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I. The International Criminal Tribunals

The year 2009 was one of contrasts in international criminal law. The U.N. tribunals for Rwanda and the former Yugoslavia were winding down. The trials at the Special Court for Sierra Leone (SCSL) were completed. The pace of developments at the International Criminal Court (ICC), however, accelerated. The ICC started its first trial at the beginning of 2009, and its second at the end of 2009, and formally opened an investigation in a fifth country (Kenya).

A. INTERNATIONAL CRIMINAL COURT

It has been a year of "firsts" for the ICC. Two countries joined the Court, bringing the total number of State Parties to 110.[1] Chile joined in September, and the Czech Republic joined in October.[2] The Court's founding President, Philippe Kirsch, whose name has been synonymous with the ICC since he chaired the 1998 Rome Conference, retired in March, and Judge Sang-Hyun Song was elected to replace him.[3] In addition to starting its first and second trials (Lubanga in January and Katanga and Ngudjolo in November), the ICC completed its fourth and fifth confirmation hearings (Bemba Gombo in January and Abu Garda in October). In March 2009, the Court issued its first warrant for a sitting head of state to President Al Bashir of Sudan. Finally, as the year came to a close, the United States ended its ostracism of the Court, agreeing for the first time in eight years to send observers to the ICC Assembly of States Parties meeting in November.[4]

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1. Press Release, International Criminal Court, ICC-ASP welcomes the Czech Republic as the 110th new State Party (Oct. 1, 2009), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2009)/pr457.

2. *Id.*

3. Press Release, International Criminal Court, ICC-CPI-20091311-PR397 (Mar. 11, 2009), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2009)/judge%20song%20_republic%20of%20korea_%20elected%20president%20of%20the%20international%20criminal%20court_%20judges%20diarra.

4. Daily Press Briefing, Under Secretary for Public Diplomacy and Public Affairs (Nov. 16, 2009), *available at* http://www.state.gov/r/pa/prs/dpb/2009/nov/131982.htm.

1. *Situation in Democratic Republic of the Congo*

Three cases are pending in the "Situation" (investigation) in the Democratic Republic of the Congo: *Prosecutor v. Thomas Lubanga Dyilo*, *Prosecutor v. Germain Katanga and Mathiu Ngudjolo Chu*, and *Prosecutor v. Bosco Ntaganda*. Ntaganda is still at large and being sought.

a. Prosecutor v. Thomas Lubanga Dyilo

The year ended for Thomas Lubanga Dyilo the same as it started — with his trial on indefinite hold. The trial was suspended in June 2008 because the prosecutor overused the confidentiality provisions of Article 54(3)(e), throwing the outcome of the trial into serious doubt.[5] By January 26, however, the differences had been ironed out, and the trial was underway. From January to July, the prosecution presented thirty witnesses, including former child soldiers, child sex slaves, and defected Uganda People's Congress (UPC) officials from Lubanga's militia. The Court granted twenty-five of the thirty witnesses some form of witness protection, including image and voice distortion, anonymous testimony, or testimony using pseudonyms.[6] All the child soldiers were allowed to testify in a narrative form with their identities shielded from the public. Ninety-nine victims represented by seven different lawyers participated in the trial; no international tribunal has ever allowed more victims to participate.[7]

Lubanga was charged solely with recruiting and using child soldiers. On May 22, however, after the prosecution had presented much of its case, the victims' representatives filed a joint request under Regulation 55 asking the Court to re-characterize the charges to "sexual slavery"[8] and "inhuman and/or cruel treatment"[9] based on the extensive testimony by female child soldiers used as sex slaves.[10] The defense strenuously objected, saying that they could not be expected to defend against new charges added at the last minute and that they would need to recall numerous prosecution witnesses for additional questioning if new charges were added.[11]

The three-judge panel did not agree on whether the Court had the authority to amend the charges during the trial. The majority (Judges Blattmann and Odio Benito) felt the Court did have such authority based on the language in Regulation 55.[12] The Regulation provides that, in rendering its decision, the Court "may change the legal characterization of facts to accord with the crimes"[13] if it does not exceed the facts and circumstances in the charges.[14] A "legal characterization of the facts" is required by Regulation 52 to be in-

5. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06-1401 (June 13, 2008).

6. Press Release, International Criminal Court, ICC-CPI-20090714-PR437 (July 14, 2009), *available at* http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/press%20releases/pr437.

7. *Id.*

8. Rome Statute, arts. 7(l)(g), 8(2)(b)(xxii), and 8(2)(e)(vi), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm.

9. *Id.* arts. 8(2)(a)(ii) and 8(2)(c)(i).

10. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06-2049, ¶ 1 (July 14, 2009).

11. *Id.* ¶¶ 13-19.

12. *Id.* ¶ 27.

13. International Criminal Court, Regulation 55, art. 1, *available at* http://www.iclklamberg.com/Regulations.htm#Regulation_55.

14. *Dyilo*, Case No. ICC 01/04-01/06-2049, ¶ 27.

cluded as part of the indictment (Document Containing the Charges).[15] The majority equated changing the legal characterization of the facts with amending the charges, finding that the power to do one included the other. The majority further reasoned that as long as procedural safeguards were respected (notice and opportunity to be heard on the new charges, adequate time and facilities to prepare a defense, and an opportunity to re-examine prior witnesses), no unfair surprise would result.[16]

The minority (Judge Fulford) believed that Article 61(9) controlled over Regulation 55.[17] That article states that only the prosecutor, as allowed by the Pre-Trial Chamber, may amend the charges, and only "after the charges are confirmed . . . and before the trial has begun."[18] Under the minority reading of the statute, the charges may not be amended once the trial has begun.[19] Thus, although the trial court can "change the characterization of the facts," it can do so only to the extent that it does not amend the charges.[20] To allow otherwise would circumvent Article 61, which requires that the specific charges be set out in the indictment (document containing the charges).[21] Under the minority view, the only likely modifications that would not conflict with Article 61 would be lesser-included offenses and the like.[22] The minority recommended this approach as it provides "an accused with a high degree of certainty as to charges that he or she will face once the trial has commenced."[23]

Both the prosecution and the defense appealed, and the case was stayed pending the outcome of that appeal. On December 8, as 2009 came to a close, the Appeals Chamber reversed the decision, essentially adopting the reasoning of the minority judge. Had the Court allowed the amendment to the charges at this stage, it would have been a unique variation from customary criminal procedure and another "first" for the ICC.

b. Prosecutor v. Germain Katanga and Mathiu Ngudjolo Chui

The second trial heard by the ICC got underway on November 24, 2009. Germain Katanga is the alleged commander of the *Force de résistance patriotique en Ituri* (Patriotic Resistance Force in Ituri). Mathieu Ngudjolo Chui is the alleged former leader of the *Front des nationalistes et intégrationnistes* (National Integrationist Front). Katanga and Chui were accused in this case of three crimes against humanity (murder, sexual slavery, and rape) and seven war crimes (using children under the age of fifteen to take an active part in hostilities, deliberately directing an attack on a civilian population or against individual civilians not taking direct part in hostilities, willful killing, destruction of property, pillaging, sexual slavery, and rape).[24] The prosecution planned to call twenty-six witnesses,

15. International Criminal Court, Regulation 52, ¶ a, *available at* http://www.iclklamberg.com/Regulations.htm#Regulation_52.

16. *Dyilo*, Case No. ICC 01/04-01/06-2049, ¶¶ 29, 30.

17. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06-2069, ¶¶ 12, 13 (July 31, 2009).

18. *Id.* ¶ 13.

19. *Id.* ¶ 15.

20. *Id.* ¶ 17.

21. *Id.* ¶ 18.

22. *Id.* ¶ 20.

23. *Id.* ¶ 16.

24. Press Release, International Criminal Court, ICC-CPI-20091120 PR477 (Nov. 20, 2009), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2009)/pr477.

including nineteen who were to have some form of witness protection.[25] Two attorneys are representing the 345 victims authorized to participate in the trial, which is expected to last several months into 2010.[26]

2. *Situation in Central African Republic*

Currently only one case, *Prosecutor v. Jean-Pierre Bemba Gombo*, is pending in the Central African Republic. The prosecution opened the investigation in the Central African Republic on May 22, 2007. Bemba was arrested in exile in Belgium a year later on May 24, 2008, and transferred to the ICC the following July.[27] His confirmation hearing was held in January 2009.[28] In June, two counts of crimes against humanity (murder (article 7(1)(a)) and rape (article 7(1)(g))) and three counts of war crimes (murder (article 8(2)(c)(i)), rape (article 8(2)(e)(vi)), and pillaging (article 8(2)(e)(v))), were confirmed against him.[29] The charges arise out of attacks in October 2002 and February 2003 following a failed coup attempt.[30] At least 600 rape victims were identified in a five-month period of attacks on civilians.[31] As of the end of 2009, his trial was scheduled for April 27, 2010.[32]

3. *Situation in Darfur, Sudan*

Three cases are pending in the situation in Darfur: *Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)*, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, and *Prosecutor v. Bahr Idriss Abu Garda*. Ahmad Harun and Ali Kushayb are currently at-large on warrants. Abu Garda voluntarily appeared on May 18, 2009, surrendered to the Court, and is free on his own liberty. He is suspected of three war crimes allegedly committed during the attack against the African Union peacekeeping mission on the military base of Haskanita, North-Darfur, on September 29, 2007.[33] His confirmation hearing was held in October 2009, and the decision was still under submission as the year ended. Seventy-eight victims were authorized to participate through legal representatives.[34] The prosecution called three witnesses, and one, called by the defense, testified in closed session.[35]

25. *Id.*

26. *Id.*

27. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, ¶ 2 (June 15, 2009).

