

Summer 2013

## A Janus Look at International Criminal Justice

Diane Marie Amann

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njihr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Diane Marie Amann, *A Janus Look at International Criminal Justice*, 11 Nw. J. INT'L HUM. RTS. 5 (2013).  
<http://scholarlycommons.law.northwestern.edu/njihr/vol11/iss3/2>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Human Rights by an authorized administrator of Northwestern University School of Law Scholarly Commons.

# A Janus Look at International Criminal Justice

Diane Marie Amann\*

## I. INTRODUCTION

¶1 Among the figures known to ancient Rome was Janus, a deity able to see both the past and the future in a single two-sided gaze. Janus introduced civil law to Rome, it is said, and “was the guardian of all entrances, thresholds, beginnings, and endings.”<sup>1</sup> It seems fitting to invoke Janus for this examination of 2011, a year when global criminal justice poised on a threshold. The year began with plans to vet candidates and ended with the election of a new Prosecutor and new judges charged with enforcing the Rome Statute during the second decade of the International Criminal Court.<sup>2</sup> It was the twentieth year since the U.N. Security Council became seized of the conflict in the Balkans<sup>3</sup>—an event that would lead the Council first to warn combatants of potential prosecution,<sup>4</sup> and then to establish a mechanism for such prosecutions, the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>5</sup> The International Criminal Tribunal for

---

\* Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law. The article builds on my interventions at the 2011 Atrocity Crimes Litigation Year-in-Review Conference held on March 14, 2012, at the Special Tribunal for Lebanon in Leidschendam, the Netherlands, and sponsored by Northwestern University School of Law, from which, I am honored to note, I received my J.D. degree. With thanks to David Scheffer, Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern Law, for inviting me to take part, and also to the Northwestern Law students who sifted through tribunal developments and provided summaries of their findings so that panelists, including me, might better prepare for the conference. Thanks as well to Georgia Law students Benjamin Brighton, Amanda Brown, Sarah A. Hassan, and Madhi Abdur-Rahman for research assistance on this article, which is current through November 2012.

<sup>1</sup> Kathleen Jenks, *Janus, in 6 GODS, GODDESSES, AND MYTHOLOGY* 770, 774 (C. Scott Littleton ed., 2005).

<sup>2</sup> See ICC, Press Release, Search Committee for the Position of ICC Prosecutor Takes Up Work, ICC-ASP-20110207-PR626 (Feb. 8, 2011), [http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2011\)/search%20committee%20for%20the%20position%20of%20icc%20prosecutor%20takes%20up%20work](http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2011)/search%20committee%20for%20the%20position%20of%20icc%20prosecutor%20takes%20up%20work) (describing work of committee composed of a former British Foreign Office Legal Adviser as well as Permanent Representatives to the United Nations from South Africa, Jordan, Slovakia, and Mexico); INDEP. PANEL ON ICC JUDICIAL ELECTIONS, REPORT ON INTERNATIONAL CRIMINAL COURT JUDICIAL NOMINATIONS (2011), <http://www.iccindependentpanel.org/sites/default/files/Independent%20Panel%20on%20ICC%20Judicial%20Elections%20-%20Report%2026%20October%202011.pdf> (detailing examination of candidates for ICC election, by panel comprising five international jurists); see also *infra* text accompanying notes 147–60.

<sup>3</sup> S.C. Res. 713, ¶ 8, U.N. Doc. S/RES/713 (Sept. 25, 1991).

<sup>4</sup> S.C. Res. 764, ¶ 10, U.N. Doc. S/RES/764 (July 13, 1992) (stating “that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches”). On the significance of this resolution, see James C. O’Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT’L L. 639, 640–41 (1993).

<sup>5</sup> See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (adopting ICTY statute); S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (authorizing establishment of tribunal). See also DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 19–27 (2012) (describing these developments). Released in the last weeks of 2011 notwithstanding its official year of publication, this memoir by the first U.S. Ambassador-at-Large for War Crimes Issues spans the period in which most tribunals were founded, and so holds a

Rwanda (ICTR), meanwhile, marked fifteen years since the first accused appeared in an Arusha courtroom.<sup>6</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC) neared fifteen years since two co-prime ministers sought U.N. help in prosecuting some leaders of the Khmer Rouge,<sup>7</sup> while the Special Court for Sierra Leone approached ten years since the United Nations and Sierra Leone agreed on that court's establishment.<sup>8</sup> And in 2011 the Security Council resolution that set in motion the newest *ad hoc* forum for criminal adjudication, the Special Tribunal for Lebanon, had its fifth anniversary.<sup>9</sup> Each tribunal thus glanced backwards even as it continued to move ahead.

¶2 For the Sierra Leone, Rwanda, and Yugoslavia tribunals the future seemed short, as plans proceeded for so-called residual mechanisms that would carry on after all trials concluded.<sup>10</sup> Yet even these initial post-Cold War forums still looked in 2011 toward major cases. Pending at ICTY throughout 2011 were proceedings against the last-captured defendants, Radovan Karadžić, Goran Hadžić, and Ratko Mladić.<sup>11</sup> Arrested on the same mid-2011 day as Mladić was militia leader Bernard Munyagishari, a fugitive long wanted by the ICTR; indicative of that tribunal's winding-up, however, by year's end he seemed destined for trial in a Rwandan national court.<sup>12</sup> In 2011 the Special Court for Sierra Leone awaited verdict in its most significant trial, of former Liberian President Charles Taylor.<sup>13</sup> Another tribunal, the ECCC, remained mired in the politics of Cambodia's awful past even as one new trial went forward.<sup>14</sup> The Lebanon tribunal honored the memory of its departed President, Antonio Cassese, an international law giant whose last opinion set the stage for an expected *in absentia* terrorism trial.<sup>15</sup> And at the lone criminal forum intended as a permanent institution, actions of states and the prosecutor swelled the ICC docket even as the ICC's first trial, concluded in August 2011, remained under advisement.<sup>16</sup>

---

place in international criminal justice literature akin to that of DEAN ACHESON, *PRESENT AT THE CREATION* (1969), in foreign policy literature.

<sup>6</sup> *Rwanda Genocide Trial Hears First 2 Suspects*, N.Y. TIMES, May 31, 1996, at 7, available at <http://www.nytimes.com/1996/05/31/world/rwanda-genocide-trial-hears-first-2-suspects.html> (reporting on entry of not-guilty pleas by Jean-Paul Akayesu and Georges Rutaganda). Both men eventually would be sentenced to life following conviction for genocide and other crimes. Rutaganda died in prison in 2010, see *Rutaganda, Georges*, HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/index.php?id=9582> (last visited May 24, 2012). At this writing Akayesu—the first person ever to be convicted of genocide after an international trial, see Diane Marie Amann, *International Decision: Prosecutor v. Akayesu*, 93 AM. J. INT'L L. 195 (1999)—continues to serve his sentence.

<sup>7</sup> See *infra* note 118 and accompanying text.

<sup>8</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/246, appended to Letter Dated March 6, 2002 from the Secretary-General Addressed to the President of the Security Council, app. II (2002).

<sup>9</sup> S.C. Res. 1664, ¶ 1, U.N. Doc. S/RES/1664 (Mar. 29, 2006) (asking the U.N. Secretary-General to negotiate an agreement with Lebanon for a tribunal to investigate the 2005 assassination of that country's former prime minister).

<sup>10</sup> See *infra* text accompanying notes 110–17.

<sup>11</sup> See *infra* text accompanying notes 65–72.

<sup>12</sup> See *infra* text accompanying notes 94–101.

<sup>13</sup> See *infra* text accompanying notes 102–06.

<sup>14</sup> See *infra* text accompanying notes 118–31.

<sup>15</sup> See *infra* text accompanying notes 132–44.

<sup>16</sup> See *infra* text accompanying notes 25–37, 147–60.

¶3 This intricate description is, nevertheless, a simplified account. It omits other contemporary efforts to advance global justice,<sup>17</sup> for example: inquiries by truth commissions; the work of nongovernmental organizations; lawsuits like those brought in the United States under its Alien Tort Statute and in South Africa under its ICC Act; and redress efforts not linked to criminal tribunals.<sup>18</sup> Also omitted is the International Court of Justice (ICJ), the U.N. organ that in 2011 marked its sixty-fifth year of resolving disputes between states.<sup>19</sup> Increasingly, the ICJ has been called upon to determine state responsibility in matters implicating international criminal law.<sup>20</sup> Pending in 2011, for instance, were matters involving genocide, sovereign immunity and forced labor, and extradition on charges of torture.<sup>21</sup>

¶4 Jurists must attend to all such efforts at justice, and to the abundance of commentary on these efforts.<sup>22</sup> That said, for reasons of space, this article limits discussion to developments in

<sup>17</sup> Reflective of this scope is the new name of the U.S. Department of State agency founded in 1997 as the Office of War Crimes Issues, see SCHEFFER, *supra* note 5, at 44. In 2011, it became the Office of Global Criminal Justice. See *Office of Global Criminal Justice*, U.S. DEP'T OF STATE, <http://www.state.gov/j/gcj/index.htm> (last visited July 30, 2012).

<sup>18</sup> See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.) (ordering reargument in review of opinion below, 621 F.3d 111 (2d Cir. 2010) (holding that corporations may not be sued under the Alien Tort Statute, 28 U.S.C. § 1350, which allows recovery for torts in violation of the law of nations)); *Southern Afr. Litig. Ctr. v. Nat'l Dir. Pub. Prosecutions*, Case No. 77150/09, Judgment (S. Afr., North Gauteng High Ct., May 8, 2012), available at <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/challenging-the-npas-refusal-to-act-in-terms-of-the-rome-statute-act/> (ruling, in matter under litigation since 2008, that the Implementation of the Rome Statute of the International Criminal Court Act 27, July 18, 2002, required South African officials to investigate alleged crimes against humanity in Zimbabwe); Lei N° 12.528, de 18 de Novembro de 2011, Cria a Comissão Nacional da Verdade no âmbito da Casa Civil da Presidência da República, available at [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2011-2014/2011/Lei/L12528.htm](http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12528.htm) (Brazilian law, signed into law by President Dilma Rousseff on Nov. 18, 2011, creating National Truth Commission to investigate torture, disappearances, and other human rights violations under the military regime in power from 1946 to 1988).

<sup>19</sup> See Statute of the International Court of Justice, 59 Stat. 1055, 33 U.N.T.S. 993 (June 26, 1945); INT'L CT. JUSTICE, THE INTERNATIONAL COURT OF JUSTICE 7 (2000) (stating that first judges were elected, and first public session held, in 1946).

<sup>20</sup> See William A. Schabas, *International Criminal Tribunals: A Review of 2007*, 6 NW. J. INT'L HUM. RTS. 382, 384–87 (2008) (describing how 2007 ICJ decision on genocide influenced tribunal jurisprudence).

<sup>21</sup> The latter two were decided by mid-2012. See *Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.)*, Judgment (July 20, 2012), available at <http://www.icj-cij.org/docket/files/144/17064.pdf> (applying anti-torture treaty to order immediate prosecution or extradition of former dictator residing as exile in requested state); *Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening)*, Judgment (Feb. 3, 2012), available at <http://www.icj-cij.org/docket/files/143/16883.pdf> (ruling that respondent's entertainment of civil suits alleging forced labor during World War II violated immunities applicant state enjoyed under international law); on the first-mentioned matter, see *Cases: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* INT'L CT. OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=cry&case=118&k=73> (last visited Feb. 5, 2013).

<sup>22</sup> A rich body of literature pertaining to international criminal justice appeared in 2011—not only special journal issues like *Women and International Criminal Law, Dedicated to the Honourable Patricia M. Wald*, 11 INT'L CRIM. L. REV. (SPECIAL ISSUE) 3 (2011), but also countless individual articles and many noteworthy books. See e.g., M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* (2011); PETER GODWIN, *THE FEAR: ROBERT MUGABE AND THE MARTYRDOM OF ZIMBABWE* (2011); FIONNUALA NÍ AOLÁIN, DINA FRANCESCA HAYNES & NAOMI CAHN, *ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS* (2011); KEVIN JON HELLER, *THE NUREMBERG TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (2011); THEODOR MERON, *THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE* (2011); FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed., 2011); SCHEFFER, *supra* note 5; KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011); BERT SWART, *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (2011);

those international tribunals that assess individual criminal responsibility. Nor does the article attempt to cover every judgment rendered by every tribunal in 2011. Rather, it endeavors first to point to a couple trends apparent in multiple tribunals, and then to touch on principal developments in each of the tribunals. The article concludes with a last Janus look, drawing on the recent past in order to make some observations about the possible future of international criminal justice.

## II. GENERAL TRENDS

¶5 Throughout 2011, international criminal tribunals struggled to negotiate the political and economic vagaries of global affairs.

### A. Politics

¶6 “Politics” proved an unsettling watchword in international criminal justice circles. The political upheaval that would come to be called the Arab Spring in fact was in full flower by mid-January 2011, when street protesters pushed Tunisia’s longtime ruler, Zine el-Abidine Ben Ali, from power.<sup>23</sup> Within a month fellow strongman Hosni Mubarak found himself out of a job in Egypt,<sup>24</sup> while demonstrations broke out on the streets of capitals like Algiers, Khartoum, Manama, Ramallah, Rabat, and Tripoli. Amid the clamor for regime change could be heard calls for accountability—not only from the grass roots, but also from the Security Council, which on February 26, 2011, unanimously referred the situation in Libya to the International Criminal Court.<sup>25</sup> Then-Deputy Prosecutor Fatou Bensouda welcomed the referral as evidence that the ICC had become “a relevant player” in international criminal justice and, more broadly, in efforts “to bring peace and security to the conflict-torn societies” of the world.<sup>26</sup>

---

CAMBODIA’S HIDDEN SCARS: TRAUMA PSYCHOLOGY IN THE WAKE OF THE KHMER ROUGE (Beth Van Schaack *et al.* eds., 2011).

