


2012

Recent Developments in International Criminal Law: 2011-2012

Valerie Oosterveld

Follow this and additional works at: <https://ir.lib.uwo.ca/lawpub>

 Part of the [International Law Commons](#), [Law and Gender Commons](#), and the [Military, War, and Peace Commons](#)

Citation of this paper:

Oosterveld, Valerie, "Recent Developments in International Criminal Law: 2011-2012" (2012). *Law Publications*. 118.
<https://ir.lib.uwo.ca/lawpub/118>

Recent Developments in International Criminal Law: 2011-2012

Valerie Oosterveld*

I have been asked to provide you with a review of developments in international criminal law from August 2011 to August 2012. I will do this by framing my comments through two questions: first, what made it into the media headlines in 2011–2012? Second, what did not make it into the headlines but is important nonetheless?

Special Court for Sierra Leone

This year's session of the International Humanitarian Law Dialogs is focused on the Special Court for Sierra Leone (SCSL), so I begin with this Tribunal. The oral judgment in the SCSL's case of *Prosecutor v. Charles Taylor* was handed down by Trial Chamber II on April 26, 2012.¹ The written judgment

* Faculty of Law, University of Western Ontario (Canada). I wish to thank Alexandra MacKenzie for her research assistance, and the Social Sciences and Research Council of Canada, which provided funding to assist me in researching the gender-related aspects of the international criminal jurisprudence.

¹ *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Judgment Summary (Special Court for Sierra Leone, Trial Chamber II, April 26, 2012).

was released on May 18, 2012 and was 2,532 pages in length, perhaps the longest international criminal judgment issued to date.² Taylor faced an 11-count indictment for crimes against humanity and war crimes.³ These charges included the crimes against humanity of murder, rape, sexual slavery, enslavement, and other inhumane acts, and the war crimes of committing acts of terror, murder, outrages upon personal dignity, cruel treatment, pillage and conscripting or enlisting children under the age of 15 years into armed forces or groups, and using them to participate actively in hostilities.⁴ In a unanimous judgment, Trial Chamber II convicted Taylor on all counts of aiding and abetting the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC) rebel groups and/or Liberian fighters operating in Sierra Leone.⁵

Taylor was also convicted of planning certain crimes.⁶ Specifically, Taylor was found to have provided

² Prosecutor v. Charles Taylor, Case No. SCSL-03-01-T, Judgment (Special Court for Sierra Leone, Trial Chamber II, May 18, 2012) [*Taylor* Trial Judgment].

³ Prosecutor v. Charles Taylor, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment (Special Court for Sierra Leone, May 29, 2007).

⁴ *Id.* at counts 1-11.

⁵ *Taylor* Trial Judgment, *supra* note 2, ¶ 7000(i).

⁶ *Id.* at ¶ 7000(ii).

assistance to the RUF, the AFRC, or the joint RUF-AFRC junta in a number of ways. First, he was found to have provided arms and ammunition, either directly or through intermediaries. For example, he facilitated two large shipments of arms used by the RUF in its military operations, including Operation Pay Yourself and the Freetown invasion. These weapons and ammunition had a substantial effect on the crimes committed by the RUF and RUF-AFRC during the indictment period.⁷ Second, he was found to have provided military personnel who helped commit crimes in various operations.⁸ Third, he was found to have provided operational support, such as phones and radio contact, and financial support—for example, funds to RUF leader Sam Bockarie (former Battlefield commander of the RUF) to purchase arms.⁹ He also provided a guesthouse in Monrovia, the capital of Liberia, for the RUF, which facilitated their procurement of arms and ammunition.¹⁰ Fourth, he was found to have provided security escorts, free passage through checkpoints, medical support, safe haven for RUF fighters, food, clothes, cigarettes, and alcohol for the RUF.¹¹ Finally, the Trial Chamber found that he had provided moral support through ongoing advice and

⁷ *Id.* at ¶¶ 6917-6921.

⁸ *Id.* at ¶¶ 6924-6930.

⁹ *Id.* at ¶¶ 6933-6943.

¹⁰ *Id.* at ¶ 6939.

¹¹ *Id.* at ¶ 6940-6941.

encouragement on tactics to senior members of the RUF.¹²

Taylor was also found guilty of working with Sam Bockarie to select strategic areas within Sierra Leone to attack and control, namely the diamond areas and Freetown.¹³ The Trial Chamber referred to this as the Bockarie-Taylor two-pronged attack.¹⁴ Taylor was found to have told Bockarie to make the attacks “fearful,” and Bockarie repeated this request, again and again, as he conveyed his orders for the attacks.¹⁵ Taylor was also found to have told Bockarie to “use all means” to get to Freetown.¹⁶ The Court found that these directives contributed to the brutal nature of the atrocities committed in the invasion of Freetown.¹⁷ The Trial Chamber found that Taylor was kept aware of the evolution of the Bockarie-Taylor plan and the resulting RUF-AFRC crimes committed against civilians.¹⁸

¹² *Id.* at ¶¶ 6946-6952.

¹³ *Id.* at ¶¶ 6964-6975.

¹⁴ *Id.* at ¶¶ 6964, 6970.

¹⁵ *Id.* at ¶¶ 6964-6965, 6975.

¹⁶ *Id.* at ¶¶ 6964, 6975.

¹⁷ *Id.* at ¶¶ 6973-6975.

¹⁸ *Id.* at ¶ 6975.

The Trial Chamber also held that the Prosecutor failed to prove beyond a reasonable doubt that Taylor had superior responsibility for the RUF, AFRC, joint RUF-AFRC junta, and/or Liberian fighters, or that he had participated in a joint criminal enterprise (JCE) with these groups.¹⁹ The Trial Chamber additionally held that the Prosecutor did not prove beyond a reasonable doubt that Taylor had ordered RUF or AFRC crimes in Sierra Leone.²⁰ The Court concluded that the RUF's leaders—Foday Sankoh, Sam Bockarie, and Issa Sesay—did not take orders from Taylor, though Taylor did provide them with guidance.²¹

While the “not guilty” finding on certain modes of liability was surely a disappointment to the Prosecutor, the verdict was also clearly a disappointment for the defense, who had argued that Taylor was not involved with the conflict except as an elder statesman trying to bring peace to Sierra Leone.²² The Trial Chamber found that Taylor was hypocritical—claiming to advance peace in Sierra Leone while supporting war.²³

¹⁹ *Id.* at ¶¶ 6897-6906, 6983-6992.

²⁰ *Id.* at ¶ 6979.

²¹ *Id.*

²² *Id.* at ¶ 17(iv).

²³ Prosecutor v. Charles Taylor, Case No. SCSL-03-01-T, Sentencing Judgment (Special Court for Sierra Leone, Trial Chamber II, May 30, 2012), ¶¶ 96-97 [*Taylor Sentencing Judgment*].

