice." There are other people who are very worried about the inequality of arms that the victims' representation acts as essentially a second prosecutor. I just wonder what your view is on that when you look at the ICC.

Johnson: I would tend to agree with that, but not from any observation, just instinctively. I'm just used to the prosecutor and the defense, and I'm wondering who are these people and why are they there when they would be witnesses for the prosecution anyway, I would think. Maybe it's a European thing, I don't know. There are big differences between civil and common, which was the most interesting thing working in the tribunal. Establishing it to some extent—because we had a number of European countries that wanted to put in things like *juge d'instruction* and trials in absentia.

Q2: Like at the Lebanon tribunal.

Johnson: Right, but we said no because even though—I mean, Fleischhauer was civil, but otherwise you had a Brit, an Israeli, a Liberian who was trained at Harvard, and two Americans, so you didn't have a lot of civil law input or background to inform drafting. It was like, no, we're not going to do trials in absentia because the way it works is if you do

eventually find the person, you're going to have to redo it anyway, so that makes no sense in terms of efficiency.

Q2: So what do you think about that at the Lebanon Tribunal?

Johnson: Well, because it was Lebanese law—prosecuting people for crimes under the laws of Lebanon. We tried to pull in crimes against humanity in the Lebanon [tribunal] to hook in the procedural law that the tribunals had developed. All of them included rights of the defendant and all of that good procedural law. But nobody bought crimes against humanity for Lebanon, even though technically we said it would work, because it says, "widespread or systematic." You don't need massive numbers for crimes against humanity because of the word "or." Often people say "and," but no, it is "or."

Q1: "Widespread or systematic."

Johnson: Yes, "or systematic." You could make a case of "systematic" if you cobbled together ten, twenty, thirty cases of terrorist bombings let's say in Lebanon with the same perpetrators, the same targets, the same modus operandi and so forth. All of that was explained and we tried to make the case, "Well, let's add crimes against humanity. That's one war crime to hook in all that procedural jurisprudence," but the P-5 said, "No, just forget it."

Q2: Is the pretrial judge at the Lebanon tribunal sort of a *juge d'instruction*, or not really?
They're just confirming the charges and things like that?

Johnson: Yes, it's a little bit more civil but it's not completely.

Q2: I know the guy who is the pretrial judge was a *juge d'instruction*.

Johnson: The Belgian?

Q2: Yes, the Belgian. Daniel, or whatever his name is. The guy with the ponytail who rides a motorcycle. Yes, he's lovely.

Johnson: Yes, I remember meeting him. He was good.

So there was that, but let me just tell you one more story about the ICTY creation, which you might find interesting. We did the statute but had had to ask for another ten days. We couldn't quite do it in sixty days. Then when it went to the Security Council, I personally thought—and I don't remember what the other people thought—that this is never really going to see the light of day; this will be—

Q2: Shot down.

Johnson: —haggled over. It will just be argued about and everybody will nitpick it for the next four or five years, and that's fine. That's their responsibility because they're fiddling with it. That's fine. The whole idea of the tribunal never came from the legal office. It wasn't the lawyers and the secretariat that thought of this thing, because probably first you'd say, "We're not going to propose it. Who would end up having to do it?" [Laughs] "We don't know anything about this."

In fact, as I said, Madeleine Albright and the French—I forget whether it was the foreign minister or the permanent rep. In any event, the report went before consultations, which were very private, as you know. In the consultations, one of the speakers—I don't remember, early on or in the middle—was someone whose name I won't mention because he's still with us and still has a pretty high position in an international organization. He was running for the ICJ [International Court of Justice] at the time and he was permanent representative of his country. Not a P-5, but rather a nonaligned country. He decided to show everybody what a great lawyer he was, so he went on and on and on picking apart in a good lawyer-like analysis the statute, and what needed to be changed, and this could be improved, and this couldn't. He went on and on and on and on. It was at that point, supposedly Madeleine Albright turned to the French and said, "We're never going to get out of this. We can't go down this road. We'll be here forever."

Even saying that this individual's comments might have been perfect or correct, or not perfect—because we had a lot of policy choices and we just flipped a coin and went this way and that way. In the end, it can go either way. It's not right or wrong. Every country

had its own instructions. The Americans had instructions too, so the question for them was, now what are we going to do? The P-5 decided—I'm not sure how much China was involved, but the Russians were on board at this stage—that we'll deviate from our instructions from making proposals for changes to making interpretative statements for the record, so then we have to adopt the thing as it is, warts and all, even though we don't like parts of it. Then we make statements in the Security Council that judges can draw on when they're interpreting the statute, and that's what they did.