<sup>23</sup> See Anthony Shadid, *Joy as Tunisian President Flees Offers Lesson to Arab Leaders*, N.Y. TIMES, Jan. 15, 2011, at A6, available at <http://www.nytimes.com/2011/01/15/world/africa/15region.html> (attributing the “popular uprising” to anger at the death in Tunisia of Mohamed Bouazizi, the 26-year-old university graduate who could find work only as a fruit and vegetable vendor, and “set himself on fire in a city square in December when the police seized his cart and mistreated him”).

<sup>24</sup> David D. Kirkpatrick with Anthony Shadid, Mona El-Naggar & Liam Stack, *Mubarak Out*, N.Y. TIMES, Feb. 12, 2011, at A1.

<sup>25</sup> S.C. Res. 1970, at 2-3, ¶¶ 4-8, S/RES/1970 (Feb. 26, 2011) [hereinafter Resolution 1970]. Proceedings against Ben Ali and Mubarak eventually took place in the courts of the states they once controlled. See *Tunisia: Ex-President Is Convicted*, N.Y. TIMES, July 5, 2011, at A6, available at <http://www.nytimes.com/2011/07/05/world/africa/05briefs-Tunisia.html> (stating that a Tunisian court convicted Ben Ali, who was living in exile in Saudi Arabia, *in absentia*, and levied a fifteen-year sentence for smuggling drugs and other contraband); Rod Nordland with Mai Ayyad, *Prosecutor Returns Mubarak To Prison*, N.Y. TIMES, July 17, 2012, at A10, available at <http://www.nytimes.com/2012/07/17/world/middleeast/egypts-former-leader-mubarak-is-transferred-back-to-prison.html> (reporting on transfer of the eighty-four-year-old Mubarak from a hospital to Cairo prison, where he was serving a life sentence following conviction “for his role as an accessory in the killings of protesters”).

<sup>26</sup> A *Conversation with Fatou Bensouda*, AM. SOC’Y OF INT’L LAW, Mar. 25, 2011, at 00:29:47, [http://fora.tv/2011/03/25/A\\_Conversation\\_with\\_Fatou\\_Bensouda](http://fora.tv/2011/03/25/A_Conversation_with_Fatou_Bensouda), quoted in Diane Marie Amann, *Politics and Prosecutions, from Katherine Fite to Fatou Bensouda*, in PROCEEDINGS OF THE FIFTH INTERNATIONAL HUMANITARIAN LAW DIALOGS 7, 25 n.48 (Elizabeth Andersen & David M. Crane eds., 2012) [hereinafter Amann, *Politics*].

¶7 Evidence of heightened expectations for international criminal justice could be found in many corners. The image of complainants' press conference on the steps of the ICC headquarters assumed an iconic status, and the media were rife with reports of requests that the ICC investigate yet another incident of violence.<sup>27</sup> News coverage of tribunals was a constant in some capitals of states where conflicts had given rise to international criminal proceedings; to name a few, Nairobi in the case of the ICC, Kigali in the case of the ICTR, and Beirut in the case of the Special Tribunal for Lebanon. Yet the difficulty of dispensing justice despite shortfalls in political will and material resources tended to put dampers on rising expectations.

¶8 These challenges were apparent in the Security Council referral of Libya to the ICC. Given that it was issued pursuant to the Council's coercive powers under Chapter VII of the U.N. Charter, that referral could have brought every U.N. member state equally within its purview. It did not. As it had in its 2005 referral of the situation in Darfur, Sudan, the Council referral specified that the ICC alone would be responsible for the cost of investigation and prosecution.<sup>28</sup> It again placed no additional obligations to cooperate on states: states already party to the ICC were bound only by their adhesion to the Rome Statute; nonparties merely were "urge[d]" to assist the ICC.<sup>29</sup> The referral likewise made clear that no national of a nonparty state could be subjected to ICC jurisdiction for any "acts or omissions" with respect to the situation.<sup>30</sup> This last proviso immunized nationals of the United States, which in March joined its NATO allies in launching military operations against the government of Libyan leader Muammar Gaddafi.<sup>31</sup> No similar exemption extended to Libya; to the contrary, as it had with Sudan, the Council exercised its coercive powers to require full cooperation from Libya and to expose its nationals to ICC prosecution, even though neither state had ratified the Rome Statute.<sup>32</sup>

¶9 Ambivalence in support for the ICC's Libya efforts persisted. In April, the heads of three Security Council permanent members, Britain, France, and the United States, jointly published

---

<sup>27</sup> See photograph of press conference accompanying Barbara Blaine, *Why the pope must face justice at The Hague*, GUARDIAN (London), Sept. 17, 2011, available at <http://www.guardian.co.uk/commentisfree/cifamerica/2011/sep/17/pope-clergy-sex-abuse-hague>; Victims' Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity and Torture as a Crime Against Humanity, ICC File No. OTP-CR-159/11 (Sept. 13, 2011), available at <http://s3.documentcloud.org/documents/243877/victims-communication.pdf>. See also Mike Corder, *Nobel peace laureate calls for ICC Yemen probe*, ASSOCIATED PRESS, Nov. 28, 2011, available at [http://www.boston.com/news/world/europe/articles/2011/11/28/nobel\\_peace\\_laureate\\_calls\\_for\\_icc\\_yemen\\_probe/](http://www.boston.com/news/world/europe/articles/2011/11/28/nobel_peace_laureate_calls_for_icc_yemen_probe/) (writing of Hague visit from 2011 Nobel Peace Prizewinner); *2010 crackdown complaint to ICC*, BANGKOK POST, Nov. 28, 2011 (citing complaint from Thailand), available at Westlaw, 2011 WLNR 24594794; Karla Zabłudovsky, *Mexico: Complaint Over President Is Filed With Hague Court*, N.Y. TIMES, Nov. 26, 2011, at A8 (reporting on Mexican human rights lawyer's complaint related to governmental measures aimed at drug cartels).

<sup>28</sup> Compare Resolution 1970, *supra* note 25, at 3, ¶ 8 (limiting funding of Libya matter to ICC and voluntary donors) with S.C. Res. 1593, at 2, ¶ 7, S/RES/1593 (Mar. 31, 2005) (same with regard to Darfur, Sudan) [hereinafter Resolution 1593]. Funding challenges at the ICC and other international criminal justice mechanisms are discussed more fully *infra* text accompanying notes 38–64.

<sup>29</sup> Compare Resolution 1970, *supra* note 25, at 2 (limiting cooperation obligations respecting Libya situation), ¶ 5 with Resolution 1593, *supra* note 28, at 1, ¶ 2 (same for Sudan).

<sup>30</sup> Resolution 1970, *supra* note 25, at 2, ¶ 6 (Libya); Resolution 1593, *supra* note 28, at 2, ¶ 6 (Sudan).

<sup>31</sup> See David D. Kirkpatrick et al., *Allies Open Air Assault on Qaddafi's Forces in Libya*, N.Y. TIMES, Mar. 20, 2011, at A1.

<sup>32</sup> Compare Resolution 1970, *supra* note 25, at 2–3, ¶¶ 5–6 (Libya) with Resolution 1593, *supra* note 25, at 2, ¶¶ 6–7 (same for Sudan). See U.N. Treaty Collection, *Rome Statute of the International Criminal Court*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en) (listing signatories and states parties) (visited Aug. 21, 2012).

an op-ed that demanded Gaddafi's ouster.<sup>33</sup> They made note of the ICC investigation, yet fell short of demanding that Gaddafi be transferred to The Hague. By July—after the ICC had issued a warrant for Gaddafi's arrest—officials in the same three P-5 states had let it be known that they might not complain if Gaddafi went into exile in his own country.<sup>34</sup> The officials voiced an intention to honor the wishes of a new Libyan regime; even after a mob killed Muammar Gaddafi in October, that intention would hinder ICC efforts to secure custody of his son, Saif al-Islam Gaddafi, and one other co-accused.<sup>35</sup> In the meantime, officials of the other P-5 states rebuffed calls by the United Nations' top human rights official and others for referral of another tragic byproduct of the Arab Spring, the protracted crackdown led by President Bashar al-Assad in Syria.<sup>36</sup> This give-and-take between the ICC and geopolitical actors played out in other tribunals as well; the phenomenon is to be expected, considering that each tribunal emerged out of political compromise and remained subject to political scrutiny.<sup>37</sup>

### III. ECONOMICS

¶10 Funding likewise has been a flashpoint in international criminal justice throughout the last two decades, and 2011 was no different. Complaints about cost came from many sectors.<sup>38</sup> In a stinging example, in an editorial published before Gaddafi's death, the *Washington Post* accorded Mladić's arrest only minimal significance:

¶11 But Moammar Gaddafi and Bashar al-Assad might be more intimidated by the Serbian example if the process worked better. Trials at the Hague, whether in the Yugoslav court or in the International Criminal Court, have been costly and sometimes interminable: Mr. Milosevic died before he could be convicted, and the trial of Mr. Karadzic drags on nearly three years after

<sup>33</sup> Barack Obama, David Cameron & Nicolas Sarkozy, *Libya's Pathway to Peace*, INT'L HERALD TRIB., Apr. 15, 2011, at 7.

<sup>34</sup> See ICC, Situation in the Libyan Arab Jamahiriya, ICC-01/11-13, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (June 27, 2011); Steven Erlanger, *France Says Qaddafi Can Stay in Libya if He Agrees to Give Up His Power*, N.Y. TIMES, July 21, 2011, at A10 (reporting statements by French foreign minister and White House spokesman); Richard Norton-Taylor & Chris Stephen, *Gaddafi Can't Be Left in Libya, Says International Criminal Court*, GUARDIAN (London), July 26, 2011, at 18 (writing of similar comment by British foreign secretary).

<sup>35</sup> See Kareem Fahim, Anthony Shadid & Rick Gladstone et al., *Qaddafi, Seized by Foes, Meets a Violent End*, N.Y. TIMES, Oct. 21, 2011, at A1; Lydia Polgreen, *Arab Uprisings Point Up Flaws In Global Court*, N.Y. TIMES, July 8, 2012, at A1 (reporting on detention of ICC lawyers by Libya's new regime, which refused to transfer the son for trial at The Hague).

<sup>36</sup> See Ruth Pollard, *Rights chief urges Syria indictment*, AGE (Melbourne), Dec. 14, 2011, at 12 (reporting on call for ICC referral by Navi Pillay, U.N. High Commissioner for Human Rights); see also Rick Gladstone, *After Council's Deadlock, Syria Is Criticized at U.N.*, N.Y. TIMES, Aug. 4, 2012, at A7 (stating that, in face of resistance to Security Council action, the U.N. General Assembly voted 133 to 13, with 33 abstentions, to condemn Syria for then-seventeen-month crackdown).

<sup>37</sup> See *infra* Part II (discussing specific developments in each tribunal); Amann, *Politics*, *supra* note 26, at 31 & n.57 (discussing political underpinnings of ICC and other tribunals, and quoting on this point *inter alia* WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 3 (2012) [hereinafter SCHABAS, ATROCITIES], and SCHEFFER, *supra* note 5, at 8).

<sup>38</sup> See Gideon Boas, *Another Dead Tyrant, and More Solemnly*, BALLARAT COURIER (Australia), Oct. 28, 2011, at 19 (lamenting that "[i]t has become something of a theme in recent times to seek out and murder our enemies rather than resort to the expensive and complex process of trying them for their crimes of atrocity in a court of law"); see also Simon Montlake, *Landmark Khmer Rouge Genocide Trial: Do Cambodians Care?*, CHRISTIAN SCI. MONITOR, June 29, 2011, available at 2011 WLNR 12954694 (reporting on locals' "bafflement at the circuitous path of the hearings . . . and the tribunal's lavish budget in a war-ravaged country mired in poverty").

his arrest. Some \$2 billion has been spent on the Yugoslav trials. If international justice is really to succeed, ways must be found to make it quicker and less costly.<sup>39</sup>

¶12 Such assessments, though not without merit, fail to give a full account. Criticism often hinges on little more than an adjective like “costly” or “expensive.” When an amount is cited it tends, as in the quote above, to be a single, seemingly huge number,<sup>40</sup> presented without any yardstick for comparison.<sup>41</sup> The question of cost deserves more careful consideration.

¶13 Available resources indicate 2011 expenditures along these lines at the international criminal tribunals: at the ICTY, \$143 million;<sup>42</sup> at the ICTR, \$123 million;<sup>43</sup> at the Sierra Leone court, \$16 million;<sup>44</sup> at the ECCC, \$41 million;<sup>45</sup> at the Special Tribunal for Lebanon, \$67 million;<sup>46</sup> and at the ICC, \$132 million.<sup>47</sup> Standing alone that total of \$522 million—about half a

<sup>39</sup> *A Step Forward in Serbia*, WASH. POST, May 27, 2011, at A20 (spelling of Gaddafi’s first name as in original). Also on the ICTY and the ICC, see *The ICC and Africa: Dim Prospects*, ECONOMIST, Feb. 19, 2011, at 53 (“Even fans of the International Criminal Court (ICC) in The Hague admit that its proceedings are interminable and expensive.”); Robert Marquand, *Ratko Mladic’s Arrival at Hague Bolsters Promise of International Courts*, CHRISTIAN SCI. MONITOR, May 31, 2011, available at 2011 WLNR 10879322 (writing that efforts at “international justice have been fraught, imperfect, often highly political, expensive, and selective, many jurists will agree”); Patrick Smyth, *No hiding Place for Dictators Breaking Laws*, IRISH TIMES, June 4, 2011, at 13 (writing that the ICTY “process has been most imperfect, and much criticised for its slowness and cost”).