The exchange of diamonds was an important part of the Trial Chamber’s discussion: Taylor was found to have accepted diamonds from the RUF—so-called “blood diamonds”—and, in exchange, to have supplied the RUF with weapons and ammunition.²⁴ Taylor was also found to have accepted diamonds from the RUF to hold for “safekeeping.”²⁵

One unusual and very curious event occurred at the end of the oral reading of the trial judgment. After the judgment had been read, but a moment before the microphone had been turned off, the alternate judge, Judge Sow, began to make a statement. Judge Sow had been appointed as an alternate, which means that he was not one of the judges empowered to make a binding decision.²⁶ He was there in the event that one of the other judges could not carry on (became ill or otherwise had to leave the bench of the trial). If that happened, Judge Sow would be able to step in and serve as the third required judge without an interruption in the trial. It may seem like a luxury to have a fourth judge sit through the entire trial but, in fact, if the worst-case scenario did occur, it would save the need for a retrial for such a long, complex, and high-level case.

²⁴ *Taylor Trial Judgment*, *supra* note 2, ¶¶ 5877, 5951, 5993, 6060-6061.

²⁵ *Id.* at ¶ 6060.

²⁶ Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 16 *bis* (adopted May 14, 2007).

Just as the regular judges were leaving the courtroom, Judge Sow made an unexpected statement, the beginning of which was caught on the microphone, and the end of which was caught by the Court's stenographer. One of the legal assistants from the *Taylor* defense team copied and distributed the text, which was struck from the official transcript.²⁷ Judge Sow said:

The only moment where a Judge can express his opinion is during the deliberations or in the courtroom, and pursuant to the rules, when there is no deliberations, the only place for me in the courtroom. I won't get—because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with the values of international criminal justice, and I'm afraid the whole system is under grave danger of just

²⁷ The striking of Judge Sow's statement from the official transcript forms part of Taylor's appeal: Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-A, Public with Confidential Annex A and Public Annexes B and C, Appellant's Submissions of Charles Ghankay Taylor (Special Court for Sierra Leone, October 1, 2012), ¶¶ 690-707 [*Taylor* Appeal brief].

losing all credibility, and I'm afraid this whole thing is heading for failure.²⁸

It was a rather dramatic and unexpected conclusion, but it is not clear what Judge Sow meant by this.²⁹

On May 30, Taylor was sentenced to a term of 50 years of imprisonment.³⁰ This was longer than many commentators expected, but shorter than the term of 80 years requested by the Prosecutor. Taylor is appealing both the trial judgment and his sentence. The Prosecutor

²⁸ This statement is reproduced in *id.* at Public Annex C. Taylor's defense counsel brought an unsuccessful motion for partial voluntary withdrawal or disqualification of Appeals Chambers judges because these judges had participated in the judicial plenary suspending Judge Sow as a result of his behaviour at the close of the oral judgement in the *Taylor* case: Prosecutor v. Charles Taylor, Case No. SCSL-03-01-A, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification for Appeals Chambers Judges (Special Court for Sierra Leone, Appeals Chamber, September 13, 2012).

²⁹ This has led to discussion. See e.g., Jennifer Easterday, "Judge Sow's Struck Statement & Reflections on the *Taylor* Judgment & the SCSL's Legacies", IntLawGrrls blog (April 28, 2012), online: <http://www.intlawgrrls.com/2012/04/judge-sows-struck-statement-reflections.html>; and William Schabas, "More Mystery About the *Charles Taylor* Judgment (and its Appeal)", PhD Studies in Human Rights blog (September 14, 2012), online: <http://humanrightsdoctorate.blogspot.ca/2012/09/more-mystery-about-charles-taylor.html>.

³⁰ *Taylor* Sentencing Judgment, *supra* note 23, 40.

is also appealing. Taylor's Notice of Appeal listed 45 grounds of appeal, and the Prosecutor's Notice listed four grounds of appeal.³¹ These grounds for appeal include appeals based on Justice Sow's statement, and the defense is claiming irregularities in deliberations, with Justice Sow's statement as evidence.³²

How was this judgment received in the international community? Many individuals and governments—including the U.N. Secretary-General—hailed it as an illustration that no one is above the law, not even the most powerful individuals in a given society.³³ And, I think, this is an important message that should not be underestimated, one that provides hope and also points to the potential that individuals such as Omar Al-Bashir, President of Sudan—against whom a warrant of arrest has been issued by the ICC for crimes in Darfur—will, eventually, be brought to justice. But how was Taylor's conviction received in Sierra Leone and Liberia? Largely, it was also hailed.³⁴ Predictably, Taylor's

³¹ *Taylor Appeal brief*, *supra* note 27; and *Prosecutor v. Charles Taylor*, Case No. SCSL-01-01-A, Public Prosecution Appellant's Submissions With Confidential Sections D & E of the Book of Authorities (Special Court for Sierra Leone, October 1, 2012).

³² *Taylor Appeal brief*, *supra* note 27, ¶¶ 690-707.

³³ UN News Centre, "UN Officials Welcome Court's Guilty Verdict in Charles Taylor Trial" (April 26, 2012), online: <http://www.un.org/apps/news/printnewsAr.asp?nid=41864>.

³⁴ *See, e.g.*, IRIN Humanitarian News and Analysis, "Sierra Leone: 'Now we can move on'" (April 26, 2012), online:

supporters in Liberia said that it was unfair that he was singled out or that the judgment was an example of a neo-colonialist imposition of Western law on Liberia.³⁵ However, victims and victims groups have a different view. As Abioseh, a former “bush wife” told IRIN News, “Taylor got what he was due—now we have seen justice and can move on.”³⁶

The *Taylor* judgment deservedly received the attention of the media. However, the SCSL has been very busy in other ways, many of which were not discussed in the media. The Court has been busy addressing a number of cases related to witness tampering or other interference with the work of the Court. On June 22, 2012, Justice Teresa Doherty convicted a former member of the Revolutionary United Front, Eric Koi Senessie, on eight out of nine counts of witness tampering.³⁷ Senessie was convicted on four counts of offering a bribe to a witness and on four counts of attempting to influence a witness to recant testimony

<http://www.irinnews.org/printreport.aspx?reportid=95368> [IRIN, “Now we can move on”].

³⁵ See, e.g., Mark Doyle and Jonathan Paye-Layley, “Taylor Verdict: Liberians and Sierra Leoneans React” (BBC World News, April 26, 2012), online: <http://www.bbc.co.uk/news/world-17859012?print=true/>.

³⁶ IRIN, “Now we can move on”, *supra* note 24.