So you have in the records of the Council when they adopted it, I think it was May 27, lots of statements in particular from the Americans and the Brits and the French—"This is how we interpret that" and "The judges should allow for plea bargains" and things like that. Of course, that was just one individual's—one country's statement, so for the judges, it was up to them. It wasn't the Council speaking. But that's how all of a sudden they adopted the thing untouched, and then it was like, "Uh oh." [Laughter] They didn't change it. For me it was like, "What?"

Q2: Certainly different from what happened with the ICC Rome Statute, which was haggled over for—

Johnson: Exactly. The interesting thing of those two tribunals is their primacy and their Chapter 7—a full Frankenstein running around terrorizing the community, as opposed to the other ones. Naomi Campbell didn't have to show up in the Sierra Leone tribunal; she had no legal obligation to do so. The only countries obligated by those tribunals decisions

are Sierra Leone, Cambodia and Lebanon. Nobody else is bound to follow them at all, as opposed to our two—the first two, which had power to bind all countries. It was very interesting.

Q2: How much did that rapid sort of acceptance of that have to do with international guilt about Yugoslavia and about Rwanda?

Johnson: There's been a lot of—well, at that time it wouldn't have been Rwanda because it was 1993.

Q2: Rwanda hadn't happened.

Johnson: I think it's probably in that Cassese journal where people addressed that. Certainly some of the political scientists or realists would say that this was the Americans and Albright trying to deflect pressure because the Americans at that time were not sending troops to Sarajevo at all. It was the Europeans that were there. When the Americans would get up and say, "Why isn't Akashi sending more air strikes or being tougher?" the Europeans would say, "You send your troops there and then you can talk." Some of them said that this was just a deflection to try to say, "The Americans at least are doing something, creating this tribunal."

[INTERRUPTION]

Q2: Can you just say that again? The statute—there were two violations?

Johnson: Afterwards we were told—on the side, of course—by the British legal advisor who later became legal advisor in London. He was sort of laughing and he said, "Do you realize that we just adopted two breaches of the charter on your recommendation?"

[Laughs] The first one was financial because it said that the tribunal will be—expenses will be covered by the regular budget of the organization, and we should—

Q2: Why was that a violation?

Johnson: Because the regular budget is different from the peacekeeping budget. This you would find in Fifth Committee documents. Resolutions are suddenly coming from the Fifth that the Security Council has no authority whatever with the budget. Some people have said that's the Achilles' heel, constitutionally. So in the Fifth Committee there were howls that, "How could the secretariat have proposed that the Security Council have any say whatever on the budgeting of this thing? That's only for the General Assembly." Of course, it wasn't very convincing for us to say, "We couldn't leave any blanks. We have to do it complete even though it's not for the Security Council to say anything on budgeting."

So it was said that this provision was unconstitutional, and the secretariat had proposed it. In GA resolutions you have a few paragraphs that say something like, "Expresses dismay or concern that the secretariat would recommend budgeting provisions contrary to the

role of the General Assembly and the budget under the Article 17". Then we had to prepare a note to the committee saying we didn't intend—obviously this was not any unconstitutional usurpation of the GA's authority, and this is just a recommendation to the General Assembly of course. So that was caught.

We probably would have had no problem if we had used the expression that was later put into Rwanda, which says something like "These are expenses of the organization." We didn't say from what budget, because you have to know how the budget works and to realize that that was not a good thing to do because the regular budget has a particular assessment scheme. The U.S. at that time was paying twenty-five percent. Then you have a peacekeeping budget, which was very different because it's peacekeeping, mostly out of the Security Council. The P-5 and the major donors are socked more, okay? So the U.S. pays thirty-three and a third percent at that time for a peacekeeping budget, as opposed to twenty-five percent. When it got to the Fifth, the major donors said, "That's fine. Twenty-five percent, for example. Regular budget." The nonaligned said, "No, no, no, you're claiming it's an enforcement action. You're claiming it's just like a peacekeeping operation"—because it's a maintenance of peace issue and it's a threat to international peace and security—"so it should come under the peacekeeping allocation, and the U.S. has to pay thirty-three and a third percent."

That went on for about two years, arguing back and forth, and the tribunal limped along on minor budgets, so what do policy makers do? You cut the baby in half. They established an entire third budget system where it's like twenty-eight percent, the

difference between twenty-five and thirty-three and a third. That was what the U.S. assessment was for what was then called the tribunal budget, which is for ICTY and ICTR. So that we overstepped and didn't know we were doing that at the time. The other one—

Q2: The other violation?