<sup>40</sup> See *Government Institutions’ Raison-d’etre is to Serve Individuals*, NEW TIMES (Kigali, Rwanda), June 10, 2011, available at 2011 WLNR 11611449 (asserting that the Rwanda Tribunal “has labored through a trifling 54 cases at the obscenely high cost of more than \$2bn”); Chris Stephen, *Libya: The Grim Evidence*, OBSERVER (London), June 19, 2011, at 8 (writing that the ICC, “despite a budget of pounds 70m and a staff of 560, is approaching its ninth anniversary having failed to win a single conviction”).

<sup>41</sup> For an exception, see Talal Al-Haj, *Hariri Court Judge Wants Prosecutor to Quit: Sources*, AL ARABIYA, Feb. 10, 2011, available at 2011 WLNR 2701272 (predicting, in an article about the Lebanon tribunal, that a diplomatic meeting would treat “the high cost of the Tribunal which stands at nearly \$70 million per year, despite the fact that it only deals with a single issue,” and stating by way of comparison that “the International Criminal Court, which has opened investigations in several African, Latin American countries and others, costs around \$100 million per year”).

<sup>42</sup> The ICTY website stated that its “regular budget” for 2010-2011 was \$286,012,600. *The Cost of Justice*, ICTY WEBSITE, <http://www.icty.org/sid/325> (last visited Aug. 11, 2012). The figure in the text represents a halving of that amount, rounded to the nearest million, as are all numbers in the text. It should also be noted that these numbers are approximates, given that research revealed no one source for clear comparison, that budgets appear in different currencies, and that some budgets operate on a single-year and others on a two-year cycle.

<sup>43</sup> “For biennium 2010-2011, the General Assembly of the United Nations approved initial appropriations for ICTR of \$245,295,800 gross (\$227,246,500 net),” according to the tribunal’s website. *General Information*, ICTR WEBSITE, <http://www.unictr.org/tabid/101/default.aspx> (last visited Aug. 11, 2012). The amount in the text reflects a halving of the two-year gross amount.

<sup>44</sup> SCSL, *Eighth Annual Report of the President of the Special Court for Sierra Leone (June 2010-May 2011)*, at 35, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=kK8RBHGowQ%3d&tabid=176> [hereinafter SCSL Report] (stating that the completion strategy “budget stipulates that the Court requires \$20,702,000 in order to complete its mandate across its Freetown, The Hague and New York offices,” and specifying that “[t]he requirement for 2011 is \$16,013,400”).

<sup>45</sup> See ECCC, *ECCC Revised Budget Requirements – 2010-2011*, at 2–6 (Jan. 24, 2011), available at <http://www.eccc.gov.kh/en/reports/eccc-revised-budget-requirements-2010-2011> (setting forth, in a table on page 6, a total of \$40,692,600 as the proposed revised budget for 2011, including both U.N. and Cambodian funding, but excluding contingency funding, and noting that the amounts represent a reduction in the originally approved budget).

<sup>46</sup> STL, *Third Annual Report (2011-2012)*, § 5(i), at 27, available at <http://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/third-annual-report-2011-2012> (“The approved Tribunal budget for the period 1 January – 31 December 2011 amounted to USD 67.3 million.”).

<sup>47</sup> ICC, *Report on Activities and Programme Performance of the International Criminal Court for the Year 2011*, ICC-ASP/11/8, ¶ 183, at 24 (May 4, 2012), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-)

billion dollars—indeed looks astronomical. Yet the picture changes when the funding of international criminal justice is viewed in context.

¶14 These institutions were designed to be costly. By the terms of its statute, each international criminal tribunal has a jurisdiction that extends across time and place. The narrowest span is fourteen and a half months in a single state, Lebanon—although the jurisdiction even of that special tribunal may be enlarged by consent.<sup>48</sup> The broadest span may be found in the statute of the ICC, a permanent court that, going forward, has potentially boundless geographical and temporal jurisdiction.<sup>49</sup> Supporting the mission of each institution are many judges, lawyers, and others—a staff drawn from myriad countries and cultures. Nearly every judicial decision must be made by a panel of three or more judges; indeed, the ECCC goes so far as to require two individuals, one appointed by Cambodia and one by the United Nations, to fill each principal position.<sup>50</sup> Such statutory staffing requirements, which increase both the time and the expense involved in every proceeding, differ greatly from the United States, to name one national system in which the felony bench trial is assigned to a single judge.<sup>51</sup> Also different is the matter of distance. The ECCC is the only tribunal based exclusively in the state it is tasked to address;<sup>52</sup> others sit far from the area of concern and maintain a presence in multiple countries. Since the founding of the ICTR, for instance, trials have taken place in Tanzania, while the Appeals Chamber is based at The Hague.<sup>53</sup> The Special Court moved the Taylor trial to that Dutch city even as it continued other proceedings in Freetown, 3,200 miles away.<sup>54</sup> The ICC's first trial took place 4,000 miles from Kinshasa, itself 1,200 miles from Bunia, capital of the Ituri region at issue; the ICC has field offices in both those cities.<sup>55</sup> Ituri is home to about eighteen ethnic groups, so that in this case as in many others, investigation and courtroom proceedings required interpretation in tongues beyond the ICC's two working languages, English and French, and four

---

11-8-ENG-ProgrammePerformance.pdf. Conversion to U.S. dollars was done on Aug. 11, 2012 (stating that in “2011, the Court’s overall expenditure including Contingency amounted to €107.41 million, resulting in a net deficit of €3.8 million to be absorbed by the Contingency Fund”).

<sup>48</sup> STL Statute (May 30, 2007).

<sup>49</sup> Provided other requirements are met, the ICC is permitted by statute to exercise jurisdiction over enumerated crimes as long as they occurred after July 1, 2002. ICC Statute, art. 11 (Nov. 29, 2010). Matters arriving at the court by way of state referral or the Prosecutor’s own motion must involve states that are party to the ICC Statute or otherwise have consented; however, those arriving by U.N. Security Council referral are not so constrained. *See id.*, arts. 13-15.

<sup>50</sup> ECCC Statute (Oct. 27, 2004).

<sup>51</sup> *See* FED. R. CRIM. P. 23(a), (c) (authorizing bench trial by parties’ consent). But at least one U.S. institution – the decade-old military commissions at Guantánamo – compares far less favorably with regard both to costs and time delays. *See* Kevin Jon Heller, *The Absurd Military Commissions*, OPINIO JURIS, July 13, 2012, <http://opiniojuris.org/2012/07/13/the-absurd-military-commissions/>.

<sup>52</sup> ECCC Statute, art. 43 (Oct. 27, 2004) (establishing Phnom Penh as site of tribunal).

<sup>53</sup> *See The Court Management Section*, ICTR WEBSITE, <http://www.unictr.org/tabid/108/default.aspx> (last visited Aug. 12, 2012).

<sup>54</sup> *See* Mariette le Roux, *Charles Taylor War Crimes Trial Closes, Judgment Awaited*, AGENCE FRANCE-PRESSE, Mar. 11, 2011, available at Westlaw, 3/11/11 Agence Fr.-Presse 14:41:59; John Momoh, *Special Court to Hold Contempt Proceedings*, CONCORD TIMES (Freetown), Aug. 10, 2011, available at Westlaw, 2011 WLNR 15856635.

<sup>55</sup> *See generally*, ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012) [hereinafter Lubanga Judgment]; *see also Field Offices*, ICC WEBSITE, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/Practical+Information/Field+Offices.htm> (last visited Aug. 12, 2012).

additional official languages, Arabic, Chinese, Russian, and Spanish.<sup>56</sup> A similar linguistic challenge is present at every tribunal.

¶15 The post-Cold War tribunals are diverse in yet another costly way. In many national criminal justice systems, the prosecution, the defense, and the judiciary are the principals; in contrast, the international systems have been structured to accommodate many other players. Each international criminal tribunal, for example, not only must afford legal representation to indigent accused; in some tribunals, victims also receive legal representation, and further may file pleadings and take part in courtroom proceedings.<sup>57</sup> What is more, each tribunal must attend to a range of victims' needs during trial, and several are expected to provide reparations thereafter.<sup>58</sup> Each institution also shoulders burdens of witness protection and public outreach greater than those in many national systems.<sup>59</sup> Considered within the architectural frame of the tribunals' statutes—statutes that states themselves negotiated—reasons for the cost of international criminal justice become evident.

¶16 These expenses pale, moreover, when measured against the amounts spent on military intervention and other geopolitical projects. As David Scheffer, the first U.S. ambassador assigned to international criminal justice issues, has written:

[T]he total cost of the war crimes tribunals – roughly \$3.43 billion from 1993 to 2009 – fell below the program costs of two Stealth bombers and equaled the two-week budget of American military operations in Iraq. Expenditures for two flights of the Space Shuttle, or about 17 percent of the cash bonuses paid out by Wall Street firms in 2008, could cover the entire international budget of the war crimes tribunals during this sixteen-year period.<sup>60</sup>

¶17 Notwithstanding, in 2011 donor fatigue was evident in tribunals such as the ECCC, where a fifteen-year process has yielded just one verdict to date.<sup>61</sup> Funding concerns also loomed large

<sup>56</sup> See Lubanga Judgment, *supra* note 55, ¶¶ 73, 113; ICC Statute, art. 50 (Nov. 29, 2010).

<sup>57</sup> E.g., ECCC Internal Rules, Rule 23 (rev. 8) (Aug. 3, 2011), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf> (outlining participation of victims as civil parties); ICC Statute, art. 68(3) (Nov. 29, 2010); STL RPE, Rules 86–87 (Feb. 8, 2011).

<sup>58</sup> E.g., ECCC Statute, arts. 33 new, 36 new (Aug. 3, 2011); ICC Statute, art. 75 (Nov. 29, 2010), analyzed in ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations (Aug. 7, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf> [hereinafter Lubanga Reparations]; STL Statute, art. 25.

<sup>59</sup> As a reminder that tribunal innovations in witness protection stirred controversy not that long ago, see Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996) (condemning ICTY witness-protection ruling as an encroachment on rights of the accused); Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997) (defending ruling's balance of interests); Monroe Leigh, *Witness Anonymity Is Inconsistent with Due Process*, 91 AM. J. INT'L L. 80 (1997) (persisting in argument that ruling impinged on fair-trial rights).

<sup>60</sup> SCHEFFER, *supra* note 5, at 28 (footnotes omitted).

<sup>61</sup> See *Donors urged to contribute to UN-backed genocide court in Cambodia*, UN NEWS CENTRE, Jan. 1, 2012 (stating, in report on U.N. Secretary-General Ban Ki-moon's plea at donors' conference in New York, that "[f]or 2011, the total budget of \$46.8 million is unfunded, except for \$1.1 million pledged by the Cambodian Government"), available at <http://www.un.org/apps/news/story.asp?NewsID=34805&Cr=cambodia#.USwlMVrwIIE>. David Scheffer, Transcript of Atrocities Crimes Litigation Year-In-Review (2011) Conference 51 (Mar. 14, 2012), available at

in tribunals nearing the transition from active to residual dockets, as Fidelma Donlon, Deputy Registrar at the Special Court for Sierra Leone, has pointed out.<sup>62</sup> The ICC was not immune, either: the permanent court entered 2012 with a new Prosecutor, with an expanded docket, and with financial woes that included a reduced budget and a dispute with the Netherlands over rent.<sup>63</sup> Such developments made clear that comparisons like those just quoted must be drawn, and the argument that international justice is good value must be made—frequently—if these mechanisms are to secure funds adequate to discharge the ample duties that states have placed on them.<sup>64</sup>

#### IV. SPECIFIC TRIBUNALS

¶18 In addition to following certain general trends, each international criminal justice mechanism developed in particular ways.

##### A. *Ad Hoc Tribunals*

¶19 At the tribunals established for specific purposes, there were some jurisprudential innovations. Many looked forward to winding up, even as others were just beginning proceedings.

##### 1. Former Yugoslavia

¶20 On May 25, 2011, sixteen years after his indictment, former Bosnian Serb General Ratko Mladić was found in a morning raid on his cousin's house in a Serbian village.<sup>65</sup> Two months later Goran Hadžić, the man alleged to have led a brutal seizure of the eastern third of Croatia—the so-called Republic of Serbian Krajina—was arrested by Serbian authorities as he tried to sell a painting said to be a stolen work by Modigliani.<sup>66</sup> The captures permitted the ICTY to try its

---

<http://www.law.northwestern.edu/legalclinic/humanrights/documents/ACL2011ConferenceTranscript.pdf> (discussing difficulties involved with fundraising for the ECCC) [hereinafter ACL Transcript].

<sup>62</sup> Fidelma Donlon, ACL Transcript, *supra* note 61, at 49; See U.N. Ofc. Internal Oversight Serv., Internal Audit Div., *Audit Report: Special Court for Sierra Leone*, at 6–7 (Mar. 31, 2011) (describing funding difficulties in latter years of Special Court's operations), <http://usun.state.gov/documents/organization/165463.pdf> [hereinafter *UN Audit*].

<sup>63</sup> *Crisis Budget for ICC in 2012*, ALLAFRICA.COM, Dec. 27, 2011 (reporting that the Assembly of States Parties approved a 2012 budget of 108 million euros, short of the 117 million euros the ICC had requested), *available at* <http://allafrica.com/stories/201112271186.html>; *Dutch gov't settles row with ICC over rent*, KUWAIT NEWS AGENCY, Jan. 13, 2012, *available at* Westlaw, 1/13/12 Kuwait News Agency (KUNA) 18:15:53.