³⁷ Prosecutor v. Eric Senessie, Case No. SCSL-2011-01-T, Judgment in Contempt Proceedings (Special Court for Sierra Leone, Trial Chamber II, June 21, 2012) 28-30.

given in the *Taylor* trial.³⁸ He was sentenced on July 5, receiving a two-year term of imprisonment.³⁹ Under the Rules of the Special Court, Senessie faced a maximum sentence of seven-years imprisonment, a fine of two million leones, or both.⁴⁰ Senessie will serve his sentence at a detention facility on the Special Court premises in Freetown.⁴¹

The Court has also been busy downsizing as it implements its completion strategy. After the close of appeals in the *Taylor* case, the Court will officially close.⁴² Then, its remaining duties and responsibilities will be turned over to a residual mechanism; the Court cannot simply close its doors and walk away. First, there are victims and witnesses who must continue to be protected. Many are at risk of retaliation for testifying

³⁸ *Id.*

³⁹ Special Court for Sierra Leone Outreach and Public Affairs office, "Press Release: "Eric Koi Senessie Sentenced to Two Years in Prison for Contempt of the Special Court" (July 5, 2012), online: <http://www.sc-sl.org/LinkClick.aspx?fileticket=UQPelGgBKww%3d&tabid=232>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Special Court for Sierra Leone, "Ninth Annual Report of the President of the Special Court for Sierra Leone: June 2011-May 2012" (Freetown, Special Court for Sierra Leone, 2012) 38-39, online: <http://www.scsf.org/LinkClick.aspx?fileticket=ZEDnSBp6ahc%3d&tabid=176>.

before the Court, and this risk might last for decades. Therefore, it is crucial that they have a place to turn should they face any threats or danger. Second, the Court has a large number of materials—documents, physical evidence, tapes of proceedings, videos of proceedings, outreach materials, etc. It is very important that they remain available to Sierra Leoneans and to the international community, balanced against the need to keep some materials confidential, for example, to continue to protect victims and witnesses. Thus, the Residual Special Court for Sierra Leone will manage these archives.⁴³ The Court has been fundraising for the Residual Special Court, which will be voluntarily funded (as is the SCSL itself).⁴⁴ I am very concerned about this: if the Court had severe difficulties fundraising for the actual trials—including the most high profile *Taylor* trial—how will it be able to fundraise for the long term for the Residual Mechanism, which will carry out very necessary, but, from a funder’s point of view, quite boring duties?

International Criminal Court

This year marks the tenth anniversary of the creation of the International Criminal Court (ICC). The ICC was created as a permanent court to address the most serious international crimes: genocide, crimes against humanity,

⁴³ *Id.* at 38.

⁴⁴ *Id.* at 39.

and war crimes, and perhaps, in the future, aggression.⁴⁵ It is prospective in that the crimes it considers must have taken place after July 1, 2002.⁴⁶ At present, the Court is active in eight situations (in Central African Republic, Cote d'Ivoire, Darfur (Sudan), the Democratic Republic of the Congo, Kenya, Libya, Mali, Northern Uganda) and is considering 16 cases (some of these cases have multiple accused). There was much media coverage of four very important events over the past year.

In the first judgment issued by the ICC, on March 14, 2012, Thomas Lubanga was convicted of the war crimes of conscripting, enlisting, and using children under the age of 15 to participate actively in hostilities from September 1, 2002, to August 13, 2003.⁴⁷ Lubanga, the first person to stand trial before the ICC, is the founder and former President of the *Union des Patriotes Congolais* (UPC), and former Commander-in-Chief of the *Forces Patriotiques pour la Libération du Congo* (FPLC), a militia group operating in the Ituri region of the eastern Democratic Republic of the Congo (DRC).⁴⁸

⁴⁵ Rome Statute of the International Criminal Court arts. 5-8, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>).

⁴⁶ See *id.* at art. 11.

⁴⁷ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (International Criminal Court, Trial Chamber I, March 14, 2012) ¶ 1358 [*Lubanga* Trial Judgment].

⁴⁸ *Id.* at ¶¶ 22, 28.

On July 10, 2012, Trial Chamber I sentenced Lubanga to 14 years of imprisonment, which, after accounting for time served, will amount to eight more years of imprisonment from the date of sentencing.⁴⁹ This was significantly less than the prosecution's request of 30 years, but the Court indicated it was based on the gravity and nature of his crimes, harm done to victims and their families, the circumstances of the conflict, Lubanga's personal circumstances, and his position of authority.⁵⁰

The *Lubanga* case is notable for its subject matter—child soldiers. As the evidence emerged in the case, it highlighted the vulnerability of children in conflict who are forced to serve as soldiers or in other support roles for armed groups, for example in battle, as bodyguards for senior officials like Lubanga, or to perform domestic work for soldiers. The case also demonstrated that those who are responsible for recruiting and using children in war can be held accountable. Many former child soldiers, male and female, were also active participants in the trial, with many providing testimony. The testimony demonstrated that boy and girl soldiers were

⁴⁹ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (International Criminal Court, Trial Chamber I, July 10, 2012) ¶ 107 [*Lubanga* Sentencing Decision]. Lubanga had already spent six years in detention in The Hague: Coalition for the International Criminal Court, 'Lubanga Case', available online at <http://www.coalitionfortheicc.org/?mod=drc> (last accessed June 10, 2013).

⁵⁰ *Lubanga* Sentencing Decision, *supra* note 49 at ¶¶ 97.

subjected to brutal treatment, with girl soldiers also subjected to sexual violence, including rape. On this, the evidence showed that rape was pervasive: girls were raped as they were being recruited as child soldiers; during their training, recruits were encouraged to rape; and child soldiers were taught to abduct and bring girls and women to UPC camps to be raped.⁵¹ Girl soldiers were very vulnerable, often experiencing rape as a daily part of their lives in the UPC.⁵² Girls who became pregnant were sent away from the UPC camp, and unfortunately were often shunned by their communities.⁵³ As Lubanga was not charged with sexual violence crimes, this evidence was used solely for the purpose of illustrating the context of Lubanga's acts.⁵⁴

The prosecution's use of intermediaries proved problematic in this case. Intermediaries are third parties, usually on the ground, who are not from the Court. They play an important role in locating and communicating with victims and witnesses and linking them with the

⁵¹ For a summary of the evidence in this respect, see Women's Initiatives for Gender Justice, Legal Eye on the ICC eLetter, 'DRC: Trial Chamber I Issues First Trial Judgment of the ICC – Analysis of Sexual Violence in the Judgment' (Special Issue #1 – May 2012), online: <http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Lubanga* Trial Judgment, *supra* note 47 at ¶ 896.

