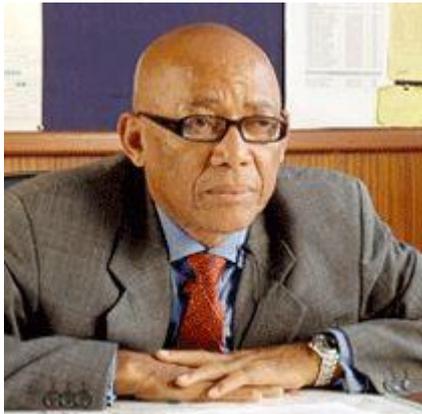




Voices from the Rwanda Tribunal

Official Transcript: Emile Short (Part 9 of 12)



Role:	Judge
Country of Origin:	Ghana
Interview Date:	21 October 2008
Location:	Arusha, Tanzania
Interviewer:	Robert Utter Donald J Horowitz
Videographer:	Max Andrews Nell Carden Grey
Interpreter:	None

Interview Summary

Emile Short discusses the importance of creating an accurate historical record of events in Rwanda. He reflects on the ICTR's contributions to generating a rich body of jurisprudence that future tribunals can draw upon. Short remarks that the ad hoc tribunals have not provided as many direct avenues to reconciliation as might have been provided by other mechanisms. That said he recognizes that reconciliation is a long and complex process of which justice is an important part, particularly for victims.

The transcript of Part 9 begins on the following page.

Part 9

- 00:00 **Donald J Horowitz: You said to – in the first part of the interview that one of the things you were pleased about, if I can state that, is that you took part in some landmark decisions that enriched the jurisprudence, international law jurisprudence.**
- 00:19 **DJH: And I'm interested in hearing from you some description of one or more of those that I, I gather are now public records. But again, why you're pleased with those or why you feel good about participating in those. Perhaps you could point out one or two examples.**
- 00:37 Well, I took part in the first case in this tribunal which had to determine whether it was proper for the prosecution to prepare their witnesses before they testify. And we held that there was nothing wrong with the process of preparing witnesses, provided they don't coach them, you see. We drew a distinction between coaching witnesses and preparing them to testify. That decision was affirmed on appeal.
- 01:36 But the interesting part of this is that the ICC has given a decision contrary to ours, you see. And – but I think that our decision has been upheld by our sister tribunal, but there are decisions also by the ICTY, our sister tribunal, which has adopted our approach and our position.
- 02:07 And so that, that is, to my mind, is a very important landmark, you know, decision as to, as to the limits to which counsel, pr-, especially prosecuting counsel, can go in preparing a witness to testify, you know.
- 02:29 One of the – the first case I also did . . .
- 02:32 **DJH: May, may I st- . . .**
- 02:33 Yes, yeah . . .
- 02:33 **DJH: . . . before you – I want you to go on, but I . . .**
- 02:35 Yes.
- 02:36 **DJH: . . . when you say ICTY again, I, I need to ask you, that's the International Criminal Tribunal for Yugoslavia?**
- 02:42 Yes, for Yugoslavia.
- 02:43 **DJH: And, and that's the other ad hoc tribunal? Yeah.**
- 02:45 Yes, tribunal, yeah. Our sister tribunal, yeah.
- 02:46 **DJH: Yes, right, and it was, it was these two tribunals, the ICTY and the ICTR, which you feel has influenced the for-, the statute of the formation of ICC . . .**
- 02:59 Yes . . .

