A Janus Look at International Criminal Justice

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I. INTRODUCTION

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.”1 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.2 It was the twentieth year since the U.N. Security Council became seized of the conflict in the Balkans3—an event that would lead the Council first to warn combatants of potential prosecution,4 and then to establish a mechanism for such prosecutions, the International Criminal Tribunal for the former Yugoslavia (ICTY).5 The International Criminal Tribunal for

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4 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, 639, 640–41 (1993).
Rwanda (ICTR), meanwhile, marked fifteen years since the first accused appeared in an Arusha courtroom.\(^6\) 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,\(^7\) while the Special Court for Sierra Leone approached ten years since the United Nations and Sierra Leone agreed on that court’s establishment.\(^8\) 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.\(^9\) Each tribunal thus glanced backwards even as it continued to move ahead.

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.\(^10\) 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.\(^11\) 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.\(^12\) In 2011 the Special Court for Sierra Leone awaited verdict in its most significant trial, of former Liberian President Charles Taylor.\(^13\) Another tribunal, the ECCC, remained mired in the politics of Cambodia’s awful past even as one new trial went forward.\(^14\) 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.\(^15\) 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.\(^16\)

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7 See infra note 118 and accompanying text.


9 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).

10 See infra text accompanying notes 110–17.

11 See infra text accompanying notes 65–72.

12 See infra text accompanying notes 94–101.

13 See infra text accompanying notes 102–06.

14 See infra text accompanying notes 118–31.

15 See infra text accompanying notes 132–44.

16 See infra text accompanying notes 25–37, 147–60.
This intricate description is, nevertheless, a simplified account. It omits other contemporary efforts to advance global justice, 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. 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. Increasingly, the ICJ has been called upon to determine state responsibility in matters implicating international criminal law. Pending in 2011, for instance, were matters involving genocide, sovereign immunity and forced labor, and extradition on charges of torture.

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

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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

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

A. Politics

“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.\(^{23}\) Within a month fellow strongman Hosni Mubarak found himself out of a job in Egypt,\(^{24}\) 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.\(^{25}\) 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.\(^{26}\)
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. 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.

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. 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. 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. 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. 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.

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

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28 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.

29 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).

30 Resolution 1970, supra note 25, at 2, ¶ 6 (Libya); Resolution 1593, supra note 28, at 2, ¶ 6 (Sudan).


an op-ed that demanded Gaddafi’s ouster. 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. 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. 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. 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.

III. ECONOMICS

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. In a stinging example, in an editorial published before Gaddafi’s death, the Washington Post accorded Mladic’s arrest only minimal significance:

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

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34 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).
35 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).
37 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 SHEFFER, supra note 5, at 8).
38 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.\textsuperscript{39}

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,\textsuperscript{40} presented without any
yardstick for comparison.\textsuperscript{41} The question of cost deserves more careful consideration.

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

\textsuperscript{39} 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”).

\textsuperscript{40} 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”).

\textsuperscript{41} 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”).

\textsuperscript{42} 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.

\textsuperscript{43} “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
halving of the two-year gross amount.

\textsuperscript{44} 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=kK8RBeHGowQ%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”).

\textsuperscript{45} 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).

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.”).

\textsuperscript{47} ICC, Report on Activities and Programme Performance of the International Criminal Court for the Year 2011,
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. 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. 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. 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. Also different is the matter of distance. The ECCC is the only tribunal based exclusively in the state it is tasked to address; 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. The Special Court moved the Taylor trial to that Dutch city even as it continued other proceedings in Freetown, 3,200 miles away. 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. 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
additional official languages, Arabic, Chinese, Russian, and Spanish. A similar linguistic challenge is present at every tribunal.

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. What is more, each tribunal must attend to a range of victims’ needs during trial, and several are expected to provide reparations thereafter. Each institution also shoulders burdens of witness protection and public outreach greater than those in many national systems. Considered within the architectural frame of the tribunals’ statutes—statutes that states themselves negotiated—reasons for the cost of international criminal justice become evident.

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.