ICC's Office of the Prosecutor to gain the evidence needed for a trial. Intermediaries are very important in the Court's work, but the Trial Chamber found that the prosecution's undue reliance on three of its principal intermediaries, without appropriate supervision, created the significant possibility that they improperly influenced witnesses to falsify their testimony, rendering most of it unreliable.⁵⁵ The Chambers did not direct the Prosecutor to stop working with intermediaries; instead it indicated that the prosecution could not delegate its investigative work to intermediaries.⁵⁶ The Court has responded to these concerns—draft Court guidelines on the use and oversight of intermediaries were completed in 2011.⁵⁷ These Draft Guidelines are to be considered by the ICC Assembly of States Parties meeting in November 2012.

There has largely been a positive response to the Court's judgment in *Lubanga*. For example, Human Rights Watch called the decision "a victory for the thousands of children forced to fight in Congo's brutal

⁵⁵ *Id.* at ¶¶. 178-477.

⁵⁶ *Id.*

⁵⁷ Draft Guidelines Governing the Relationship between the Court and Intermediaries, as cited in Open Society Justice Initiative, "Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties" (December 2011), online: <http://www.opensocietyfoundations.org/publications/intermediaries-and-international-criminal-court-role-assembly-states-parties>.

wars.”⁵⁸ There have been, however, mixed reviews of the 14-year judgment. Some victims felt the sentence was too lenient, while others expressed their appreciation for the verdict but also demanded that Bosco Ntaganda be similarly held to account.⁵⁹

Since the *Lubanga* judgment is the first issued by the ICC, it is also the first to consider the issue of reparations. This was not highlighted in the international media, but on August 7, 2012, Trial Chamber I of the International Criminal Court issued guidance on addressing reparations for victims of Lubanga’s crimes.⁶⁰ In their lengthy decision, the judges stressed the importance of reparations in international criminal law. Reparations go “beyond the notion of punitive

⁵⁸ Human Rights Watch, “ICC: Landmark Verdict a Warning to Rights Abusers” (March 14, 2012), online: <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers>.

⁵⁹ See e.g., IRIN Humanitarian News and Analysis, “DRC: Lubanga Verdict “a First Step” (March 14, 2012), online: <http://www.irinnews.org/printreport.aspx?reportid=95073>; IRIN Humanitarian News and Analysis, “Global: New ICC Prosecutor Vows to Focus on Victims” (July 30, 2012), <http://www.irinnews.org/report/95982/global-new-icc-prosecutor-vows-to-focus-on-victims>. Bosco Ntaganda was Lubanga’s chief of military operations – his case is discussed *infra*.

⁶⁰ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations (International Criminal Court, Trial Chamber I, August 7, 2012).

justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims.”⁶¹ Reparations are specifically mentioned in Article 75 of the Rome Statute, the founding document of the ICC, which lists restitution, compensation, and rehabilitation as forms of reparations. The judges also noted that reparations with symbolic, preventative, or transformative value may be appropriate.⁶² They stressed that reparations should be applied in a “broad and flexible manner” and laid out principles to be applied in the *Lubanga* case.⁶³ One such principle is that victims are to be treated fairly and equally, irrespective of whether they participated in the trial proceedings.⁶⁴ However, priority may be given to certain victims who are in a vulnerable situation, such as victims of sexual violence, individuals who need immediate medical care, and traumatized children.⁶⁵

Rule 97(1) of the Rules of Procedure and Evidence states, “the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both,” and the judges determined

⁶¹ *Id.* at ¶ 177.

⁶² *Id.* at ¶ 222.

⁶³ *Id.* at ¶ 180.

⁶⁴ *Id.* at ¶ 187.

⁶⁵ *Id.* at ¶ 200.

that the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.⁶⁶ It was held that individual and collective reparations are not mutually exclusive and may be awarded concurrently.⁶⁷ Lubanga has been declared indigent by the Court and cannot contribute monetarily towards a reparations program. However, he can, on his own volition, participate in symbolic reparations, such as issuing a public apology—but the Court will not order such symbolic acts.⁶⁸ As well, since Lubanga does not have any assets, the ICC's Trust Fund for Victims can use its own assets to award reparations.⁶⁹

Going forward, the judges stated the reparations for Lubanga's victims will be primarily handled by the ICC's Trust Fund for Victims and overseen by a different trial chamber of the ICC.⁷⁰ The judges endorsed a five-step implementation plan: the Trust Fund for Victims, the Registry of the ICC, the ICC's Office of Public Counsel for Victims, and an appointed team of experts will first decide the localities to be

⁶⁶ *Id.* at ¶ 219.

⁶⁷ *Id.* at ¶ 220.

⁶⁸ *Id.* at ¶ 269.

⁶⁹ *Id.* at ¶¶ 270-271.

⁷⁰ *Id.*

involved with the reparations process specific to the *Lubanga* case.⁷¹ Second, consultations will be held in each relevant location.⁷² Third, the team of experts will carry out an assessment of harm during the consultations.⁷³ Fourth, reparations procedures and principles will be explained to communities through a series of public debates.⁷⁴ Finally, proposals from each location will then be collected and presented to the Trial Chamber overseeing reparations.⁷⁵

The second major story in the international media on the ICC relates to Libya. On February 26, 2011, the U.N. Security Council referred the situation in Libya to the ICC.⁷⁶ An investigation was initiated on March 3, 2011.⁷⁷ Arrest warrants were issued on June 27, 2011 for

⁷¹ *Id.* at ¶¶ 281-282.

⁷² *Id.* at ¶ 282.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ UNSC Res. 1970 (2011) (February 26, 2011), ¶ 4.

⁷⁷ International Criminal Court, Statement of the Prosecutor, “ICC Prosecutor to Open an Investigation in Libya” (March 2, 2012), online: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/Pages/statement%20020311.aspx.

Muammar Gaddafi, Saif Al-Islam Gaddafi (his son), and Abdullah Al-Senussi (a Colonel in the Libyan Armed Forces and head of Military Intelligence) for crimes against humanity.⁷⁸ Muammar Gaddafi was killed on October 20, 2011, and his case was terminated.⁷⁹ In early June 2012, four ICC staff members from the Office of Public Counsel for the defense were detained by Libyan authorities following a meeting with their client, Saif Gaddafi.⁸⁰ They were accused of spying and smuggling documents to Mr. Gaddafi.⁸¹ They were detained incommunicado, despite widespread recognition that the detention was contrary to

⁷⁸ Situation in the Libyan Arab Jamahiriya, Situation No. ICC-01/11, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi” (International Criminal Court, Pre-Trial Chamber I, June 27, 2011) 41.

⁷⁹ Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Case No. ICC-01/11-01/11, Decision to Terminate the case Against Muammar Mohammed Abu Minyar Gaddafi (International Criminal Court, Pre-Trial Chamber I, November 22, 2011) 5.

⁸⁰ International Criminal Court, “Press Release: Four ICC Staff Members Detained in Libya; Immediate Release Requested” (June 9, 2012), online: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/releases/Pages/pr805.aspx.