<sup>64</sup> For a salutary 2012 example, see Patricia O'Brien, *Impunity over for heinous crimes against humanity*, IRISH TIMES, July 23, 2012, at 14 (writing, in op-ed by U.N. Under-Secretary for Legal Affairs and Legal Counsel, that "[e]nsuring accountability for serious international crimes is neither cheap nor fast," because the "cases are complex" and must adhere to "the highest standards of justice and fairness").

<sup>65</sup> See Doreen Carvajal & Steven Erlanger, *Serb Fugitive Slowly Starved of Friends and Cash*, N.Y. TIMES, May 30, 2011, at A1; see also ICTY, *Prosecutor v. Radovan Karadžić & Ratko Mladić*, IT-95-5-I, Indictment (July 24, 1995), <http://www.icty.org/x/cases/mladic/ind/en/kar-ii950724e.pdf>.

<sup>66</sup> Marlise Simons with Nicholas Kulish, *Serbia Arrests Its Last Fugitive Accused of War Crimes*, N.Y. TIMES, July 21, 2011, at A8. For the most recent charging document against this defendant, see ICTY, *Prosecutor v. Goran Hadžić*, IT-4-75-PT, Second Amended Indictment (Mar. 22, 2012) (alleging persecutions, extermination and murder, as well as imprisonment, deportations, and inhumane acts as crimes against humanity, and torture, cruel treatment, wanton destruction, and plunder as war crimes), *available at*

last-remaining indictees rather than transfer their cases to a residual mechanism, as many had anticipated. Thus both defendants soon found themselves in custody in the Netherlands, awaiting eventual trial in the same Hague courthouse where proceedings against Mladić's co-accused, former Bosnian Serb President Radovan Karadžić, had been under way since 2009.<sup>67</sup>

¶21 In the case of Mladić, the question was whether he would live to see his trial's end. In the 1990s, when he is alleged to have led the Bosnian Serb troops that laid siege to Sarajevo and massacred more than 7,000 Muslim boys and men at Srebrenica, Mladić was in his early fifties and known for his swagger.<sup>68</sup> But by the year of his arrest he was a sixty-nine-year-old stroke survivor in ill health—"a tired old man," as investigators put it.<sup>69</sup> In 2006 former Serbian President Slobodan Milošević had died in a Dutch jail, four years into an ICTY trial that seemed far from verdict.<sup>70</sup> Loathe to repeat that precedent, Trial Chamber I approved a request to reduce charges against Mladić in an effort to speed the proceedings.<sup>71</sup> A new indictment, alleging eleven counts of genocide, crimes against humanity, and war crimes, was issued in mid-December 2011.<sup>72</sup>

¶22 Throughout 2011 the ICTY remained busy. The Appeals Chamber considered arguments and briefs in numerous post-conviction matters.<sup>73</sup> Trial Chamber I rendered a number of judgments,<sup>74</sup> resumed one trial that had been on a two-year hiatus because of the ill health of a

---

<http://www.icty.org/x/cases/hadzic/ind/en/120322.pdf>. Hadžić's trial began in October 2012. See ICTY, *Case Information Sheet: Goran Hadžić*, at 2, [http://www.icty.org/x/cases/hadzic/cis/en/cis\\_hadzic\\_en.pdf](http://www.icty.org/x/cases/hadzic/cis/en/cis_hadzic_en.pdf).

<sup>67</sup> See *Case Information Sheet: Radovan Karadžić*, at 5, ICTY WEBSITE,

[http://www.icty.org/x/cases/karadzic/cis/en/cis\\_karadzic\\_en.pdf](http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf) (last visited Feb. 23, 2013) (stating that trial began in October 2009, that prosecution rested its case in May 2012, and that defense case opened in October 2012).

<sup>68</sup> See Marlise Simons with David Jolly, *Former General Complains About His Health and Scoffs at War Crimes Charges*, N.Y. TIMES, June 4, 2011, at A9 [hereinafter Simons with Jolly, *Health*] (writing that, in appearance at ICTY courtroom, Mladić "seemed much diminished – the swagger gone").

<sup>69</sup> Carvajal & Erlanger, *supra* note 65 (quoting unnamed investigators); see Marlise Simons, *Poor Health Of Defendant Is New Focus At The Hague*, N.Y. TIMES, Nov. 6, 2011, at A12; Simons with Jolly, *supra* note 68.

<sup>70</sup> See Gillian Higgins, *The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY*, 7 NW. J. INT'L HUM. RTS. 239, 239 (2009).

<sup>71</sup> ICTY, *Prosecutor v. Ratko Mladić*, IT-09-92-PT, Decision Pursuant to Rule 73bis, (Dec. 2, 2011), <http://www.icty.org/x/cases/mladic/tdec/en/111202.pdf>.

<sup>72</sup> ICTY, *Prosecutor v. Ratko Mladić*, IT-09-92-PT, Fourth Amended Indictment, (Dec. 16, 2011), <http://www.icty.org/x/cases/mladic/ind/en/111216.pdf> (charging genocide, persecution, extermination, murder, deportation, and inhumane acts as crimes against humanity, and murder, terrorizing and unlawfully attacking civilian populations, and hostage-taking as war crimes). Trial would begin in May 2012 and proceed in fits and starts thereafter. See Mike Corder, *Teary Testimony Begins as Defence of Former Serb Military Chief Presses for Time*, GLOBE & MAIL (Toronto), July 10, 2012, at A17.

<sup>73</sup> See Eighteenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. A/66/210 – S/2011/473, at 12-13 (July 31, 2011) [hereinafter ICTY Report] (summarizing Appeals Chamber's activities).

<sup>74</sup> The first judgment, *discussed infra* text accompanying notes 81-86, may be found at *Prosecutor v. Ante Gotovina, Ivan Čermak & Mladen Markač*, IT-06-90-T, Judgment, Volume I of II (Apr. 15, 2011), [http://www.icty.org/x/cases/gotovina/tjug/en/110415\\_judgement\\_vol1.pdf](http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol1.pdf), [hereinafter Gotovina Judgment vol. I], and *Prosecutor v. Ante Gotovina, Ivan Čermak & Mladen Markač*, IT-06-90-T, Judgment, Volume II of II (Apr. 15, 2011), [http://www.icty.org/x/cases/gotovina/tjug/en/110415\\_judgement\\_vol2.pdf](http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf), [hereinafter Gotovina Judgment vol. II]. The second judgment was *Prosecutor v. Momčilo Perišić*, IT-04-81-T, Judgment (Sept. 6, 2011), [http://www.icty.org/x/cases/perisic/tjug/en/110906\\_judgement.pdf](http://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf), (sentencing former Yugoslav Army general to twenty-seven years on multiple counts related to attacks in Sarajevo, Srebrenica, and Zagreb).

defendant,<sup>75</sup> and began retrial of Kosovo's former prime minister following the Appeals Chamber's post-acquittal reinstatement of some charges against him.<sup>76</sup> Early in March 2011, Trial Chamber III completed a trial of six former leaders of Croatian rebels in Bosnia; having consumed 465 trial days over the course of nearly five years, the matter remained under advisement throughout the year.<sup>77</sup> The trial before the same chamber of a Serbian parliamentarian, begun in 2007 and marked with findings that the defendant was in contempt of court, also went into 2012.<sup>78</sup> Trial Chamber II continued with the trial of a Bosnian Serb intelligence officer charged with genocide and other offenses related to the Srebrenica massacre,<sup>79</sup> and it neared conclusion of the trial of two Bosnian Serbs charged with persecution and other crimes in the Krajina.<sup>80</sup>

¶23

The Krajina region of Croatia also was the locus of *Gotovina*, one of the more noted – and at 1,377 pages, one of the more lengthy – judgments of 2011.<sup>81</sup> The case arose out of Operation Storm, the late-1995 Croat military campaign to drive Serbs out of the region. The three defendants were alleged to have committed crimes against humanity and war crimes, in a joint criminal enterprise with others including Franjo Tuđman, who served as President of Croatia until his death in 1999.<sup>82</sup> Trial Chamber I acquitted one defendant but convicted the other two, including General Ante Gotovina, overall commander of Operation Storm.<sup>83</sup> Drawing considerable attention was the conviction for unlawful attacks on civilians and civilian objects as persecution, stemming from the artillery shelling of four towns. The defense maintained that

<sup>75</sup> See *Case Information Sheet: Stanišić & Simatović*, ICTY WEBSITE, [http://www.icty.org/x/cases/stanistic\\_simatovic/cis/en/cis\\_stanistic\\_simatovic\\_en.pdf](http://www.icty.org/x/cases/stanistic_simatovic/cis/en/cis_stanistic_simatovic_en.pdf) (last visited Feb. 23, 2013) (writing that defense case opened in June 2011).

<sup>76</sup> See *Case Information Sheet: Haradinaj et al.*, ICTY WEBSITE, [http://www.icty.org/x/cases/haradinaj/cis/en/cis\\_haradinaj\\_al\\_en.pdf](http://www.icty.org/x/cases/haradinaj/cis/en/cis_haradinaj_al_en.pdf) (last visited Feb. 23, 2013) (stating that closing arguments were held in mid-2012).

<sup>77</sup> See *Case Information Sheet: Prlić et al.*, ICTY WEBSITE, [http://www.icty.org/x/cases/prlic/cis/en/cis\\_prlic\\_al\\_en.pdf](http://www.icty.org/x/cases/prlic/cis/en/cis_prlic_al_en.pdf) (last visited Aug. 20, 2012). As of the date visited, no trial verdict yet had issued.

<sup>78</sup> See *Case Information Sheet: Vojislav Šešelj*, ICTY WEBSITE, [http://www.icty.org/x/cases/seselj/cis/en/cis\\_seselj\\_en.pdf](http://www.icty.org/x/cases/seselj/cis/en/cis_seselj_en.pdf) (last visited Feb. 23, 2013) (stating that the trial ended in March 2012). A number of contempt matters came before the ICTY in 2011. See ICTY Report, *supra* note 73, at 8-13 (summarizing chambers' activities).

<sup>79</sup> See *Case Information Sheet: Zdravko Tolimir*, ICTY WEBSITE, [http://www.icty.org/x/cases/tolimir/cis/en/cis\\_tolimir\\_en.pdf](http://www.icty.org/x/cases/tolimir/cis/en/cis_tolimir_en.pdf) (last visited Feb. 23, 2013) (noting that closing arguments were held in August 2012).

<sup>80</sup> See *Case Information Sheet: Stanišić & Župljanin*, ICTY WEBSITE, [http://www.icty.org/x/cases/zupljanin\\_stanisticm/cis/en/cis\\_stanistic\\_zupljanin\\_en.pdf](http://www.icty.org/x/cases/zupljanin_stanisticm/cis/en/cis_stanistic_zupljanin_en.pdf) (last visited Feb. 23, 2013) (stating that the defense case ended in December 2011 and that closing arguments concluded in June 2012). Trial Chamber II further returned a verdict in *Prosecutor v. Vlastimir Đorđević*, IT-05-87/1-T, Public Judgment, (Feb. 23, 2011), [http://www.icty.org/x/cases/djordjevic/tjug/en/110223\\_djordjevic\\_judgt\\_en.pdf](http://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf).

<sup>81</sup> See *Gotovina Judgment vol. I*, *supra* note 74; *Gotovina Judgment vol. II*, *supra* note 74.

<sup>82</sup> See *Gotovina Judgment vol. II*, *supra* note 74, at 992, ¶ 1967. See also David Binder, *Tudjman Is Dead; Croat Led Country Out of Yugoslavia*, N.Y. TIMES, Dec. 11, 1999, at A1. On the joint criminal enterprise theory of liability see, e.g., Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-In-Review*, 7 NW. J. INT'L HUM. RTS. 170, 218-25 (2009) [hereinafter Van Schaack, *Review*].

<sup>83</sup> See *Gotovina Judgment vol. I*, *supra* note 74, at 37, ¶ 69 (describing extent of Gotovina's command). See also *Gotovina Judgment vol. II*, *supra* note 74, at 1203-316, ¶¶ 2376-551 (explaining reasons for acquittal); *id.* at 1178-201, ¶¶ 2322-375, and at 1339, ¶ 2617 (discussing conviction of defendant Gotovina and consequent sentence to twenty-four years in prison); *id.* at 1316-27, ¶¶ 2554-587, and at 1339, ¶ 2618 (discussing conviction and eighteen-year sentence respecting defendant Mladen Markač, who had been in charge of special police).

targets were chosen by use of a 200-meter radius of error, with the result that about 95 percent of the shells hit military objectives.<sup>84</sup> Requisite accuracy of targeting is of concern to many contemporary militaries – including, in the post-September 11 era, the United States. That Trial Chamber I found Gotovina guilty notwithstanding the assertion that only 5 percent of shells affected civilians prompted eleven U.S.-based experts on the law of armed conflict to prepare an *amicus* brief in late 2011, asking the Appeals Chamber for reconsideration of that conviction.<sup>85</sup> The answer to whether that aspect of the *Gotovina* ruling would indeed be reconsidered awaited issuance of the appellate judgment.<sup>86</sup>

## 2. Rwanda

¶24

Completion strategy dominated events at the ICTR in 2011. Trial Chamber I had finished its work even before the year began; Trial Chamber II rendered three judgments in 2011 and continued with trial in one case.<sup>87</sup> Trial Chamber III had delivered two judgments by year's

<sup>84</sup> See *Gotovina Judgment* vol. I, *supra* note 74, at 724-26, ¶¶ 1375-81; *Gotovina Judgment* vol. II, *supra* note 74, at 961-69, ¶¶ 1899-913. See also Beth Van Schaack, *ICTY Appeal & U.S. Suit Review Operation Storm*, INTLAWGRRLS (Aug. 13, 2011, 7:00 AM), <http://www.intlawgrrls.com/2011/08/icty-appeal-us-civil-suit-examine.html>. This article made note of an additional facet of the *Gotovina* case: “Virtually invisible within the opinion is the role played by the United States in Operation Storm”—specifically, allegations “that the U.S. trained and provided intelligence, strategic and potentially other forms of support to Croatian troops involved in the Operation, which proved to be decisive in the conflict against the Serbs in the former Yugoslavia and contributed to Milosevic’s eventual capitulation.” *Id.*

<sup>85</sup> See Laurie Blank, *Gotovina’s Impact on IHL*, INTLAWGRRLS (Feb. 1, 2012, 7:27 AM), <http://www.intlawgrrls.com/2012/02/gotovina-s-impact-on-ihl.html> (describing November 2011 experts’ meeting); Laurie Blank, *Operations Experts File Amicus in Gotovina*, INTLAWGRRLS (Feb. 2, 2012, 6:50 AM), <http://www.intlawgrrls.com/2012/02/operations-experts-file-amicus-in.html> (outlining experts’ filing of ICTR, Prosecutor v. Ante Gotovina & Mladen Markač, IT-06-90-A, Application and Proposed Amicus Curiae Brief Concerning The 15 April 2011 Trial Chamber Judgment and Requesting That the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm (Jan. 13, 2012)).