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. Funding concerns also loomed large

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56 See Lubanga Judgment, supra note 55, ¶¶ 73, 113; ICC Statute, art. 50 (Nov. 29, 2010).
58 E.g., ICC 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.
60 SCHEFFER, supra note 5, at 28 (footnotes omitted).
61 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#.USwlMVrwI1E.
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.\(^6\) 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.\(^6\) 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.\(^6\)

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.\(^6\) 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.\(^6\) The captures permitted the ICTY to try its
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.\footnote{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.}

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.\footnote{See Case Information Sheet: Radovan Karadžić, at 5, ICTY WEBSITE, 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).} 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.\footnote{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”).} In 2006 former Serbian President Slobodan Milošević had died in a Dutch jail, four years into an ICTY trial that seemed far from verdict.\footnote{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.} Loathe to repeat that precedent, Trial Chamber I approved a request to reduce charges against Mladić in an effort to speed the proceedings.\footnote{ICTY, Prosecutor v. Ratko Mladić, IT-09-92-PT, Decision Pursuant to Rule 73bis before the ICTY, 7 NW. J. INT’L HUM. RTS. 239, 239 (2009).} A new indictment, alleging eleven counts of genocide, crimes against humanity, and war crimes, was issued in mid-December 2011.\footnote{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.}

and began retrial of Kosovo’s former prime minister following the Appeals Chamber’s post-acquittal reinstatement of some charges against him. 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. 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. Trial Chamber II continued with the trial of a Bosnian Serb intelligence officer charged with genocide and other offenses related to the Srebrenica massacre, and it neared conclusion of the trial of two Bosnian Serbs charged with persecution and other crimes in the Krajina.

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. 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 Tudman, who served as President of Croatia until his death in 1999. Trial Chamber I acquitted one defendant but convicted the other two, including General Ante Gotovina, overall commander of Operation Storm.

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
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. 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. The answer to whether that aspect of the Gotovina ruling would indeed be reconsidered awaited issuance of the appellate judgment.

2. Rwanda

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. Trial Chamber III had delivered two judgments by year’s end.

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84 See Gotovina Judgment, supra note 74, at 724-26, ¶ 1375-81; Gotovina Judgment, supra note 74, at 961-69, ¶ 1809-913. 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.


86 ICTR, Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntabahali, Sylvain Nsabimana, Alphonse Nteziyayo, Joseph Kanyabashi & Élï Ndayambaje, ICTR-98-42-T, Judgment and Sentence, (June 24, 2011), http://www.unictr.org/Portals/0/Cases/tabid/127/PID/83/default.aspx?id=4&muid=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 Nindindilyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye & Innocent Sagahutu, ICTR-00-56-T, Judgment and Sentence, (May 17, 2011), http://www.unictr.org/Portals/0/Cases%5CEnglish%5C9Nindindilyimana%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 Bicanumpaka & Prosper Mugiraneza, ICTR-99-50-T,
end, and it was moving toward written judgment in three cases. These matters joined several others pending in the Appeals Chamber, which in 2011 delivered judgments in two cases.

Particular note was paid to the mid-2011 judgment against Pauline Nyiramasuhuko, Rwanda’s former Minister of Women’s Development. 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. She is the first woman ever to have been convicted by an international tribunal of that offense.

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. Rather than go forward with trial in Arusha,
however, ICTR Prosecutor Hassan Bubacar Jallow eventually sought to refer the case to the national courts in Rwanda pursuant to ICTR Rule 11 bis. In the past, such transfers, requested as part of an overall completion strategy, had been thwarted by adverse judicial rulings. 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. 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. 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. The decision was hailed in Rwanda as lifting the last extradition roadblocks. 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.

3. Sierra Leone

With the conclusion of the three principal trials in Freetown against leaders of rebel and government-supported militias, 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.

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95 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.unictr.org/Portals/0/English%5CLegal%5CROP%5C100209.pdf.


97 ICTR, Prosecutor v. Jean Uwinkindi, ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (June 28, 2011), http://www.unictr.org/Portals/0/Case%5CEnglish%5C%5CUwinkindi%5C%5C%5C10628.pdf.


100 Id. ¶ 129 (interpreting European Convention, supra note 98, art. 6).

101 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.

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

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—were marked by the eleventh-hour admission of leaked U.S. diplomatic cables and by a couple-day defense boycott of proceedings. By mid-March closing arguments had concluded, and Trial Chamber II began deliberating, as it would through the balance of 2011.

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. One would plead guilty before year’s end; proceedings against the others continued into 2012.

4. Residual Mechanisms

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.

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. 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).


See One Convicted in Special Court Contempt Trial, CONCORD TIMES (Freetown), July 18, 2011, available at Westlaw, 2011 WLNR 14451621.


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. 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. Full establishment of that body, to be called the Residual Special Court for Sierra Leone, awaited completion of the Taylor trial.