⁸¹ See e.g., Luke Harding, Julian Borger and Chris Stephen, “Libya Accuses Australian ICC Official of Passing Secret Letter to Gaddafi’s Son” (The Guardian, June 25, 2012), online: <http://www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying>.

international law.⁸² There were many calls for their release, not only from the ICC, but also from, among others, the International Criminal Tribunal for the former Yugoslavia and the SCSL.⁸³ All recognized what a very serious threat such illegal detentions represented to their work.

The ICC staff members were only released on July 2, 2012, after three and a half weeks of detention, and only after the ICC had apologized to Libya for any “difficulties” caused by its staff.⁸⁴ It appeared, from the outside, as if the ICC had been forced to apologize. Details later emerged of the staff members’ ordeal, and it became clear that the staff were not permitted to have a confidential meeting with their client, were spied upon, were secretly filmed, and documents protected by lawyer-client privilege were seized.⁸⁵

⁸² See e.g., United Nations Security Council, “Security Council Press Statement on International Criminal Court Staff Detained in Libya”, UN Doc. SC/10674, AFR/2405, L/3196 (June 15, 2012).

⁸³ See e.g., Special Court for Sierra Leone Outreach and Public Affairs office, “Press Release: Statement by Special Court President Shireen Avis Fisher on the Detention of ICC Staff in Libya” (June 15, 2012), online: <http://www.sc-sl.org/LinkClick.aspx?fileticket=wngR2Nli8d0%3d&tabid=53>.

⁸⁴ International Criminal Court, “Press Release: Statement on the Detention of Four ICC Staff Members” (June 22, 2012), online: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr815.aspx.

⁸⁵ For a summary of this, see Kevin John Heller, “The Most Complete Account to Date of Melinda Taylor’s Detention” (Opinio

The Libyan government (the National Transition Council) is challenging the ICC's jurisdiction over Gaddafi and Al-Senussi. It claims that it wishes to prosecute the two men in Libya, under Libyan law, by Libyan judges, and that its national judicial system is already actively investigating.⁸⁶ Problematically, however, Libya still does not actually have custody over Gaddafi or Al-Senussi. Despite numerous declarations by the NTC that he would be transferred to Tripoli, Saif Gaddafi remains in the hands of the Zintan brigade that arrested him in November 2011, which has refused to surrender him to Libya's national authorities.⁸⁷ Given the unwillingness of the Zintan brigade to cooperate with the NTC, it is far from clear that Libyan authorities themselves would be able to conduct the trial. As well, Al-Senussi is not in Libya. In March 2012, he was arrested in a joint operation between French and Mauritanian authorities in the Mauritanian capital, where he remains—Mauritania will not extradite him to Libya.⁸⁸ It appears that Libya will have some difficulty

Juris blog, August 1, 2012), online: <http://opiniojuris.org/author/kevinjonheller/page/13/#>.

⁸⁶ This challenge has now been decided with respect to Saif Gaddafi, and these claims are highlighted in the Pre-Trial Chamber's rejection of Libya's admissibility challenge: Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi (International Criminal Court, Pre-Trial Chamber I, May 31, 2013), ¶¶ 25-41, 182-198 [Libya Admissibility Challenge].

⁸⁷ *Id.* at ¶¶ 206-207.

convincing the ICC that it is actually able to prosecute the two men.⁸⁹ This also means is that the ICC itself does not have the indictees in its custody, either.

The third set of headlines was quite recent and involved an ICC indictee, Bosco Ntaganda, Thomas Lubanga's Chief of Military Operations. The ICC issued an arrest warrant for him in 2006 for the recruitment and use of child soldiers.⁹⁰ On July 12, 2012, additional charges of war crimes and crimes against humanity were added to his arrest warrant, including murder, persecution, rape, sexual slavery, and pillaging.⁹¹ Unlike Lubanga, Ntaganda has eluded arrest. After his time with

⁸⁸ This was correct at the time of the Sixth IHL Dialog: "Ex-Gaddafi Spy Chief Al-Senussi "will not be Extradited" (BBC News Africa, August 6, 2012), online: <http://www.bbc.co.uk/news/world-africa-19145021?print=true>. However, shortly afterward, Mauritania did extradite Al-Senussi to Libya: "Mauritania Departs Libya Spy Chief Abdullah Al-Senussi" (BBC News Africa, September 5, 2012), online: <http://www.bbc.co.uk/news/world-africa-19487228>.

⁸⁹ Indeed, this is the case with respect to Gadaffi. On May 31, 2013, Pre-Trial Chamber I ruled against Libya's claim: Libya Admissibility Challenge, *supra* note 86.

⁹⁰ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest (International Criminal Court, Pre-Trial Chamber I, August 22, 2006) 4.

⁹¹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application Under Article 58 (International Criminal Court, Pre-Trial Chamber II, July 13, 2012) 36.

Lubanga, he joined another armed group and, in 2009, was made a general in the Congolese army. The Congolese government dismissed the ICC's calls for Ntaganda's arrest and said he was necessary for the peace process in eastern Congo. However, his forces continued to commit atrocities and, for many, his case became a lesson in what happens when impunity reigns.

In March 2012, Ntaganda mutinied and orchestrated a new rebellion, known as the M23. His forces continued to commit horrendous crimes. In April, finally, the Congolese government said it was prepared to arrest him.⁹² But it has not been able to do so. M23 rebels are taking over villages and towns in Rutshuru territory, overthrowing the defenses of the Congolese army and U.N. peacekeepers in the area. Human Rights Watch and a U.N. group of experts have uncovered evidence that Rwandan military officials have been supplying weapons, ammunition, and recruits to Ntaganda and his forces.⁹³ This certainly undermines international justice

⁹² See e.g., David Zounmenou and Naomi Kok, "Is President Joseph Kabila's Call for Ntaganda's Arrest a Move Towards Justice in the DRC?" (Institute for Security Studies, African Centre for Peace and Security Training, 2012), online: <http://www.issafrica.org/acpst/news.php?nid=15>.

⁹³ Human Rights Watch, "DR Congo: M23 Rebels Committing War Crimes" (September 11, 2012), online: <http://www.hrw.org/print/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes>; United Nations Security Council, Letter Dated 26 June 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the

efforts and shows how important it is for ICC indictees to be arrested sooner rather than later.

In an interesting about-face, in late August 2012, an M23 commander accused the DRC army of recruiting child soldiers, telling the media, “The law bans the recruitment of child soldiers.”⁹⁴ This demonstrates that Lubanga’s conviction has sent a message about the unlawfulness of recruiting child soldiers, although it is presented here by a group that is also accused of using child soldiers.