<sup>86</sup> The Appeals Chamber rejected the experts’ brief. See ICTY, Prosecutor v. Ante Gotovina & Mladen Markač, IT-06-90-A, Decision on Application and Proposed Amicus Brief (Feb. 14, 2012), <http://www.icty.org/x/cases/gotovina/acdec/en/120214.pdf>. Shortly before hearing argument in the case in 2012, however, the chamber posed questions to the parties much like those raised in the brief. See ICTY, Prosecutor v. Ante Gotovina & Mladen Markač, IT-06-90-A, Addendum to the Scheduling Order for Appeal Hearing (Apr. 24, 2012), <http://www.icty.org/x/cases/gotovina/acord/en/120424.pdf>, discussed in Laurie Blank, *Update on Gotovina, Being Argued Now at ICTY*, INTLAWGRRLS (May 14, 2012, 3:00 AM), <http://www.intlawgrrls.com/2012/05/update-on-gotovina-being-argued-now-at.html>. After argument, the chamber ordered further briefing on each defendant’s liability, if any, should he be “not found liable for unlawful artillery attacks or to be a member of a joint criminal enterprise.” ICTY, Prosecutor v. Ante Gotovina & Mladen Markač, IT-06-90-A, Order for Additional Briefing, at 1-2, (July 20, 2012), <http://www.icty.org/x/cases/gotovina/acord/en/120720.pdf>.

<sup>87</sup> ICTR, Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi & Éli Ndayambaje, ICTR-98-42-T, Judgment and Sentence, (June 24, 2011), <http://www.unictr.org/Cases/tabid/127/PID/83/default.aspx?id=4&mnid=2>, [hereinafter Nyiramasuhuko Judgment] (levying on five defendants sentences ranging from life to twenty-five years in prison following conviction on some counts related to genocide, crimes against humanity, or war crimes, and giving the sixth defendant thirty years on the sole count of conviction, for direct and public incitement to genocide); ICTR, Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye & Innocent Sagahutu, ICTR-00-56-T, Judgment and Sentence, (May 17, 2011), [http://www.unictr.org/Portals/0/Case%5CEnglish%5CNdindiliyimana%5Cjudgement%5C110517\\_judgement.pdf](http://www.unictr.org/Portals/0/Case%5CEnglish%5CNdindiliyimana%5Cjudgement%5C110517_judgement.pdf), (finding each of the four defendants guilty on some counts related to genocide, crimes against humanity, or war crimes, and imposing sentences ranging from time served to thirty years minus time served); ICTR, Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka & Prosper Mugiraneza, ICTR-99-50-T,

end,<sup>88</sup> and it was moving toward written judgment in three cases.<sup>89</sup> These matters joined several others pending in the Appeals Chamber, which in 2011 delivered judgments in two cases.<sup>90</sup>

¶25 Particular note was paid to the mid-2011 judgment against Pauline Nyiramasuhuko, Rwanda's former Minister of Women's Development.<sup>91</sup> Having determined beyond reasonable doubt that she was responsible for a range of violence committed by her co-defendant son and others, ICTR Trial Chamber II found her guilty on multiple charges, including superior responsibility for rape as a crime against humanity.<sup>92</sup> She is the first woman ever to have been convicted by an international tribunal of that offense.<sup>93</sup>

¶26 Making headlines on May 25, 2011—the same day that Mladić was seized in Serbia—was the arrest in the Democratic Republic of the Congo of one of the ICTR's "most wanted" fugitives, militia leader Bernard Munyagishari.<sup>94</sup> Rather than go forward with trial in Arusha,

Judgment and Sentence, (Sept. 30, 2011),

<http://www.unicttr.org/Portals/0/Case%5CEnglish%5CBizimungu%5Cjudgement%5C110930.pdf>, (acquitting two defendants, convicting two others of conspiracy to commit genocide and direct and public incitement to commit genocide, and sentencing each of the latter to thirty years in prison). The remaining case had surpassed its 156th day in trial as of mid-2012. *Case Minutes*, Prosecutor v. Ngirabatware, ICTR-99-54-T,

<http://www.unicttr.org/Cases/tabid/127/PID/7/default.aspx?id=2&mmid=2> (visited Aug. 13, 2012).

<sup>88</sup> ICTR, Prosecutor v. Grégoire Ndahimana, ICTR-01-68-T, Judgment and Sentence (Dec. 30, 2011),

<http://www.unicttr.org/Portals/0/Case%5CEnglish%5CNdahimana%5CJudgment%5C111230%20-%20Judgement%20and%20Sentece.pdf>, (sentencing defendant to fifteen years' imprisonment after conviction, as an aider and abettor, on counts of genocide and extermination as a crime against humanity); ICTR, Prosecutor v. Jean-Baptiste Gatete, ICTR-2000-61-T, Judgment and Sentence (Mar. 31, 2011),

<http://www.unicttr.org/Portals/0/Case%5CEnglish%5CGatete%5Cjudgement%5C110331.pdf> (imposing life sentence on defendant convicted of one count each of genocide and of extermination as a crime against humanity).

<sup>89</sup> At the tail end of 2011, the trial chamber gave two defendants life sentences on conviction of a war crime and of crimes against humanity (one relating to extermination, the other to rape and sexual assaults) in an oral hearing. *See* ICTR, Prosecutor v. Édouard Karemera & Matthieu Ndirumpatse, ICTR-98-44-T, Oral Summary (Dec. 20, 2011), <http://www.unicttr.org/Portals/0/Case%5CEnglish%5CKaremera%5CJudgement%5C111221-Oral%20Summary.pdf>. However, it did not issue the written judgment until the following year. *See* ICTR, Prosecutor v. Édouard Karemera & Matthieu Ndirumpatse, ICTR-98-44-T, Judgment and Sentence, (Feb. 2, 2012),

<http://www.unicttr.org/Portals/0/Case%5CEnglish%5CKaremera%5CJudgement%5C120202%20-%20JUDGEMENT.pdf>. Judgments also issued the following year in two additional cases. *See* ICTR, Prosecutor v.

Ildéphonse Nizeyimana, ICTR-2000-55C-T Judgment and Sentence, (June 19, 2012), <http://www.unicttr.org/Portals/0/Case%5CEnglish%5CNizeyimana%5CJudgment%5CJUDGEMENT%20AND%20SENTENCE.pdf>, a case discussed in Valerie Oosterveld, *Atrocity Crimes Litigation Year-in-Review (2010): A Gender Perspective*, 9 NW. U. J. INT'L HUM. RTS. 325, 342-43 (2011) [hereinafter Oosterveld, *Review*], and ICTR,

Prosecutor v. Callixte Nzabonimana, ICTR-98-44D-T, Judgment and Sentence, (May 31, 2012), <http://www.unicttr.org/Portals/0/Case%5CEnglish%5CNzabonimana%5CJudgement%5C120531-Judgement.pdf>.

<sup>90</sup> ICTR, Prosecutor v. Tharcisse Muvunyi, ICTR-2000-55A-A, Judgment (Apr. 1, 2011), <http://www.unicttr.org/Portals/0/Case%5CEnglish%5CMuvunyi%5Cjudgement%5C110401.pdf>, (affirming conviction and sentence); ICTR, Prosecutor v. Tharcisse Renzaho, ICTR-97-31-A, Judgment (Apr. 1, 2011),

[http://www.unicttr.org/Portals/0/Case%5CEnglish%5CRenzaho%5Cjudgement%20and%20sentence%5C110401\\_ap1\\_judgement.pdf](http://www.unicttr.org/Portals/0/Case%5CEnglish%5CRenzaho%5Cjudgement%20and%20sentence%5C110401_ap1_judgement.pdf) (reversing some convictions and affirming others, and affirming life sentence). For a list of pending matters, see *Status of Cases*, ICTR WEBSITE, <http://www.unicttr.org/Cases/tabid/204/Default.aspx>.

<sup>91</sup> Nyiramasuhuko Judgment, *supra* note 87, ¶ 8.

<sup>92</sup> *Id.*, ¶¶ 5605–16, 5645–5651, 5867–86 (discussing rape charges pursuant to ICTR Statute, arts. 3(6), 6(3) (Jan. 31, 2010); *see id.*, ¶ 6186 (setting forth entire verdict).

<sup>93</sup> *See* Marlise Simons, *Official Gets Life Sentence for Genocide In Rwanda*, N.Y. TIMES, June 25, 2011, at A4. For examination of this verdict, see Mark Drumbl, *'She Makes Me Ashamed to Be a Woman': The Genocide Conviction of Pauline Nyiramasuhuko, 2011*, MICH. J. INT'L L. (forthcoming 2013).

<sup>94</sup> Edmund Kagire, *Genocide Suspect Arrested in DRC*, NEW TIMES (Kigali), May 26, 2011, available at Westlaw, 2011 WLNR 10506076 (calling Munyagishari "one of the most wanted suspects of the 1994 Genocide against the

however, ICTR Prosecutor Hassan Bubacar Jallow eventually sought to refer the case to the national courts in Rwanda pursuant to ICTR Rule 11 *bis*.<sup>95</sup> In the past, such transfers, requested as part of an overall completion strategy, had been thwarted by adverse judicial rulings.<sup>96</sup> The legal logjam broke a month after Munyagishari's arrest, when ICTR judges approved a request to refer the case of Jean Uwinkindi to Rwanda.<sup>97</sup> The European Court of Human Rights subsequently held that another Rwandan suspect, found in Sweden, had failed to show a "real risk" that his extradition to Rwanda for trial would violate the ban on torture or other maltreatment.<sup>98</sup> Citing the recent ICTR ruling as well as improvements in the Rwanda criminal justice system, the European court further determined that the suspect "would not face a real risk of a flagrant denial of justice" in Rwanda.<sup>99</sup> The decision was hailed in Rwanda as lifting the last extradition roadblocks.<sup>100</sup> As 2011 drew to a close, it seemed likely that Munyagishari and Uwinkindi soon would be moved to Rwanda, thus easing the planned transition from the ICTR to a residual mechanism.<sup>101</sup>

### 3. Sierra Leone

¶27

With the conclusion of the three principal trials in Freetown against leaders of rebel and government-supported militias,<sup>102</sup> just one Special Court for Sierra Leone case remained in progress as 2011 began. That was the trial of Liberia's former President, Charles Taylor, which nearly five years earlier had been moved to the Lebanon tribunal headquarters at The Hague.<sup>103</sup>

---

Tutsi"); *Europe's Most Wanted Criminal Ratko Mladic Arrested*, VOICE OF AMERICA, May 25, 2011, <http://www.voanews.com/content/reports-bosnian-serb-war-crimes-suspect-ratko-mladic-arrested-122649724/139938.html> (reporting on arrest of ICTY fugitive).

<sup>95</sup> *ICTR Files Another Case for Referral to Country*, NEW TIMES (Kigali), Oct. 6, 2011, available at Westlaw, 2011 WLNR 20476636. Authorizing a trial chamber to refer an ICTR indictment to another tribunal is Rule 11 *bis* of the Rules of Procedure and Evidence (Feb. 9, 2010), <http://www.unict.org/Portals/0/English%5CLegal%5CROP%5C100209.pdf>.

<sup>96</sup> See *Ahorugeze v. Sweden*, App. No. 37075/09, ¶¶ 44-75, Eur. Ct. H.R. (Oct. 27, 2011), available at [http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/\[hereinafter Ahorugeze Judgment\]](http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/[hereinafter%20Ahorugeze%20Judgment]) (detailing these rulings, in ICTR and in some national courts).

<sup>97</sup> *ICTR, Prosecutor v. Jean Uwinkindi*, ICTR-2001-75-R11 *bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (June 28, 2011), <http://www.unict.org/Portals/0/Case%5CEnglish%5CUwinkindi%5Cdecisions%5C110628.pdf>.

<sup>98</sup> *Ahorugeze Judgment*, *supra* note 96, ¶ 95 (interpreting Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]).

<sup>99</sup> *Id.* ¶ 129 (interpreting European Convention, *supra* note 98, art. 6).

<sup>100</sup> See James Karuhanga, *European Court Paves Way for Genocide Suspect's Extradition*, NEW TIMES (Kigali), Oct. 28, 2011 available at Westlaw, 2011 WLNR 22314556 (quoting comment of Rwandan Prosecutor-General that "the biggest court on the European continent has guided national jurisdictions on how to approach cases involving Rwandan fugitives," so that "there should be no more obstacles in securing the extradition of fugitives").

<sup>101</sup> By mid-2012, both men had been transferred. Felly Kimenyi, *ICTR Refers Last Detainee to Rwanda*, NEW TIMES (Kigali), June 9, 2012 available at Westlaw, 6/10/12 allAfrica.com 15:37:47 (reporting on the transfer of Munyagishari and Uwinkindi in June and April, respectively, and noting that files against certain at-large ICTR suspects also had been given to Rwanda authorities). On the residual mechanism, see *infra* text accompanying notes 110-12.