Johnson: The other violation was—and this is somewhat interesting. Fleischhauer was very keen on this, to allow observer states—non-member states that have observer missions in New York—to vote for the judges.

Q2: What would have been the observer states at that time?

Johnson: Switzerland, mainly. Switzerland and the Holy See. Now he—outwardly in the report I think it says, because they're active in New York so they should be part of the process. It mirrors what is in the statute of the ICJ—or what's in the charter or the statute, I forget which—on election of judges to the International Court of Justice, because there they allow non-member states who were parties to the statute of the ICJ to vote for judges. That's where the Swiss and Nauru, before they became members, would sit in the floor and they would vote.

The real reason was the ICRC [International Committee of the Red Cross] and the fact that the Swiss were not members, so the fear was that the prosecutor or the court would

want to talk to ICRC delegates who are in the field who might have seen a lot of things and might have heard a lot of things. The Swiss might say, "We're not a member. We're not bound by Chapter 7. Go away." He was worried that the Swiss would somehow try to get out of their obligations under this very strong regime where judges could order people to be flown to The Hague. He wanted to somehow engage them, and he thought, maybe if they get the vote like they do in the ICJ they will feel part of the process. They will be voting for judges.

Q2: Was there any thought about the Swiss when Carla Del Ponte was—?

Johnson: No.

Q2: She's Swiss, right?

Johnson: Yes.

Q2: Swiss-Italian, yes.

John: No, nobody thought anything about it, but you realize that for ICJ, all of that is in the charter or in the statute, which is part of the charter. Otherwise in the charter it says members of the organization have one vote in the General Assembly, and nobody else, so why are these other people voting? Nobody paid any attention, and we had more trouble getting UNHCR staff to cooperate. Mrs. [Sadako] Ogata, who was then the high

commissioner for refugees, did not want her staff to talk to the tribunal people because all her contacts in the field would have dried up. Half of her operations—[Snaps fingers].

The Swiss right away said, "We're bound. We have no trouble with Chapter 7."

I just had lunch with the ICRC observer here, who came to speak to students, and he said the ICRC let it be known that none of their people will talk to tribunal people ever, it is all confidential, but the prosecutor never made a big deal out of it. The bigger deal was UN staff who had confidential information from the field. Then it was agreed that they would not testify, nor would their confidential documents be used in evidence, but they would talk to and documents shown to the prosecutor only—not to judges—to the prosecutor only who would use it as lead evidence. This is in the rules of procedure. He could use that information to go out and find somebody who could testify.

Q2: Would it have to be disclosed to the defense?

Johnson: No, because the UN document would not be used and the UN oral information would not be used.

Q2: Was sort of justifying indictments and things?

Johnson: Yes, they were giving information—"I can't tell you what I saw, but other people that were there also that maybe they can talk, so go talk to Mr. X, Mrs. Y." They'll give the context and say, "We can't talk about it because we promised confidentiality, but

maybe there are other people that you might want to see." That's what was called lead—he gives them lead information that will lead to evidence. But UNHCR confidential documents were never put in. That's [Laughs] where this whole thing about trying to hook the Swiss in—it was sort of quiet; nobody said much. When the Holy See attends the voting session, they say they don't vote because they don't want to be involved in—they have a particular position so they just announce that they're not voting, but they're seated with the H's. The Swiss were there and they always voted.

Now it did come up a couple of months ago when you had the last election, because who's sitting there next to Palau? Palestine. Mm-hmm. Observer state. Palestine was voting in the ICTY or ICTR election. There was, "Wait a minute. What are they doing here?" And they went back [Laughs] to revisit the statute, but after twenty-seven years I don't think anybody's going to turn it over. Anyway, that's a side little issue, but it's funny.

Q2: Larry, if someone had told you in 1993 that the ICTY would still be operating in 2015, what would you have said?

Johnson: I would have said, "How is that possible? Why they couldn't finish their job?" Or I might have been the typical jaded staff member to say, "What are these people doing, just keeping their jobs?" I mean, what are they doing? They're not doing quick, efficient work. But I don't think that—

Q2: You think there's any truth to that?

Johnson: Well, there's got to be some truth, sure.

Q2: Just like an inertia kind of—

Johnson: Yes, and I think some of the other tribunals had more criticism of that—Sierra Leone—that they were taking a lot more time than say ICTY. I think ICTY has been run pretty well, not only under Meron but I think all of their presidents, once the focus was on the completion strategy—which came from the tribunal itself, not from the Council, so people forget that, or at least used to forget that. Once they realized, whoof, this is very expensive and it's taking a long time. We better wind this thing up ourselves before the Council does it for us. There'd been some articles about that. Daryl Mundis wrote an article and I did a counter-article in the *American Journal [of International Law]* on the completion strategy being a shield for political pressure on a judicial institution. He was the prosecutor; now he's registrar of Lebanon, maybe.