I will briefly mention one more ICC-related headline that reverberated in media outlets around the world: on June 15, 2012, Fatou Bensouda made her solemn undertaking and formally took office as the Prosecutor of the ICC during a ceremony held at the seat of the Court in The Hague.⁹⁵ She has been elected for a nine-year term. The ceremony was presided over by ICC President Sang-Hyun Song. Referring to Ms. Bensouda’s wealth of prosecutorial experience and staunch

President of the Security Council, UN Doc. S/2012/348/Add.1 (June 27, 2012).

⁹⁴ South African Press Ass’n, “Rebels: DRC Army Recruits Child Soldiers” (August 24, 2012), online: <http://www.iol.co.za/news/africa/rebels-drc-army-recruits-child-soldiers-1.1369403>.

⁹⁵ Int’l Crim. Ct., “Press Release: Ceremony for the Solemn Undertaking of the ICC Prosecutor, Fatou Bensouda” (June 15, 2012), online: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr811.aspx.

international support, ICC President Song stated, “I am confident that her strong independent voice, legal expertise and genuine concern for human rights issues will contribute greatly to the continued fight against impunity.”⁹⁶ In a lesser-known but very positive development—one that did not make the international headlines—Prosecutor Bensouda appointed Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, as her Special Gender Advisor.⁹⁷ Ms. Inder will provide strategic advice to the Office of the Prosecutor on gender issues, including sexual and gender-based violence.

International Criminal Tribunal for the Former Yugoslavia

This past year, press attention on the International Criminal Tribunal for the former Yugoslavia (ICTY) tended to focus on the proceedings against two high-profile accused: Ratko Mladić and Radovan Karadžić.

⁹⁶ As quoted in the International Criminal Court Weekly Update #132 (June 18, 2012) 5, online: http://www.icc-cpi.int/NR/rdonlyres/77F6A227-0DE5-4667-A538-5E25808D0DC4/284634/ED132_ENG.pdf.

⁹⁷ Int’l Crim. Ct., “Press Release: ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, as Special Gender Advisor” (August 21, 2012), online: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr833.aspx.

Mladić was commander of the Main Staff of the Army of the Republica Srpska, and he is charged with a number of crimes, including rape and other acts of sexual violence as a method to eliminate Bosnian Muslims and Croats.⁹⁸ Kelly Askin of the Open Society Justice Initiative has commented that this “recognizes the profound and far-reaching impact that sex crimes have on the individual victims, their families and whole communities.”⁹⁹ Mladić is also accused in relation to the shelling and sniping campaign in Sarajevo and the plan to eliminate Bosnian Muslims in the Srebrenica massacre.¹⁰⁰ After various setbacks, his trial began on May 16, 2012, only to be halted again when it became clear that the Prosecutor had failed to disclose a substantial amount of evidence to the defense.¹⁰¹ The trial began again in June 2012, and the presentation of

⁹⁸ Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, December 16, 2011) ¶¶ 39(b) and (c), 52, 53, 59(e), 70 [*Mladić* Indictment].

⁹⁹ Kelly Askin, “The Trial of Ratko Mladić: A Gender Crimes Perspective” (Open Society Justice Initiative blog, May 16, 2012), online: <http://www.opensocietyfoundations.org/voices/trial-ratko-mladic-gender-crimes-perspective>.

¹⁰⁰ *Mladić* Indictment, *supra* note 98 at ¶¶ 7, 19, 21-23, 41-51, 55-61, 64-65, 67-68, 72-74, 76-78, 80, 84-85, 87.

¹⁰¹ BBC News Europe, “Ratko Mladić War Crimes Trial Suspended Over Evidence Error” (June 18, 2012), online: <http://www.bbc.co.uk/news/world-europe-18499018>.

evidence began on July 9. In May, Mladić caused controversy for his demeanor in court when he made a nasty throat-cutting gesture to a woman in the audience whose son and husband were murdered in Srebrenica.¹⁰²

The case of Radovan Karadžić, former President of the Republika Srpska, also received much press attention. Karadžić has been charged with participating in a joint criminal enterprise to forcibly remove Bosnian Muslims and Croats from territory claimed as Bosnian Serb through genocide, crimes against humanity, and war crimes, including the Srebrenica massacre and the sniping and shelling of Sarajevo.¹⁰³ In late June, 2012, the Trial Chamber decided to dismiss the genocide charge relating to various municipalities in Bosnia, though it left the genocide charge relating to Srebrenica.¹⁰⁴ The prosecution started presenting evidence on April 13, 2010. Its case was rested on

¹⁰² Julian Borger, "Ratko Mladić's Trial Opens with a Cut-Throat Gesture" (The Guardian, May 16, 2012), online: <http://www.guardian.co.uk/world/2012/may/16/ratko-mladic-war-crimes-trial>.

¹⁰³ Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Prosecution's Marked-Up Indictment (International Criminal Tribunal for the former Yugoslavia, Trial Chamber III, October 19, 2009) ¶¶ 6-87.

¹⁰⁴ This oral decision is documented in Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Decision on Prosecution Request for Certification to Appeal Judgment of Acquittal Under Rule 98 *bis* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber III, July 13, 2012) ¶ 1.

May 25, 2012. In early June 2012, Trial Chamber III judges, prosecution, and defense teams took a five-day visit to Srebrenica.¹⁰⁵ This is interesting, as it is not common for the Court to visit the scene of the crime. The defense case is scheduled to commence on October 16, 2012.¹⁰⁶

Underneath the headlines, we see a very busy tribunal, with 35 cases still ongoing even as it is working to complete its mandate. For example, the trial of Goran Hadžić, former President of the Republic of Serbian Krajina, will commence on October 16.¹⁰⁷ The ICTY is also working hard to solidify its legacy with a number of outreach events—for example, releasing a documentary, entitled “Sexual Violence and the Triumph of Justice” about the crucial role of the ICTY in prosecuting

¹⁰⁵ Int’l Crim. Trib. for the former Yugoslavia, “Press Release: Karadžić Case: Trial Chamber Conducts Site Visit in and around Srebrenica” (June 5, 2012), online: <http://www.icty.org/sid/10980> [ICTY Srebrenica Site Visit]. A site visit to Sarajevo took place in 2011: International Criminal Tribunal for the former Yugoslavia, “Press Release: Karadžić Case: Trial Chamber Conducts Site Visit in Sarajevo” (May 16, 2011), online: <http://www.icty.org/sid/10651>.

¹⁰⁶ ICTY Srebrenica Site Visit, *supra* note 105.

