



Voices from the Rwanda Tribunal

Official Transcript: Alex Obote Odora (Part 4 of 9)



Role:	Chief of Appeals
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Interviewers:	Lisa P. Nathan John McKay
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Interview Summary

Alex Obote Odora speaks about the responsibilities of African states in creating peace and stability in the great lakes region and across Africa. He talks about the importance of education in upholding human rights and the necessity for justice capacity building. Odora also offers his opinion on the quality of defense counsel, the implications of maintaining the highest international standards, and the need to delink criminal prosecutions from the broader goals of reconciliation.

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Part 4

- 00:00 **John McKay: Good morning and thank you. I'm John McKay, professor at Seattle University Law School and former United States Attorney and Federal Prosecutor in the United States and it's my privilege to follow up on my colleague, Lisa Nathan.**
- 00:17 **JM: As, as Lisa explained, these interviews are for very general consumption and not just lawyers. But I, I can't help but ask you a few questions about, about the law because you, of course, are the Chief of Appeals here and there are some fascinating new legal theories and international law that have come now from this, from this tribunal.**
- 00:40 **JM: And I'm wondering if you can, in general terms to, to, to people everywhere, not just to lawyers, tell us what you think the significance is of some of the, the new theories that, that have come out of this tribunal. For example, in media law and, and in genocide itself as a crime, rape as genocide – can you, we're interested in your, your perspective on the significance of these developments.**
- 01:09 Let me start with one area that is really very significant but has generally been neglected even in legal discourse – that is the mode of liability which we refer to here as Joint Criminal Enterprise. And Joint Criminal Enterprise is very unpopular with the defense. They actually call it “Just convict everybody” for JCE, Joint Criminal Enterprise.
- 01:38 What that presupposes is that where two or more people come together to plan a crime, first under Joint Criminal, Joint Criminal Enterprise Category 1, they will all be guilty if the Prosecut-, Prosecutor can prove shared intent.
- 02:03 Under JCE 2, what we call the “concentration camp example,” these individuals can be responsible if one of them or any one of them who – any person who is not in that group was, for example, in charge of a camp where a lot of people were mistreated, tortured, abused, they would be held responsible.
- 02:33 And under JCE 3, they would be criminally responsible for the foreseeable consequences of their act. Now, we have – he attended to use JCE 3. I give one example. Where a person, two or more person agree to commit genocide and in the process of committing gen-, genocide, a person who is not one of them, in the process of committing genocide goes and commits rape, this individual will also be liable for that rape.
- 03:15 And the defense are uncomfortable with these because they've tried to compare this with the vicarious liability in civil law which is really not that, so an attempt has been made. This theory started developing from Tadić, that came on forward.
- 03:31 So this is, I think, is a very, a very important development in international criminal justice system, generally, by creating this mode of liability which is not expressly provided for in Article 6 of the ICTR statute and Article 7 of the ICTY. It is not express provided for but the judges read it in the, in the article. So that's, this is an important

development and if it is, it is used at the national level, it can assist the prosecution very much.

- 04:02 And when it comes to the issue of rape, for example, in the context of genocide, that has been a very good development starting with the Akayesu, but we should also recognize that there has been some drawback with later legislation.
- 04:26 So that while Akayesu was very, very good, later decisions are chipping off aspect of that and I think the prosecution, the, the prosecutions and legal commentators should actually be vigilant and constantly review the jurisprudence that is developing. People have limited themselves to Akayesu. They have not look at the current progressive development, which is reducing the importance of Akayesu decision on rape.
- 04:56 Another important thing we've had is in relation to war crimes. That is the establishment of a nexus. Many of the acquittals that we have had in the ICTR here on war crimes had been on the ground that the prosecution did not prove the existence of a nexus. That is the facts with, with, with which the accused is alleged to have committed and the armed conflict.
- 05:29 The Rwandan situation was that while the Rwandan Armed Forces and the RPF were fighting against each other, the evidence show that the RPF and the FAR really did not directly engage themselves very much. The killing was basically the killing of the civilians, which was part of genocide or crimes against humanity.
- 05:51 Now, the responsibility of the Prosecutor was to prove that those killings were in fact connected with armed conflict if they want to get a conviction for armed conflict. Until the Rutaganda judgment, we had not been very successful, but I think now that has – since then, a series of decisions have come that have clearly expanded on the law and explained the law very well.
- 06:19 And, another part which has also been very important is the concept of commission. The appeals chamber have now interpreted the law to include the, the commission by the instrumentality of others. In other words, the accused need not have committed a crime personally, but he can commit that crime through the instrumentality of others.
- 06:46 That is a little bit of an expansion of the, the, the concept of commission. Some individuals are uncomfortable with it. Almost on every appeal that we get, there is a ground dealing with commission that fortunately are, if I can put it that way, we have been able to successfully, you know, put our point of view which the appeals chamber has appreciated and that is currently the law. And if these were used at a national level, I think it would really assist prosecution very much.
- 07:21 JM: Do you expect that some, some countries that do take transfer of cases may possibly adopt those theories within those countries?**
- 07:30 That is my hope. My hope is that when other countries are dealing with cases where the crimes are committed in Rwanda, they should be able to look at the ICTR jurisprudence and treat it as persuasive, as useful. I, I do not want to, to say that it is, i-

i-, it is binding on them as such, but my personal position is that under Article 28 of the ICTR statute, that should actually be binding.

08:07 Because when a decision is taken by Security Council under Chapter 7, it is a binding decision. And we are working under Chapter 7 of the UN Charter which means that our decision should in effect be binding.

08:20 But as to whether different jurisdictions will take that reading and today's binding is a different matter. Some courts are, are not very keen to be seen to be – to international law being imposed on their, on their jurisprudence, the national court. So that may be some areas of further discourse.

08:41 JM: This will become more important as we see the transfer of some remaining cases to individual countries who are willing to prosecute cases from the genocide.

08:52 Actually, even before that, you should know that we have had a, a series of, of, of cooperation with Canada for example, with Belgium for example, where, and, and with Britain, where they've got these other cases, so that when we provide them with materials we also, in our covering note we indicate, you know, the legal basis upon which we have done this or done the other. And of course they are free to accept or to reject it but most of the time they treat as persuasive and over time, I think it will be accepted.