- 03:00 DJH: . . . in, in a better way, I mean. Yeah, okay.**
- 03:01 Yes. I think so, I think so.
- 03:03 DJH: I wanted to be clear that that was your view and I think that comes across. Did you in this case that you just described – and by you I mean the court . . .**
- 03:13 Yes, yes.
- 03:15 DJH: . . . provide some definitions or guidelines as to what's coaching and what's preparing?**
- 03:20 Yes I did. I think we did. We did provide guidelines. I mean, for example, if – you know, we're dealing with events that took place 14 years ago, witnesses may have made statements so long ago, you need to remind them of what they had, statements they had made and if there're, you know, contradictions give them an opportunity to, to see.
- 04:03 Telling them about the whole process, the whole court process and preparing them for the court process and getting them to know the modalities of the judicial process. All these are matters which we thought were harmless.
- 04:18 But coaching the witness and trying to tell them what to say and what not to say, or trying to change their testimony, of course that we, we, we decided was unacceptable, you know.
- 04:32 In other words, coaching. You know, trying to, to, to mold the testimony of a witness. Yeah. I think that's where we drew the limit, you know.
- 04:46 DJH: Alright, I think we understand that and, and, and your reasons for feeling good about that.**
- 04:52 I think . . .
- 04:52 DJH: You were trying to talk about another case.**
- 04:54 Yeah, well I think, the other case I believe also was – the first case I did here was a case which involved several counts of rape. And we had occasion to discuss the elements of rape, and the, the legal position is still unclear. The first case that discussed the definition of rape in this tribunal was the Akayesu case; that's a very landmark case and gave a very broad definition of rape.
- 05:44 Subsequent cases gave a much narrower definition; a more traditional definition which included sexual penetration and so on. And so we had an opportunity in that case to look at the . . .
- 06:00 DJH: In which case?**
- 06:01 In the case I'm, I was involved in which was called the Muhimana . . .

- 06:06 DJH: Muhimana?**
- 06:07 . . . Muhimana case.
- 06:08 DJH: Okay.**
- 06:09 Yeah. And I think we were more in favor of the broader definition which was developed in the Akayesu case. And so that, that debate of course still goes on because, you know, there were one or two appeal judgment cases which had approved of the narrower definition.
- 06:45 So that, that was a very interesting case and I, I think the debate on that issue is still quite alive but I think we had the opportunity to express our views about this important issue.
- 07:01 DJH: Let me, if I can – I want to make sure I understand and be clear, there’s (___), rape as the crime itself and then rape as a cr-, as a part or as a, a crime against humanity . . .**
- 07:14 A crime against humanity, yeah.
- 07:16 DJH: . . . and was the definitional discussion about rape as a, as par-, as a crime against humanity or rape itself, or both?**
- 07:24 Rape as a crime against humanity.
- 07:26 DJH: Okay.**
- 07:27 But I’m, I was talking about the element of the crime.
- 07:29 DJH: Yes. Of the crime against humanity? Rape as a . . . yeah.**
- 07:32 Yes. Yes.
- 07:33 DJH: And, but the, the element of, the crime of rape itself, that, was that part of that discussion too? In other words, I presume somebody could be, in the same case perhaps, ac-, accused of rape and then a crime against humanity of which rape was the el-, was an or the element.**
- 07:55 Well, I mean the crimes we deal with here are genocide, crimes against humanity, war crimes, so when we’re talking about rape, we’re talking about rape as a crime against humanity, you know, which is sort-of rape committed in a consistent and widespread manner. You know, so that’s the context in which we, we’re talking about rape.
- 08:17 DJH: Right. The reason I ask this is obviously people will be looking at the . . .**
- 08:20 Yeah, okay.
- 08:21 DJH: . . . this tape, trying to understand it.**

- 08:22 Yeah, yes.
- 08:24 DJH: Any other decisions that you would like to bring to our attention which you participated in?**
- 08:31 There are quite a few, you know, interlocutory decisions I can't, I can't put my finger on, on some of them but I could – if, if I had the time, I would provide you with some of those decisions here.
- 08:50 DJH: You, you're, you're invited to do that at a later point . . .**
- 08:52 Okay. Alright, yeah.
- 08:53 DJH: . . . and we would, we would be happy to have that.**
- 08:55 Alright.
- 08:55 DJH: I had read something about a, a discussion in a case – and a case – involving the difference between incitement and aiding and abetting or s-, or am I correct in that, or, or . . . and, and that you had written about i-, in, in some way and I was trying to understand, for us and for legal scholars, that issue. Do you know whi-, which I'm referring to?**
- 09:25 I think I do. I think that's in the Karemera case.
- 09:29 DJH: I think that's correct, yeah.**
- 09:33 I think . . .
- 09:36 DJH: Is it a crime in itself or is it an element to the crime . . . yes.**
- 09:38 Yeah I think that was the discussion. Well, I, I, I can't go into the details of that now. I'll have to look at it and then talk about it at a later time, yeah.
- 09:51 DJH: Okay.**
- 09:51 But I, I do recall that I did write a dissenting opinion on that issue.