<sup>102</sup> See Van Schaack, *Review*, *supra* note 82, at 200-02, 203-06, 213-14 (describing certain landmark rulings in these earlier proceedings).

<sup>103</sup> See S.C. Res. 1688, p. 2, U.N. Doc. S/RES/1688 (June 16, 2006) (endorsing transfer on ground that Taylor's "continued presence" in West Africa "is an impediment to stability and a threat to the peace of Liberia and of Sierra Leone and to international peace and security in the region"); *Cases: Prosecutor vs. Charles Taylor*, SCSL WEBSITE, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (visited Aug. 17, 2012)

Final sessions in Taylor's trial—on eleven counts of crimes against humanity and war crimes for his alleged involvement in Sierra Leone's civil war<sup>104</sup>—were marked by the eleventh-hour admission of leaked U.S. diplomatic cables and by a couple-day defense boycott of proceedings.<sup>105</sup> By mid-March closing arguments had concluded, and Trial Chamber II began deliberating, as it would through the balance of 2011.<sup>106</sup>

¶28 Back in Freetown a couple months later, Trial Chamber II made way for contempt-of-court proceedings against several former rebels alleged to have offered bribes and otherwise tried to induce prosecution witnesses to recant their testimony in *Taylor* and another trial.<sup>107</sup> One would plead guilty before year's end;<sup>108</sup> proceedings against the others continued into 2012.<sup>109</sup>

#### 4. Residual Mechanisms

¶29 Even as matters proceeded in the Sierra Leone court and the two Security Council-established *ad hoc* tribunals, each of these institutions worked in 2011 toward transition to so-called residual mechanisms.

¶30 Plans were for Special Court operations to be reduced—to just sixty-six staffers by December 2011—and for the Freetown courthouse and other assets to be transferred to the Sierra Leone government.<sup>110</sup> Transition included construction of a Peace Museum on the site of the

---

(stating that Taylor, originally indicted in March 2003, was transferred in June 2006, and that the prosecution opened its case in June 2007).

<sup>104</sup> See SCSL, *Prosecutor v. Charles Taylor*, SCSL-03-01-PT, Prosecution's Second Amended Indictment (May 29, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=lm0bAAMvYM%3d&tabid=107>.

<sup>105</sup> See Amanda Fortier, *Court Admits Wikileaks Documents in Former Liberian President's Trial*, VOICE OF AMERICA, Jan. 30, 2011, <http://www.voanews.com/content/court-admits-wikileaks-documents-in-charles-taylor-trial-114941749/134320.html>, (reporting on admission into evidence of "secret U.S. cables" that "appear to reveal doubts over the impartiality of the Special Court for Sierra Leone"); Marlise Simons, *Former Liberia Leader Boycotts War Crimes Trial*, INT'L HERALD TRIB., Feb. 10, 2011, at 3 (reporting on second day of boycott by defendant and his attorney, occasioned by court's exclusion of a defense submission as untimely).

<sup>106</sup> See *Taylor "Controlled" Sierra Leone Rebels: Prosecutor*, AGENCE FR.-PRESSE ENGLISH WIRE, Mar. 11, 2011, available at Westlaw, 3/11/11 Agence Fr.-Presse 10:29:35, (reporting on prosecution and defense closings). The accused would be convicted on April 26, 2012, pursuant to a 2,499-page decision later published as ICTR, *Prosecutor v. Charles Taylor*, SCSL-03-01-T, Judgment (May 18, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=EGbW%2bCH%2fbwE%3d&tabid=53>. He received a 50-year sentence. ICTR, *Prosecutor v. Charles Taylor*, SCSL-03-01-T, Sentencing Judgment (May 30, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3d&tabid=107>. The case is now on appeal.

<sup>107</sup> See ICTR, *Prosecutor v. Charles Taylor*, SCSL-03-01-T, Decision on the Report of the Independent Counsel (May 24, 2011) (authorizing one case to go forward in *Taylor* matter, involving a former Revolutionary United Front member), <http://www.sc-sl.org/scsl/public/SCSL-03-01-Taylor/SCSL-03-01-T-1249.pdf>; *War Crimes Court Charges Five With Contempt*, UN NEWS SERVICE, June 7, 2011, available at Westlaw, 2011 WLNR 11444035 (describing that matter and another involving four persons, charged in relation to an earlier trial, against leaders of the Armed Forces Revolutionary Council).

<sup>108</sup> See *One Convicted in Special Court Contempt Trial*, CONCORD TIMES (Freetown), July 18, 2011, available at Westlaw, 2011 WLNR 14451621.

<sup>109</sup> See SCSL, *Prosecutor v. Eric Senessie*, SCSL-2011-01-T, Judgment in Contempt Proceedings (Aug. 17, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=%2b3vnj%2fhcVGc%3d&tabid=199> (setting forth reasons for conviction, rendered in one of the cases during a June 2012 hearing); see also *Sierra Leone Court Begins Contempt Hearing*, NEW DAWN (Monrovia, Liberia), June 19, 2012, available at Westlaw, 6/19/12 allAfrica.com 13:31:45 (reporting on proceedings in other case).

<sup>110</sup> See *SCSL Report*, *supra* note 44, at 30, 34–35; see generally *UN Audit*, *supra* note 62.

Special Court in Freetown, as well as further training of Sierra Leonean authorities.<sup>111</sup> As the year concluded, national legislators enacted a statute approving a transitional court, to be charged with protection of victims, supervision of incarcerated defendants, and related ongoing matters.<sup>112</sup> Full establishment of that body, to be called the Residual Special Court for Sierra Leone, awaited completion of the *Taylor* trial.

¶31

Also under way were plans for transition in the international tribunals for Rwanda and for former Yugoslavia. By resolution adopted in the last weeks of 2010, the Security Council adopted a statute for a joint entity, the International Residual Mechanism for Criminal Tribunals.<sup>113</sup> Perhaps because of the unpronounceability of the ensuing acronym, IRMCT, the entity later was dubbed the Mechanism for International Criminal Tribunals, or MICT.<sup>114</sup> It was set to begin in Arusha in mid-2012 and at The Hague in mid-2013, based on an initial four-year mandate that would overlap somewhat with the final work of the two *ad hoc* tribunals.<sup>115</sup> MICT would comprise a common Prosecutor, President, and Registrar, a common Appeals Chamber, and two Trial Chambers.<sup>116</sup> By statute it is authorized not only to conduct retrials and to adjudicate contempt and other subsidiary offenses, but also to prosecute the handful of “most senior” ICTR indictees still at large.<sup>117</sup>

## 5. Cambodia

¶32

One might expect to read that the Khmer Rouge tribunal likewise is moving toward a transitional mechanism. Having been set in motion by Cambodian officials’ request in 1997,<sup>118</sup> the Extraordinary Chambers in the Courts of Cambodia seems among the older post-Cold War tribunals—in one sense the oldest, considering that the crimes within its jurisdiction occurred

<sup>111</sup> See *SCSL Report*, *supra* note 44, at 5–6, 23; Valerie Oosterveld, *Transition to the Residual Special Court for Sierra Leone*, INTLAWGRRLS, Nov. 15, 2011, <http://www.intlawgrrls.com/2011/11/transition-to-residual-special-court.html>. See generally Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone* (Nov. 1, 2011), <http://www.soros.org/sites/default/files/legacy-scsl-20111101.pdf>; Sierra Leone Truth & Reconciliation Comm’n, *Peace Museum*, <http://www.sierraleonetr.org/index.php/sierra-leone-peace-museum> (visited Aug. 18, 2012).

<sup>112</sup> See Jariatu Bangura, *MPs Enact Residual Special Court for Country Act*, CONCORD TIMES (Freetown), Dec. 27, 2011, available at Westlaw, 12/27/11 allAfrica.com 17:21:40; Valerie Oosterveld, *Completing the Work of the Special Court for Sierra Leone*, INTLAWGRRLS (Nov. 16, 2011, 6:31 AM), <http://www.intlawgrrls.com/2011/11/completing-work-of-special-court-for.html>. See also Letter dated 15 July 2010 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2010/385 (July 15, 2010) (writing of Council’s approval).

<sup>113</sup> MICT Statute (Dec. 22, 2010) [hereinafter Resolution 1966].

<sup>114</sup> See *Mechanism for International Criminal Tribunals*, MICT WEBSITE, <http://www.unmict.org/> (last visited Aug. 18, 2012).

<sup>115</sup> See *About*, MICT WEBSITE, <http://www.unmict.org/about.html> (visited Aug. 18, 2012); see also Transitional Arrangements, Annex 2 to Resolution 1966, *supra* note 113.

<sup>116</sup> MICT Statute, arts. 4, 11, 14, 15 (Dec. 22, 2010). Appointed in early 2012 were Theodor Meron of the United States, President; Hassan Bubacar Jallow of The Gambia, Prosecutor; and John Hocking of Australia, Registrar. Each had held the same post at either the ICTY or the ICTR. See *Principals*, MICT WEBSITE, <http://www.unmict.org/principals.html> (last visited Aug. 18, 2012).

<sup>117</sup> MICT Statute, art. 1 (Dec. 22, 2010). Officials were to refer cases to national courts when possible. *Id.* art. 6.

<sup>118</sup> See Letter from Prince Norodom Ranariddh, the First Prime Minister of Cambodia, and Hun Sen, the Second Prime Minister of Cambodia, to the Secretary-General (June 21, 1997), U.N. Doc. A/51/930, (June 24, 1997) (seeking “assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge”).

during and, in part because of, the Cold War.<sup>119</sup> Yet as a result of decades-long disagreements between the Cambodian government and international stakeholders, in many respects this ECCC has just begun the work for which it was designed.

¶33 The Cambodia tribunal has concluded just one case, against a lone defendant, the former head of a Phnom Penh detention center where more than 14,000 persons perished between 1975 and 1979.<sup>120</sup> He was convicted in mid-2010; his appeal remained pending throughout 2011.<sup>121</sup> A second case began in the middle of 2011, when former Khmer Rouge leaders—three men and one woman, ranging in age from eighty-five to seventy-nine—appeared in the ECCC’s Phnom Penh courtroom in order to face charges of crimes against humanity, war crimes, and genocide.<sup>122</sup> Thereafter, different incidents were sequenced into separate trials,<sup>123</sup> with the first trial beginning in November 2011—against the three men, the woman having been found incapable of proceeding because she suffered from dementia.<sup>124</sup>

¶34 Drawing the most attention in 2011 were two cases that did not go forward. Case 003 reportedly involved allegations of murder, extermination, torture, unlawful imprisonment, enslavement, and persecution and other inhumane acts, lodged against two Khmer Rouge commanders who became Cambodian generals following an amnesty.<sup>125</sup> Case 004 was said to involve similar charges against three regional officials.<sup>126</sup> During the October 2010 visit to Phnom Penh of U.N. Secretary-General Ban Ki-moon, Cambodian Prime Minister Hun Sen had

<sup>119</sup> See ECCC Statute, art. 2 new (Oct. 27, 2004) (authorizing trial of “senior leaders of Democratic Kampuchea” for certain offenses “committed during the period from 17 April 1975 to 6 January 1979”); Robert Petit, *Lawfare and International Tribunals: A Question of Definition? A Reflection on the Creation of the “Khmer Rouge Tribunal,”* 43 CASE W. RES. J. INT’L L. 189, 191 (2010) (drawing link, in article by the ECCC’s first International Co-Prosecutor, between Cold War politics and Khmer Rouge atrocities).

<sup>120</sup> Seth Mydans, *Cambodia: Prisoner Release Appealed*, N.Y. TIMES, Nov. 19, 2011, at A10, (describing Duch “as commandant of the Tuol Sleng prison, where more than 14,000 people were sent to their deaths”).

<sup>121</sup> The Appeals Chamber would reject his challenge in early 2012. ECCC, Prosecutor v. KAING Guek Eav alias ‘DUCH’, 001/18-07-2007-ECCC/SC, Appeal Judgment (Feb. 3, 2012), <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf> (affirming conviction for crimes against humanity and war crimes, and increasing sentence from thirty-five years to life in prison). See Oosterveld, *Review*, *supra* note 89, at 351–53.

<sup>122</sup> Seth Mydans, *Ex-Khmer Rouge Leaders Go on Trial in Cambodia*, N.Y. TIMES, June 27, 2011, at A4 (reporting the ages of the accused). See ECCC, Prosecutor v. KAING Guek Eav alias ‘DUCH’, 002/19-09-2007-ECCC, Closing Order (Sept. 15, 2010), <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf> (detailing charges); see also Oosterveld, *Review*, *supra* note 89, at 353–55 (analyzing forced-marriage charges in Case 002).

<sup>123</sup> See ECCC, 002/19-09-2007-ECCC, Severance Order Pursuant to Internal Rule 89TER (Trial Ch., Sept. 22, 2011).

<sup>124</sup> Seth Mydans, *Prosecutors Describe Khmer Rouge Leaders’ ‘Organized and Systematic’ Atrocities*, N.Y. TIMES, Nov. 22, 2011, at A12; Suy Se, *Court Denies Release of Ailing KRouge ‘First Lady’*, AGENCE FRANCE-PRESSE, Dec. 13, 2011 (reporting on ECCC Supreme Court Chamber reversal of decision below that had ordered unconditional release of the ailing defendant, identified as Pol Pot’s sister-in-law), available at Westlaw, 12/13/11 Agence Fr.-Presse 13:17:21. The passage of time also has affected survivors of the Khmer Rouge terror; one of fourteen known survivors of the Tuol Sleng detention center died after giving testimony in the first ECCC trial, yet before other trials were under way. See Beth Van Schaack, *In Memoriam: Vann Nath*, INTLAWGRRLS (Sept. 6, 2011, 2:23 PM), <http://www.intlawgrrls.com/2011/09/in-memoriam-vann-nath.html>.