Q2: Daryl Mundis—is that right? Is he the registrar?

Johnson: I think so. Herman von Hebel went to ICC and then Daryl moved up.

Q2: Yes, I think that's right.

Johnson: Anyway, Daryl was OTP [Office of the Prosecutor] at the time. I wrote the defense that this is not political pressure and so on and so forth. I didn't really see any particular political pressure. I think before I came, defense counsel noticed that the appeals chamber began deciding facts rather than remanding for the trial level to look again at the facts, which you do in this country, and which they maybe did at ICTY in the early years when they had time. Rather than sending it back down to the trial chamber to look at the facts again, the appeals chamber just *de novo* looked at the facts—determined the facts on appeal. There are maybe some articles out about that this is because of the pressure of time.

Q2: Some of the judges at our institutes have said that they feel that there are some due process challenges there and the pressure they're feeling. I think they feel very strongly that they're being leaned on. What is your take over all of the judges who served at the ICTY?

Johnson: [Laughs] Uh, I don't know. That's a loaded question.

Q2: You don't have to say any names. I'm just curious.

Q1: You can take out any part of the transcript you'd like.

Q2: You can take out anything, yes.

Johnson: They tried—it's interesting. You should talk to somebody about how the new ICC procedure works, because you're aware of—

Q2: You mean the election?

Johnson: Yes, because—

Q2: There is a lot of constraints on—

Johnson: Right. The problem of judges is seen as a problem of elections and the selection as it were. If you have the elections like you do for ICTY, ICTR, and ICJ, then it becomes another UN election circus.

Q2: The horse-trading thing.

Johnson: Horse-trading, yes. One judge who was a sitting judge in his country—criminal, local, not international—was in the receiving line that his country was offering for him at a reception and somebody came up to him and said, "Maybe I'll vote for you, but is your country going to vote for my country for ECOSOC [United Nations Economic and Social Council]?" And he said, "What's ECOSOC?" [Laughs] He had no idea. He was in a totally different world. There's that problem that the ICC tried to handle a little bit by having categories of I think gender and then mix of diplomat, academic, judicial. They had all kinds of different features.

Q2: Yes. Now I think they really don't want to have too many diplomats anymore.

Johnson: Right. That's the major complaint—why diplomats? What do they know about international criminal law? You're not in diplomacy; you're supposed to be drafting judgments. Some people say you need more diplomacy in order to get a majority, but in academics, if you get the right academics and the knowledge of international law, it works.

Q2: Well, you look at someone like Ted Meron—he's a great legal thinker.

Johnson: Right.

Q2: I'm sure there's people who have courtroom experience, of course. On appeals chamber they have a very different—

Johnson: But that's it, you see. He was very fortunate, I think. He might well have been a terrific trial chamber judge, but he lacked that experience. That would have been a challenge for him and other academics who have never been a trial judge to be put in charge of a trial, because it's a totally different thing—quite a different thing than being at the appellate level where you don't have many appearances; you don't have witnesses as such; you don't have scheduling witnesses; you don't have lots of yelling and screaming and motions and this, that and the other thing.

Q2: The Milošević trial was certainly an example.

Johnson: That was bad. There's the trial—and the appellate level is more analytical of the first judgment, so more academic level. I think academics who are experts in international criminal law and IHL are more suited for the appellate.

Q2: It's kind of amazing when you look at the ICTR that the president was also a trial judge.

Johnson: Yes.

Q2: Erik Møse is someone that we have—

Johnson: Oh, he's terrific.

Q2: Yes, but I mean it's just the man worked twenty-two hours a day. He would sit for hours on a trial every day and then do all the stuff for a president.

Johnson: Yes, he was amazing.

Q2: I just think you have to have a tremendous amount of commitment to be able to take that on.

Johnson: We did have an issue—it's interesting. There's a disconnect—there's something in the rules of procedure that I think both ICTR and ICTY have, and then all the others added it too, that the registrar—you have to look for it—is not under the control but it's under the supervision of the president of the tribunal. That is not in the statute. It's in Lebanon statute, unfortunately. It got put in there. We put it in there because of our experience in Sierra Leone, because there was a registrar that created quite a lot of difficulties. We used the president, and the president and the legal office were of one mind about, "We have to deal with this problem." So he took the leadership role—the then president of Sierra Leone—and eventually the registrar's contract was not renewed.