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. Perhaps because of the unpronounceability of the ensuing acronym, IRMCT, the entity later was dubbed the Mechanism for International Criminal Tribunals, or MICT. 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. MICT would comprise a common Prosecutor, President, and Registrar, a common Appeals Chamber, and two Trial Chambers. 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.

5. Cambodia

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, 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

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113 MICT Statute (Dec. 22, 2010) [hereinafter Resolution 1966].


115 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).

116 MICT Statute, art. 1 (Dec. 22, 2010). Officials were to refer cases to national courts when possible. Id. art. 6.

117 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.\textsuperscript{119} 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.

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.\textsuperscript{120} He was convicted in mid-2010; his appeal remained pending throughout 2011.\textsuperscript{121} 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.\textsuperscript{122} Thereafter, different incidents were sequenced into separate trials,\textsuperscript{123} 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.\textsuperscript{124}

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.\textsuperscript{125} Case 004 was said to involve similar charges against three regional officials.\textsuperscript{126} During the October 2010 visit to Phnom Penh of U.N. Secretary-General Ban Ki-moon, Cambodian Prime Minister Hun Sen had

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\textsuperscript{120} 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”).


\textsuperscript{123} See ECCC, 002/19-09-2007-ECCC, Severance Order Pursuant to Internal Rule 89TER (Trial Ch., Sept. 22, 2011).


\textsuperscript{126} 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.\footnote{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.} 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.”\footnote{Cayley Statement, supra note 125; see Mydans, Conflicts, supra note 125.}\footnote{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.} \footnote{See Petit, supra note 119, at 191.}\footnote{Petit, supra, note 119, at 191.} Cayley’s Cambodian counterpart, Chea Leang, publicly disagreed, while the two judges publicly demanded Cayley’s retraction.\footnote{Cayley Statement, supra note 125; see Mydans, Conflicts, supra note 125.} “Since then, a soap opera has been playing out in the media,” one commentator wrote in June 2011.\footnote{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.\footnote{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.} 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.\footnote{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/I0010 [hereinafter Terrorism Decision].}

6. Lebanon


\¶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.”\footnote{Terrorism Decision, supra note 132, ¶ 42.} 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
international law ought to be taken into account.\textsuperscript{135} 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.\textsuperscript{136}

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.”\textsuperscript{137} 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.\textsuperscript{138}

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 on other, it drew criticism for potentially expanding the universe of conduct that merits international criminal law intervention.\textsuperscript{139} Debate seemed likely to continue within international fora.

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 . . . .”\textsuperscript{140} 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,
volitionally committed an act through means liable to create a public danger, and explored the
considerations implicit in each of those elements.141

¶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.142 The four were said to be “close associates” of the
militant group Hezbollah, whose leadership refused to turn over the indictees.143 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.144

¶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,145 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.146 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.147
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

141 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
bore resemblance to that in ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 162–78 (2d ed. 2008).
142 Alexandra Sandels, Tribunal posts information on Hariri slaying suspects, L.A. TIMES, July 30, 2011, at 7. See
warrant is available at Key filings, STL WEBSITE, http://www.stl-tsl.org/en/stl/1101-key-filings/Page-3 (last visited
Aug.18, 2012).
143 Sandels, supra note 142.
144 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.
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
146 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,
Aug. 18, 2012).
147 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. 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.

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.

Yet the Ivoirian 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. 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. 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. The same was true for another case in trial in 2011, while the third

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153 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).
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.”

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. His comments echoed others reported in the media. 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. 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.” 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.

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157 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).
158 See, e.g., Margaret deGuzman, Bensouda on ICC prosecutions, INTLAWGRRLS (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.
160 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.\(^{161}\) The attack must occur “pursuant to or in furtherance of a State or organizational policy,” moreover.\(^{162}\) 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.\(^{163}\) 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.\(^{164}\) The dissent reiterated another filed the previous year, in which Kaul had traced the roots of his argument to the Nuremberg era.\(^{165}\) This jurisprudential disagreement has spurred commentary.\(^{166}\)

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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;\(^{167}\) 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.\(^{168}\) Whether that day would come was a question left for answer in some future year.\(^{169}\)

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\(^{161}\) ICC Statute, art. 7(1) (Nov. 29, 2010).

\(^{162}\) Id. art. 7(2)(a).


\(^{166}\) 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).

\(^{167}\) 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 (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).

\(^{168}\) 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; see also Diane Marie Amann,
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.