<sup>125</sup> See *Statement from the International Co-Prosecutor Regarding Case File 003*, ECCC WEBSITE (May 9, 2011), <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-003> [hereinafter Cayley Statement]; Seth Mydans, *Conflicts Imperil Future Khmer Rouge Trials*, N.Y. TIMES, June 17, 2011, at A6 [hereinafter Mydans, *Conflicts*].

<sup>126</sup> James O’Toole, *Case 004 in the spotlight*, PHNOM PENH POST, May 6, 2011 (reporting identities of “trio of former cadres” that a “[l]ocal activist Theary Seng” said were “the subject of investigation in the court’s controversial fourth case”), available at Westlaw, 2011 WLNR 8872856.

made clear his view that trials should stop with Case 002.<sup>127</sup> Five months later, the ECCC's Co-Investigating Judges ended investigation in Case 003—a decision that spurred several U.N. investigators to resign, and International Co-Prosecutor Andrew Cayley to state publicly his intention to seek further inquiry on the ground “that the crimes alleged . . . have not been fully investigated.”<sup>128</sup> Cayley's Cambodian counterpart, Chea Leang, publicly disagreed, while the two judges publicly demanded Cayley's retraction.<sup>129</sup> “Since then, a soap opera has been playing out in the media,” one commentator wrote in June 2011.<sup>130</sup> By year's end, the International Co-Investigating Judge had resigned and no new charges had issued; in short, the matter of Cases 003 and 004 stood at an impasse.<sup>131</sup>

## 6. Lebanon

¶35 The Special Tribunal for Lebanon, meanwhile, moved swiftly on a number of fronts in 2011. In February, it produced what was among the year's more notable statements of doctrine, a 154-page decision that determined how the tribunal was to adjudicate the offense of terrorism.<sup>132</sup> Signing the decision on behalf of the five-member Appeals Chamber was President Antonio Cassese, an Italian law professor and international criminal law expert who also had served as the first President of the ICTY. Yielding his position to Judge David Baragwanath of New Zealand on October 9, 2011, Cassese died from cancer fewer than two weeks later.<sup>133</sup>

¶36 In the interlocutory decision, the Appeals Chamber responded to queries posed by the Pre-Trial Judge; in particular, a series of questions dealing with what the chamber called “this Tribunal's principal *raison d'être*: the crime of terrorism.”<sup>134</sup> By statute the tribunal was to apply “provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism” and other offenses; consequently, the Pre-Trial Judge had asked the extent to which

<sup>127</sup> See *No Third Khmer Rouge Trial, Says Hun Sen*, RFI, Oct. 27, 2010, available at <http://www.english.rfi.fr/node/55442>. (The prime minister is himself a former Khmer Rouge cadre). See Petit, *supra* note 119, at 191.

<sup>128</sup> Cayley Statement, *supra* note 125; see Mydans, *Conflicts*, *supra* note 125.

<sup>129</sup> ECCC, Order on International Co-Prosecutor's Public Statement Regarding Case File 003, Case No. 003/07-09-2009-ECCC (May 18, 2011), available at <http://www.eccc.gov.kh/en/document/court/order-international-co-prosecutors-public-statement-regarding-case-file-003>. The issuing judges were You Bunleng of Cambodia and Siegfried Blunk of Germany.

<sup>130</sup> Phuong Pham, *The Khmer Rouge Tribunal in Cambodia Under Scrutiny*, INTLAWGRRLS (June 15, 2011, 4:51 AM), <http://www.intlawgrrls.com/2011/06/khmer-rouge-tribunal-in-cambodia-under.html>.

<sup>131</sup> *Statement by the International Co-Investigating Judge*, ECCC WEBSITE, <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge> (last visited Aug. 18, 2012); see Lindsay Murdoch, *Khmer Rouge trials face collapse as judge quits*, AGE (Oct. 12, 2011), at 18. Investigations did not resume in the first half of 2012. See Mary Kozlovski, *New Judge for Cambodia's War Crimes Court*, DEUTSCHE WELLE (July 31, 2012) (noting that appointee would be third international co-investigating judge in less than a year), available at <http://www.dw.de/dw/article/0,,16133344,00.html>.

<sup>132</sup> STL, STL-11-01/I, Interlocutory Decision on the Applicable Law; Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (App. Ch. Feb. 16, 2011), available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis/filings/orders-and-decisions/appeals-chamber/f0010> [hereinafter Terrorism Decision].

<sup>133</sup> *Ex-president of STL Cassese dies of cancer in Italy*, DAILY STAR (Oct. 23, 2011), available at Westlaw, 2011 WLNR 21764892. See “Walking the road he paved”, *Tribute to Antonio Cassese*, STL WEBSITE, <http://www.stl-tsl.org/en/about-the-stl/events/walking-the-road-he-paved-tribute-to-antonio-cassese> (last visited July 30, 2012) (collecting documents commemorating Cassese).

<sup>134</sup> Terrorism Decision, *supra* note 132, ¶ 42.

international law ought to be taken into account.<sup>135</sup> Reasoning in a manner familiar to any student of certain U.S. Supreme Court decisions in the wake of the terrorist attacks of September 11, 2001, the Appeals Chamber wrote that it would apply Lebanon's code, yet would consult pertinent international principles as an aid to interpreting that domestic law.<sup>136</sup>

¶37 This methodology necessitated an interim step, one that would prove pathbreaking. For decades international bodies had struggled with defining the crime of terrorism; thus did the tribunal's Defence Office and Prosecutor "forcefully assert that there is currently no settled definition of terrorism under customary international law."<sup>137</sup> The Appeals Chamber disagreed, and articulated three essential elements of what it called a "customary rule" applicable "at least *in time of peace*":

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.<sup>138</sup>

¶38 This definition, broader than that in some treaties, stirred controversy: on the one hand, it generated praise for easing enforcement of counterterrorism measures; on the other, it drew criticism for potentially expanding the universe of conduct that merits international criminal law intervention.<sup>139</sup> Debate seemed likely to continue within international fora.

¶39 As for the domestic law that the special tribunal must apply, the Lebanese Criminal Code referred to "acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices . . ." <sup>140</sup> Having compared this statute with international treaties and custom, the Appeals Chamber determined that in the Special Tribunal for Lebanon conviction for terrorism would require proof that the accused, intending to cause a state of terror,

<sup>135</sup> STL Statute, art. 2(a) (May 30, 2007). On the comparison with post-September 11 jurisprudence, see *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (interpreting provision of federal military justice statute respecting military commissions by reference to international law, including the Geneva Conventions on the laws of war); Diane Marie Amann, *Cues from Offstage: International Law and the Supreme Court's Detention Trilogy*, ACLU INT'L CIV. LIBERTIES RPT. 1 (2004), available at <http://www.aclu.org/files/iclr/amann.pdf>. Cassese himself had paid heed to the U.S. developments. See Diane Marie Amann, *In passing: Antonio Cassese*, INTLAWGRRRLS (Oct. 25, 2011, 4:10 AM), <http://www.intlawgrrls.com/2011/10/in-passing-antonio-cassese.html>.

<sup>136</sup> Terrorism Decision, *supra* note 132, ¶¶ 44–45, 62 (explaining, in paragraph 45, ". . . that as domestic law those Lebanese provisions may be construed in the light and on the basis of the relevant international rules . . .") (emphasis in original).

<sup>137</sup> *Id.* ¶ 83. See ANTONIO CASSESE, INTERNATIONAL LAW, 449–50 (2d ed. 2005) (writing that U.N. debate on the crime of terrorism had waged for more than three decades, yet no agreement on a definition had been reached).

<sup>138</sup> Terrorism Judgment, *supra* note 132, ¶ 85 (emphasis in original).

<sup>139</sup> Compare, e.g., Michael P. Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, ASIL INSIGHT (Mar. 4, 2011), <http://www.asil.org/insights110304.cfm> (stating with approval that definition would help implement Security Council measures against terrorism financing), with Diane Marie Amann, *Terrorism said to be defined*, INTLAWGRRRLS (Mar. 9, 2011, 6:00 AM), <http://www.intlawgrrls.com/2011/03/terrorism-said-to-be-defined.html> (raising questions about reach of posited definition).

<sup>140</sup> Lebanese Crim. Code, art. 314, quoted in Terrorism Judgment, *supra* note 132, ¶ 47.

volitionally committed an act through means liable to create a public danger, and explored the considerations implicit in each of those elements.<sup>141</sup>

¶40 These contours having been set forth, tribunal officials moved toward trial. In mid-2011, the Pre-Trial Judge approved arrest warrants against four Lebanese men alleged to have been involved in the February 14, 2005, bombing in Beirut that killed former Prime Minister Rafik Hariri and twenty-one other persons.<sup>142</sup> The four were said to be “close associates” of the militant group Hezbollah, whose leadership refused to turn over the indictees.<sup>143</sup> Accordingly, the four defendants appeared destined to become the first since the Nazi leader Martin Bormann to be tried *in absentia* by an international criminal tribunal.<sup>144</sup>

¶41 Granted by its statute jurisdiction over attacks that are deemed “connected in accordance with the principles of criminal justice and are of a nature and gravity similar” to that which killed Hariri,<sup>145</sup> the tribunal added a second case to its docket. Specifically, national authorities were instructed to permit the tribunal to pursue three other 2005 bombing attacks against Lebanese politicians.<sup>146</sup> Investigation remained under way at the close of 2011.

### B. International Criminal Court

¶42 The International Criminal Court passed a milestone on December 5, 2011, when Laurent Gbagbo, the ex-President of Côte d’Ivoire, made his initial appearance in an ICC courtroom.<sup>147</sup> Gbagbo had been transported to The Hague, under sealed arrest warrant, to face trial for crimes against humanity alleged to have occurred a year earlier, by armed forces that remained loyal to

<sup>141</sup> Terrorism Judgment, *supra* note 132, ¶ 147. (enumerating the three elements of the offense); *see id.* ¶¶ at 38–148 (surveying state practice and international agreements, including the Arab Convention on the Suppression of Terrorism, Apr. 22, 1998, available at [https://www.unodc.org/tldb/pdf/conv\\_arab\\_terrorism.en.pdf](https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf)). The analysis bore resemblance to that in ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 162–78 (2d ed. 2008).

<sup>142</sup> Alexandra Sandels, *Tribunal posts information on Hariri slaying suspects*, L.A. TIMES, July 30, 2011, at 7. *See Accused*, STL WEBSITE, <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/accused> (last visited Aug. 18, 2012). Each warrant is available at *Key filings*, STL WEBSITE, <http://www.stl-tsl.org/en/stl1101-key-filings/Page-3> (last visited Aug. 18, 2012).

<sup>143</sup> Sandels, *supra* note 142.

<sup>144</sup> The Trial Chamber ordered further submissions on the question toward the end of 2011. STL, Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi & Assad Hassan Sabra, STL-11-01/I/TC/F0079/20111123/R094603-R094609/EN/nc, Interim Decision Under Rule 106 (Proceedings *In Absentia*) (Trial Ch. Nov. 23, 2011) (ordering further submissions), available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f0079>. It decided early in 2012 to go forward with such a trial. STL, Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi & Assad Hassan Sabra, STL-11-01/I/TC/F0112/20120201/R109799-R109846/EN/pvk, Decision to Hold Trial *In Absentia* (Trial Ch. Feb. 1, 2012), available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f0112>. On Bormann’s *in absentia* conviction by the International Military Tribunal at Nuremberg, see TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 87–90, 204, 267, 597–99 (1992); Chris Jenks, *Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 FORDHAM INT’L L.J. 57, 68 (2009).

<sup>145</sup> STL Statute, art. 1 (May 30, 2007).

<sup>146</sup> *See UN-backed Lebanon Tribunal to Probe Three Hariri-linked Bomb Attacks*, AL ARABIYA, Aug. 19, 2011, available at Westlaw, 2011 WLNR 16476296. Information on the investigations may be found at *Connected cases, Hamadeh, Hawi and El-Murr (STL-11-02)*, STL WEBSITE, <http://www.stl-tsl.org/en/the-cases/stl-11-02> (last visited Aug. 18, 2012).

<sup>147</sup> ICC, Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11-T-1-ENG, Transcript of Initial Appearance Open Session (Dec. 5, 2011).

him in the wake of his loss in a presidential election.<sup>148</sup> Although other heads of state or government had been sought—Sudan’s Omar Hassan al-Bashir since March 2006, and Libya’s Gaddafi in the months leading up to his death in October 2011—Gbagbo thus became the first over whom the ICC exercised custody.<sup>149</sup> The event augured well for the ICC as it approached its second decade with several new judges and a new Prosecutor: elected the week after Gbagbo’s appearance was Fatou Bensouda of The Gambia who, as Deputy Prosecutor, had traveled to Abidjan six months earlier in order to launch the Côte d’Ivoire investigation.<sup>150</sup>

¶43

Yet the Ivorian matter had its downsides as well. Some critics, among them nongovernmental organizations like Human Rights Watch, pressed for investigation of crimes alleged to have been committed by forces loyal to the newly installed president.<sup>151</sup> Others assessed the Situation in Côte d’Ivoire in the context of all situations before the ICC in 2011, seven all told, and all seven on the continent of Africa.<sup>152</sup> The first ICC trial, on which Trial Chamber I deliberated after closing arguments in August, arose out of conflict in the Democratic Republic of the Congo.<sup>153</sup> The same was true for another case in trial in 2011, while the third

<sup>148</sup> See ICC, Situation in the Republic of Côte D’Ivoire, ICC-02/11-01/11-1, Under Seal: Ex Parte Prosecution and Registry Only: Urgent: Warrant Of Arrest For Laurent Koudou Gbagbo (Nov. 23, 2011), <http://www2.icc-cpi.int/iccdocs/doc/doc1276751.pdf>.