¹⁰⁷ Int’l Crim. Trib. for the former Yugoslavia, “Case Information Sheet: Goran Hadžić”, 2, online: http://www.icty.org/x/cases/hadzic/cis/en/cis_hadzic_en.pdf.

wartime sexual violence.¹⁰⁸ The documentary has been screened in Zagreb and Belgrade.¹⁰⁹

International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) has largely finished its trial phase and is now focusing on appeals. The Tribunal seems to be on track to finish all appeals by December 2014.¹¹⁰ In recognition of this progress toward closure, on July 1, the Arusha branch of the Mechanism for International Criminal Tribunals (MICT), a residual court, opened. This development received some press coverage.¹¹¹ The MICT is to continue operations of the Court that cannot be closed down when the Court-proper closes its doors. For example, three indictees under ICTR jurisdiction

¹⁰⁸ The documentary is described on the ICTY's website, "Sexual Violence and the Triumph of Justice" (2011), online: <http://www.icty.org/sid/10949>.

¹⁰⁹ *Id.*

¹¹⁰ U.N.S.C., Letter Dated 22 May 2012 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council, UN Doc. S/2012/349 (May 22, 2012), ¶ 100 [ICTR Completion Strategy Report].

¹¹¹ U.N. Mechanism for Int'l Crim. Trib., "Press Release: Mechanism for International Criminal Tribunals (MICT) Begins Work in Arusha" (July 2, 2012), online: http://unmict.org/news/2012/120702_PR1e.html.

remain at large: one in Kenya, one in Zimbabwe, and one in the Democratic Republic of the Congo. The MICT will continue to track them.¹¹²

This year was a significant one for the ICTR in that the judges finally accepted requests from the Prosecutor to transfer cases to Rwanda.¹¹³ Eight cases have been referred to Rwandan jurisdiction.¹¹⁴ In addition, beneath the press reports, the ICTR issued several important judgments over the past year. For example, Callixte Nzabonimana, the Rwandan Minister of Youth and Associative Movements in 1994, was convicted of genocide and crimes against humanity and sentenced to life imprisonment.¹¹⁵ In June 2012, Ildephonse Nizeyimana was sentenced to life imprisonment for his actions that led to the killing of thousands of Tutsis, as well as the targeted killings of several high-profile Tutsis

¹¹² ICTR Completion Strategy Report, *supra* note 110 at ¶ 5.

¹¹³ *Id.* at ¶ 4.

¹¹⁴ U.N.S.C., Letter Deated 14 November 2012 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council, UN Doc. S/20012/836 (November 14, 2012), ¶¶ 4-5, 12-16.

¹¹⁵ Prosecutor v. Callixte Nzabonimana, Case No. ICTR-98-44D-T, Judgment and Sentence (International Criminal Tribunal for Rwanda, Trial Chamber III, May 31, 2012) Disposition at 360 and ¶ 1822.

to advance the genocide.¹¹⁶ The ICTR also issued judgments in two multi-accused trials, popularly known as “*Government I*” and “*Government II*.” *Government I* was decided in February 2012, and *Government II* was decided on September 30, 2011 (with two acquittals).¹¹⁷ While this does not relate to the ICTR directly, it is relevant to note that the gacaca community courts in Rwanda completed their work in June 2012, having considered the cases of over two million people, according to official government statistics.¹¹⁸

¹¹⁶ Prosecutor v. Ildéphonse Nizeyimana, Case No. ICTR-2000-55C-T, Judgment and Sentence (International Criminal Tribunal for Rwanda, Trial Chamber III, June 19, 2012) ¶¶ 1581, 1599.

¹¹⁷ “*Government I*” is Prosecutor v. Édouard Karemera and Mathieu Ngirumpatse, Case No. ICTR-98-44-T. Judgment and Sentence (International Criminal Tribunal for Rwanda, Trial Chamber III, February 2, 2012), convictions at 310. sentencing at ¶¶ 1762-1763; *Government II* is Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka and Prosper Mugiraneza, Case No. ICTR-99-50-T, Judgment and Sentence (International Criminal Tribunal for Rwanda, Trial Chamber II, September 30, 2011), convictions and acquittals at 538-539, sentencing at ¶¶ 2021-2022.

¹¹⁸ BBC News Africa, “Rwanda ‘Gacaca’ Genocide Courts Finish Work” (June 18, 2012), online: <http://www.bbc.co.uk/news/world-africa-18490348>.

Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in response to the atrocities committed by the Khmer Rouge regime, which controlled Cambodia from 1975-1979. The Khmer Rouge forced millions of Cambodians from the cities to the countryside in an attempt to create a classless agrarian society. It is estimated that over two million Cambodians died as a result, from execution, starvation, exhaustion from overwork, and disease. The ECCC was in the news this year for a positive reason and also for negative reasons.

The positive reason for media attention is that the trial in *Case 2* against three senior Khmer Rouge officials commenced on November 21, 2011.¹¹⁹ This trial will only deal with the forced transfer of persons out of Phnom Penh and other urban areas and the related crimes against humanity charges.¹²⁰ The Court has already heard a great deal of evidence.

¹¹⁹ Extraordinary Chambers in the Ct. of Cambodia, “Press Release: Trial Chamber Announces Date for Opening of the Substantive Hearing in Case 002” (October 18, 2011), online: <http://www.eccc.gov.kh/sites/default/files/media/ECCC%2018%20Oct%202011-Eng.pdf>.

¹²⁰ Extraordinary Chambers in the Ct of Cambodia, “Press Release: Severance of Proceedings Ordered in Case 002” (September 22, 2011), online: <http://www.eccc.gov.kh/sites/default/files/media/ECCC%2022%20September%202011-Eng.pdf>.

The negative reason for the ECCC making headlines is that there appears to be political interference in *Cases 3 and 4*. *Cases 3 and 4* involve five lower-ranking Khmer Rouge officials. Investigations into the crimes began in September 2009 but were closed in April 2011 amid claims of interference by the Cambodian government. The decision to end the investigations was strongly criticized by Co-Prosecutor Andrew Cayley, who made a formal request for the investigations to proceed and accused the co-investigating judges of trying to bury the cases.¹²¹ Co-Investigating Judge Blunk eventually resigned in October 2011, amid criticism.¹²² Then the Reserve Judge was appointed as the new International Co-Investigating Judge, but he was blocked in his work and it appeared to be again by Cambodian government interference.¹²³ He resigned in March 2012, citing an inability to perform the functions of his office.¹²⁴ Thus, this past year at the ECCC has seen

¹²¹ Extraordinary Chambers in the Ct. of Cambodia, “Statement from the International Co-Prosecutor regarding Case File 003” (May 9, 2011) online: <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-00>.

¹²² Extraordinary Chambers in the Ct. of Cambodia, “Statement by the International Co-Investigating Judge” (October 10, 2011), online: <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>; and Open Society Justice Initiative, “The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia” (October 2012), online: http://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf [OSJI Report on Cases 003/004].