That was then put into the Lebanon statute, but it created a monster in Sierra Leone when that president asserted that authority over the registrar. The registrar has to be independent because you can't have the president taking up different roles, saying, "In the next budget I want all the money to go to chambers." Of course, they wouldn't be that absurd, but still. A prosecutor is going to wonder, wait a minute now. I don't want the registrar being under the power and control of the president. This is prejudicing my job. That continues to create some friction because [Laughs] all of the judges have put it in their rules, so registrars have had to handle that. Herman has had to deal with it—and both Sierra Leone and Lebanon; now he's got ICC too—to what extent judges can pressure or push the registrar around there, I don't know.

Q1: I have a question, going back a little bit to when you were setting up the statutes. How much did Nuremberg factor into what you were doing? The legacy of those courts—?

Johnson: Oh, yes, it was basic, and so I don't know whether—

Q1: Because it's the first one since Nuremberg, so—

Johnson: Right. Yes, in some sense the Frankenstein body parts came from there, but I'm not sure all the substantive law. Some of it came from other sources from that same time period—Allied Control Council [Law] No. 10. For the issue of rape under crimes against humanity, we had a good number of women's NGOs [nongovernmental organizations], and human rights people came because rape was not in Nuremberg. But it was in Control Council No. 10, which was adopted a little later for all the other Allied courts in Germany at the time. So in fact everybody was making this big deal about, you have to include rape and this is going to be the biggest thing. Actually, no, it was already there. It just wasn't in Nuremberg, but it was in the immediate follow-up. I think when we indicated we have now added this—I don't remember what we said but I'm sure we must have put, "Not only because of contemporary developments, etc., and the reality and the crimes that had been in the field," but also because it was there basically from 1945, 1946 anyway.

Q2: I know we have to finish up here, but just a final question I guess—when you look at the ICTY, what do you think is the most important legacy that's going to come out of this tribunal?

Johnson: I can't think of anything particularly profound other than the obvious, which is people that have committed terrible crimes didn't get away with it. When people criticize Milošević—they took too long, they didn't convict him—yes, but he didn't die in his villa in Belgrade, or he didn't die in a casino in Scheveningen in The Hague; he died in jail. He was taken off the streets. That's a big deal. These people were taken off the streets and they had their day in court, and whether you call it victor's justice, that's a whole other argument. It has had some effect on other killers or atrocity committers, like the LRA [Lord's Resistance Army] leader. [Joseph] Kony supposedly wanted a deal with the Uganda government that he'd come in and be a good boy scout as long as they gave him immunity from going to The Hague. No. They don't get to go to Miami anymore. The Haitian junta people—remember those days, just to get them out you'll agree to anything? What's his name went to Saudi Arabia—the Uganda fellow.

Q2: Oh, Idi Amin.

Johnson: Didn't he go to Saudi Arabia or somewhere?

Q2: Yemen or something like that.

Johnson: Yes, somewhere like that, but he was not hiding somewhere, and he wasn't in a jail. So I think it was an amazing first step towards international criminal justice, which was totally unexpected. If anybody had said that would happen in 1992, you would have thought, well, you're crazy. That's just academic wishful thinking. But in fact the stars aligned for some reason and the next year, boom, it started. It's a great satisfaction in that sense, with all of its warts and all of its troubles and difficulties that it's working. We'll see how the ICC does, but the genie's out of the bottle.

Q1: Alright, should we close up? If there's anything else you'd like to say in closing—?

Johnson: No, I don't think so. I've exhausted your patience.

Q1: [Laughs] Okay. Well, thanks very much.

Johnson: Sure. My pleasure.

Q2: Yes, that was really interesting to have your insights and your stories. I hope you do write your memoirs as you—

Johnson: Thank you, yes. [Laughs]

Q2: —if you're going to do something like that.

Johnson: Thank you. I'll get that box of papers out, and in case—I don't know whether you're keeping archives or not, or I don't know if I give them to the UN, but the UN—you don't know what's going to happen to them these days.

Q2: Oh, that's an interesting idea. I never even thought—

Johnson: Because you're talking about oral archives. I don't know what you want to do, if you want—

Q2: But that's an interesting thing.

Q1: That could be substantive materials for anybody—

Q2: That's a really very interesting idea for us to explore with the Brandeis.

Q1: That would be nice, yes.

Johnson: Just to see if you want to rifle through all those papers. I'm afraid if I start looking at it I'll just be there for days, remembering stuff.

Q1: Okay, I'll shut this off now.

Johnson: Great.

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