<sup>149</sup> See Robyn Dixon, *Ivory Coast ex-president arrives in The Hague to face charges*, L.A. TIMES, Dec. 1, 2011, at A10. On Bashir, see ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; on Gaddafi and other matters related to the ICC’s Situation in Libya, see *supra* text accompanying notes 25–37. In 2012, ICC judges would rebuff a defense claim that Gbagbo was unfit to endure the proceedings against him. See ICC, Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11-286-Red, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court (Nov. 2, 2012), <http://www2.icc-cpi.int/iccdocs/doc/doc1501444.pdf>.

<sup>150</sup> See Scott Stearns, *ICC Opens War Crimes Investigation in Ivory Coast*, VOICE OF AMERICA, June 28, 2011 (reporting on Bensouda’s visit to Abidjan), available at Westlaw, 2011 WLNR 12883367. See also Int’l Crim. Ct., *Assembly of States Parties to the Rome Statute elects six judges*, (Dec. 16, 2011), <http://www.icc-cpi.int/menu/asp/press%20releases/press%20releases%202011/pr758>; Marlise Simons, *Gambian Will Lead Prosecution in Hague*, N.Y. TIMES, Dec. 13, 2011, at A6 (reporting on Assembly’s election of Fatou Bensouda to become Prosecutor in mid-2012).

<sup>151</sup> See Human Rights Watch, “*They Killed Them Like It Was Nothing*”: *The Need for Justice for Côte d’Ivoire’s Post-Election Crimes* (Oct. 2011), available at [http://www.hrw.org/sites/default/files/reports/cdi1011webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/cdi1011webwcover_0.pdf).

<sup>152</sup> *Situations and cases*, ICC WEBSITE, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/> (last visited Nov. 6, 2012) (listing situations fully under way in the Central African Republic, Côte d’Ivoire, the Democratic Republic of the Congo, Kenya, Libya, Uganda, and Darfur, Sudan) [hereinafter ICC, *Situations*]. An eighth situation, also in Africa, was opened when the Republic of Mali, beset by rebel occupation in the north of the country, self-referred to the ICC by means of a letter dated July 13, 2012, available at <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>. The Office of the Prosecutor consequently launched a preliminary examination to determine whether to go forward with this situation. See ICC, Press Release, *ICC Prosecutor Fatou Bensouda on the Malian State referral of the situation in Mali since January 2012*, ICC-OTP-20120718-PR829 (July 18, 2012), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr829.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr829.aspx).

<sup>153</sup> The verdict convicting this first defendant, a former Congolese rebel leader, would be delivered on March 14, 2012—and viewed via live webcast by participants in the Hague conference that gave rise to the instant Article. *Lubanga* Judgment, *supra* note 55. A prison sentence of fourteen years was imposed. ICC, Prosecutor v. Thomas Lubanga Dyilo Lubanga, ICC-01/04-01/06-2842, Decision on Sentence pursuant to Article 76 of the Statute (July 10, 2012). For an examination of these two decisions in *Lubanga*, as well as the decision in *Lubanga* Reparations, *supra* note 58, see Diane Marie Amann, *International Decision: Prosecutor v. Lubanga*, 106 AM. J. INT’L L. 809 (2012).

concerned a Congolese official implicated in crimes in the Central African Republic.<sup>154</sup> Many of the accused were government elites—not only Gbagbo, Gaddafi, and Bashir, but also a half-dozen top politicians known in their home state of Kenya, in a disparaging nod to the first ICC Prosecutor, as the “Ocampo Six.”<sup>155</sup>

¶44 These facts generated intense debate. The chief executive of the African Union, whose fifty-three members included thirty-one ICC states parties, called the court “discriminatory” for maintaining an all-Africa docket at a time that Western states were intervening in countries such as Iraq and Afghanistan.<sup>156</sup> His comments echoed others reported in the media.<sup>157</sup> ICC officials responded, first, that six of the seven matters arrived at The Hague by Security Council referral or by request of the territorial states themselves, and, second, that victims in Africa welcomed ICC intervention.<sup>158</sup> Bensouda nevertheless took pains to stress in her first post-election speech, “I will be the Prosecutor of all the States Parties, in an independent and impartial manner.”<sup>159</sup> Whether the court would turn its attention to non-Africa matters, and whether it would develop criteria for explaining its case-selection decisions, remained questions as 2011 drew to a close.<sup>160</sup>

<sup>154</sup> See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC WEBSITE, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0107/Democratic+Republic+of+the+Congo.htm> (last visited Aug. 21, 2012) (describing proceedings in second case involving the Democratic Republic of the Congo); *Prosecutor v. Jean-Pierre Bemba Gombo* (describing proceedings in case involving the Central African Republic), ICC WEBSITE, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Case+The+Prosecutor+v+Jean-Pierre+Bemba+Gombo.htm> (last visited Aug. 21, 2012).

<sup>155</sup> In Kenya’s newspapers, stories about the Ocampo Six not infrequently appeared under emotion-grabbing headlines. E.g., Oliver Mathenge, *Politicians Walk a Tightrope As Courts Swoop in for the Kill*, NATION, Jan. 1, 2011, available at Westlaw, 2011 WLNR 93924. On the proceedings themselves, see *Situation in Kenya*, ICC WEBSITE, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/> (last visited Aug. 21, 2012).

<sup>156</sup> Rukmini Callimachi, *African Union calls on member states to disregard ICC arrest warrant against Libya’s Gadhafi*, ASSOCIATED PRESS, July 2, 2011, available at <http://readingeagle.com/article.aspx?id=317224>; see also William Davison, *African Union gets a South African leader, lending the group heft*, CHRISTIAN SCI. MONITOR, July 22, 2012, available at Westlaw, 2012 WLNR 15354609 (quoting Jean Ping of Gabon, who would be voted out of office the following year). The ICC Office of the Prosecutor announced in 2007 that it had opened a preliminary examination in Afghanistan, but had not made any determination in that matter as of this writing. See *Afghanistan*, ICC WEBSITE, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/afghanistan/Pages/afghanistan.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/afghanistan/Pages/afghanistan.aspx) (last visited Aug. 21, 2012). Preliminary investigations remained pending in a number of other states as well. See also ICC, *Situations*, *supra* note 152.

<sup>157</sup> See Callimachi, *supra* note 156 (quoting a Libyan official’s description of the court as “imperialist”); see also Scott Stearns, *African Union Says ICC Prosecutions are Discriminatory*, VOICE OF AM. (July 4, 2011), <http://www.voanews.com/content/article--african-union-says-icc-prosecutions-are-discriminatory-125012734/158424.html> (reporting similar comments by one of the defense attorneys for Charles Taylor, the former Liberian President subjected to trial before the Special Court for Sierra Leone).

<sup>158</sup> See, e.g., Margaret deGuzman, *Bensouda on ICC prosecutions*, INTLAWGRRRLS (Mar. 31, 2011, 6:30 AM), <http://www.intlawgrrls.com/2011/03/bensouda-on-icc-prosecutions.html> (reporting Bensouda’s response to question about the ICC and Africa); ICC, *Situations*, *supra* note 152.

<sup>159</sup> Fatou Bensouda, *A global mandate to end impunity & effect justice*, INTLAWGRRRLS (Dec. 14, 2011, 9:39 AM), <http://www.intlawgrrls.com/2011/12/global-mandate-to-end-impunity-effect.html> (reprinting Dec. 12, 2011, speech (translation of passage from original French by author)).

<sup>160</sup> Among those calling for improved explanation were James A. Goldston, *More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT’L CRIM. JUST. 383 (2010), and William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731 (2008).

¶45 The Kenya case involving post-election violence produced a notable decision respecting the meaning of crimes against humanity. By the terms of the Rome Statute, specified acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” constitute crimes against humanity.<sup>161</sup> The attack must occur “pursuant to or in furtherance of a State or organizational policy,” moreover.<sup>162</sup> In approving the Prosecutor’s request for issuance of a summons, Pre-Trial Chamber II Judges Ekaterina Trendafilova of Bulgaria and Cuno Tarfusser of Italy determined that the political network in which the accused were alleged to have been involved constituted an “organization,” and the network’s actions constituted a “policy” within the meaning of the statute.<sup>163</sup> The third member of the panel, Judge Hans-Peter Kaul of Germany, filed a twenty-eight-page dissent in which he argued that the statutory terms applied only to states or state-like entities.<sup>164</sup> The dissent reiterated another filed the previous year, in which Kaul had traced the roots of his argument to the Nuremberg era.<sup>165</sup> This jurisprudential disagreement has spurred commentary.<sup>166</sup>

¶46 Judge Kaul further emerged as a principal advocate for activation of ICC jurisdiction over the crime of aggression, an offense not prosecuted internationally since the close of the Nuremberg tribunals. Amendments that would permit activation as early as 2017 were adopted by consensus at the 2010 ICC Review Conference in Kampala, Uganda;<sup>167</sup> by the end of 2011, however, not one of the twenty states necessary for entry into force had ratified. That stood in stark contrast with the Rome Statute, which had garnered its first ratification in six months. Kaul, a former diplomat who had headed the German delegation at the Rome meeting that launched the ICC, often voiced, in moving words, why he hoped aggression one day would be fully punishable.<sup>168</sup> Whether that day would come was a question left for answer in some future year.<sup>169</sup>

<sup>161</sup> ICC Statute, art. 7(1) (Nov. 29, 2010).

<sup>162</sup> *Id.* art. 7(2)(a).

<sup>163</sup> ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, No. ICC-01/09-01/11-01, Decision on the “Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,” ¶¶ 25–26, (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf>.

<sup>164</sup> ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, ICC-01/09-01/11-2, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,” ¶12, (Mar. 15, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1039488.pdf>.

<sup>165</sup> See *id.* at 4, ¶4 (quoting Situation in the Republic of Kenya, ICC-01/09-19, Dissenting Opinion of Judge Hans-Peter Kaul appended to the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” ¶¶ 8, 65 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>).

<sup>166</sup> Compare, e.g., SCHABAS, ATROCITIES, *supra* note 37, at 143–44 (endorsing Kaul’s argument) with Leila Sadat, *Crimes Against Humanity in the Modern Age*, AM. J. INT’L L. (forthcoming 2013) (manuscript on file with author) (arguing, by reference to empirical data, that majority’s approach better reflects contemporary meaning of crimes against humanity).

<sup>167</sup> Resolution RC/Res. 6, *The Crime of Aggression*, adopted June 11, 2010, by consensus (June 28, 2010, advance version), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) (last visited Aug. 21, 2012). The Rome Statute named aggression as one of four crimes within the purview of the ICC, yet conditioned prosecution of aggression on subsequent amendments “defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.” ICC Statute, art. 5 (Nov. 29, 2010).

<sup>168</sup> See Hans-Peter Kaul, Second Vice-President, International Criminal Court, Address at the Li Haopei Lecture Series: Is it Possible to Prevent or Punish Future Aggressive War-making?, ICC WEBSITE (Feb. 8, 2011), available at [http://www.icc-cpi.int/NR/rdonlyres/6B2BA9C6-C5B5-417A-8EF4-DA3CA0902172/282974/07022011\\_ImplicationsoftheCriminalizationofAggress.pdf](http://www.icc-cpi.int/NR/rdonlyres/6B2BA9C6-C5B5-417A-8EF4-DA3CA0902172/282974/07022011_ImplicationsoftheCriminalizationofAggress.pdf); see also Diane Marie Amann,

## V. CONCLUSION

¶47

In 2011 international criminal tribunals perched, like Janus, on a threshold. All looked back at strengths and shortfalls, aspiring to minimize the latter and multiply the former. Each looked forward to a different future: some to transitions in the near term, others to years more of courtroom proceedings. Looking furthest forward was the International Criminal Court, the sole tribunal designed to be permanent. As with all others, its future depended on efficient litigation responsive to the demands of multiple stakeholders, and to the successful navigation of the shoals of global economic and political developments.

---

*ICC prospects post-Kampala*, INTLAWGRRLS (Sept. 8, 2010, 3:05 AM), <http://www.intlawgrrls.com/2010/09/icc-prospects-post-kampala.html> (reporting on Kaul's speech at International Humanitarian Law Dialogs).

<sup>169</sup> Ratifications trickled in during 2012. In May, Liechtenstein deposited its instrument of ratification. *Crime of Aggression: Ratification of the Amendment*, ICC WEBSITE (May 9, 2012), <http://www.icc-cpi.int/NR/exeres/4CEF8E87-B878-4348-9EE3-2E2E4C278A52.htm>; see Diane Marie Amann, *Making Aggression Punishable Before the ICC: Liechtenstein Leads Way & Germany's on Road*, INTLAWGRRLS (May 9, 2012, 2:27 PM), <http://www.intlawgrrls.com/2012/05/making-crime-of-aggression-punishable.html> (discussing, in addition to first ratification, Berlin conference in which Kaul took part, and at which top German diplomat pledged her country would ratify the amendments). Following Liechtenstein several months later were two other countries, Samoa and Trinidad and Tobago. See ICC, Press Release, *Trinidad and Tobago ratifies amendments to the Rome Statute on the crime of aggression and article 8* (Nov. 15, 2012), <http://www2.icc-cpi.int/Menu/ASP/Press+Releases/Press+Releases+2012/PR852.htm>; ICC, Press Release, *Samoa Ratifies Amendments on the Crime of Aggression and Article 8* (Sept. 27, 2012), <http://www.icc-cpi.int/Menu/ASP/Press+Releases/Press+Releases+2012/PR838.htm>.