¹²³ OSJI Report on Cases 003/004, *supra* note 123 at 9-10.

growing tensions between the Cambodian and international judges at the ECCC, as well as continuing allegations of interference by the government of Cambodia. Unfortunately, these developments cause many to question the Court's credibility.¹²⁵

Flying somewhat under the media radar was the appeal in the ECCC's first case, that of Duch, former Commander of the notorious S-21 prison. He was originally convicted in July 2010 to 30 years' imprisonment, which he appealed.¹²⁶ He argued that he was not a senior leader or one of those most responsible for Khmer Rouge atrocities.¹²⁷ On February 3, 2012, the Supreme Court Chamber (SCC) ruled, rejecting these arguments. The SCC found that the concepts of "most responsible" and "senior leaders" were non-justiciable policy guides for the co-investigating judges and Co-Prosecutors when determining the scope of the ECCC's investigations and prosecutions.¹²⁸ They also increased

¹²⁴ *Id.* at 10-11.

¹²⁵ See entire report at *id.*

¹²⁶ Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment (Extraordinary Chambers in the Cts. of Cambodia, Trial Chamber, July 26, 2010).

¹²⁷ Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/SC, Appeal Judgment (Extraordinary Chambers in the Cts. of Cambodia, Supreme Court Chamber, February 3, 2012) ¶ 23.

¹²⁸ *Id.* at ¶¶ 63-74.

his sentence to life imprisonment, saying that “the high number of deaths and the extended period of time over which the crimes were committed place this case among the gravest before international criminal tribunals.”¹²⁹

Special Tribunal for Lebanon

The Special Tribunal for Lebanon is not often in the international media, though it is discussed quite a bit in the local Lebanese media, so the Court may be unknown to many of you. It is tasked with addressing responsibility for the assassination of former Lebanese Prime Minister Rafiq Hariri who was killed, along with 21 others, in an attack in Beirut on February 14, 2005. It is the first international tribunal with the mandate to prosecute the international crime of terrorism in peacetime. In June 2011, four individuals were indicted by the Tribunal—all are suspected members of Hezbollah.¹³⁰ Their arrest warrants were made public in August 2011.¹³¹ Each has been charged with nine

¹²⁹ *Id.* at ¶¶ 376, 383.

¹³⁰ Prosecutor v. Mustafa Amine Badreddine, Salim Jamil Ayyash, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/I/PTJ, Indictment (Special Tribunal for Lebanon, Pre-Trial Judge, June 10, 2011) [STL Indictment].

¹³¹ Special Trib. for Lebanon, “Press Release: Indictment and its Confirmation Made Public” (August 17, 2011), online: <http://www.stl-tsl.org/en/media/press-releases/17-08-2011-indictment-and-its-confirmation-decision-made-public>.

criminal counts, including the premeditated intentional homicide of Hariri and 21 others.¹³²

The most significant ruling of the Special Tribunal of the past year came on February 1, 2012, in a finding that the proceedings against an accused could proceed in absentia.¹³³ Trial in absentia is a form of trial of last resort for the Special Tribunal, so the Trial Chamber only permitted this form of trial after it had concluded that the accused had in fact absconded and that the Lebanese authorities had done all that could be expected to apprehend the accused.¹³⁴ Since deciding that the trial could proceed in absentia, defense counsel have been assigned, and preparations by both the Prosecutor and defense, including disclosure of documents, the examination of witnesses, and collection of evidence have begun.¹³⁵ In May 2012, the defense filed a motion to reconsider the decision to proceed in absentia, but this

¹³² STL Indictment, *supra* note 131 at ¶ 1.

¹³³ Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/I/TC, Decision to Hold Trial *In Absentia* (Special Tribunal for Lebanon, Trial Chamber, February 1, 2012).

¹³⁴ *Id.* at ¶ 111.

¹³⁵ Special Trib. for Lebanon, “Special Tribunal for Lebanon: Fourth Annual Report (2012-2013)” (2013), 29-31, 33, online: <http://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/fourth-annual-report-2012-2013> [Report of the STL President].

was rejected by the Trial Chamber on July 11.¹³⁶ The date for the trial is tentatively set for March 25, 2013.¹³⁷

Another important development—though not widely reported—is that, on July 30, 2012, the Trial Chamber released its decision on the legality of the jurisdiction of the Tribunal, finding that the Tribunal did in fact have jurisdiction to try the accused.¹³⁸ The defense had earlier brought a motion claiming that the Security Council resolution creating the Tribunal was an abuse of Council powers.¹³⁹ Also not widely reported: the possibility of more indictments or more charges in cases involving killings similar to that of Hariri; in May 2012, 58 of 73 victim-participation applications were approved; and a

¹³⁶ Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/PT/TC, Decision on Reconsideration of Trial *In Absentia* Decision (Special Tribunal for Lebanon, Trial Chamber, July 11, 2012) 14.

¹³⁷ Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/PT/PTJ, Order Setting a Tentative Date for the Start of Trial Proceedings (Special Tribunal for Lebanon, Pre-Trial Judge, July 19, 2012) 8.

¹³⁸ Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal (Special Tribunal for Lebanon, Trial Chamber, July 27, 2012) 30.

¹³⁹ *Id.* at ¶ 1.

Legal Aid Policy for Victims' Participation was adopted by the Tribunal.¹⁴⁰ In June 2012, victims' counsel were sworn in.¹⁴¹ Clearly, the Special Tribunal for Lebanon is more active than the press coverage would lead one to believe.

Conclusion

International criminal justice makes headlines these days. I have covered a number of important stories in the media over the past year. But international criminal justice is so much more than just the issuances of groundbreaking trial judgments: there are the stories behind the stories of individuals working hard to make this world a more just place. And yet, of course, there is still much more that can be done in the legal sector and in other areas. This is encapsulated in a comment by James Kpomgbo, whose arm was cut off during the Sierra Leone civil war, after the release of the *Taylor*

¹⁴⁰ Report of the STL President, *supra* note 135 at 27; Special Tribunal for Lebanon, "Press Release: Victims' Participation" (May 9, 2012), online: <http://www.stl-tsl.org/en/media/press-releases/09-05-2012-victims-participation>; Special Tribunal for Lebanon, "Legal Aid Policy for Victims' Participation" (April 4, 2012), online: <http://www.stl-tsl.org/en/documents/victims-participation-documents/legal-aid-policy-for-victims-participation>.

¹⁴¹ Special Trib. for Lebanon, "Press Release: Victims' Legal Representatives Sworn In" (June 5, 2012), online: <http://www.stl-tsl.org/en/media/press-releases/05-06-2012-victims-legal-representatives-sworn-in>.

judgment: “I will reflect on the suffering we suffered today, but I want to forget—we have known all along Charles Taylor is guilty. Today is just another day where we must find food.”¹⁴²

¹⁴² IRIN, “Now we can move on,” *supra* note 24.