28. *Id.* ¶ 12.

29. *Id.*

30. INTERNATIONAL CRIMINAL COURT, THE COURT TODAY, ICC-PIDS-CIS-01-004/09 (Nov. 18, 2009). *See also* Press Release ICC-CPI-20091105-PR472 (Nov. 5, 2009), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2009)/pr472.

31. Background, Situation in the Central African Republic, ICC-OTP-BN-20070522-220-A_EN (May 22, 2007).

32. Press Release, International Criminal Court, ICC-CPI-20091030-PR470 (Oct. 30, 2009).-01- 004/09_Eng

33. *Id.*

34. *Id.*

35. *Id.*

B. International Criminal Tribunal for Rwanda

A full appellate reversal of a conviction by an international criminal tribunal is rare, but that is exactly what happened last year at the International Criminal Tribunal for Rwanda (ICTR). Protais Zigiranyirazo, the brother-in-law of former Rwandan president Juvenal Habyarimana, was widely believed to be involved in the original planning of the genocide of Tutsis in Rwanda.[36] He was convicted in 2008 of genocide and extermination in connection with the death of over 1,000 Tutsis slaughtered at Kesho Hill and a roadblock in Kigali, which he allegedly ordered.[37] He had been sentenced to twenty years imprisonment.[38]

In reversing the conviction and ordering him freed, the ICTR Appeals Chamber found that the Trial Chamber had improperly applied the burden of proof relating to the alibi defense, did not address all the significant defense evidence in its written decision, and made factual errors in its decision about the evidence actually presented.[39]

The prosecution relied on evidence that Zigiranyirazo was present at the scene of both events. In response, Zigiranyirazo raised an alibi defense. In its decision, however, the Trial Chamber repeatedly stated that the defendant did not establish his alibi and that the defense testimony did not exclude the possibility that the prosecution's testimony was accurate.[40] The Appeals Chamber found that this reversed the burden of proof on the alibi defense.[41] The defense's burden on alibi is simply to raise a reasonable doubt about the prosecution evidence.[42] It does not need to conclusively establish its alibi or eliminate the possibility that the prosecution's case is true.[43] Because the Trial Chamber did not explicitly state what standard it was using, the Appeals Chamber could only conclude that it misapplied the burden of proof by making it too high.[44] Compounding this error, the Appeals Chamber found that the court did not address all the significant defense evidence in its decision.[45]

This rule is consistent with the rule in the majority of jurisdictions in the United States as well, which provides that the burden on the defense in raising an alibi is simply to raise a reasonable doubt as to the prosecution's evidence.[46] A minority of jurisdictions require that the defense prove the alibi by a preponderance of the evidence.[47] The Trial Chamber in this case arguably required Zigiranyirazo to prove his alibi beyond a reasonable doubt.

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36. *Protais Zigiranyirazo* (Monsieur Z" ou Zigi), Trial-ch.org: Trial Watch, *available at* http://www.trial-ch.org/en/trial-watch/profile/db/facts/protais_zigiranyirazo_397.html (last visited Jan. 25, 2009).

37. Press Release, International Criminal Tribunal for Rwanda, Appeals Chamber Acquits and Releases Protais Zigiranyirazo (Nov. 16, 2009), *available at* http://www.unictr.org/ENGLISH/PRESSREL/2009/624.htm.

38. *Id.*

39. Protais Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Appeal Judgment, ¶ 39 (Nov. 16, 2009), *available at* http://www.unhcr.org/refworld/docid/4b13c5fb2.html.

40. *Id.* ¶¶ 40, 41.

41. *Id.* ¶ 43.

42. *Id.* ¶ 42.

43. *Id.*

44. *Id.* ¶ 43.

45. *Id.* ¶¶ 45-46.

46. People v. O'Neill, 437 N.Y.S.2d 202, 204 (N.Y. App. Div. 1981).

47. State v. Stump, 119 N.W. 2d 210, 224-25 (Iowa 1963).

C. Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) completed its third and final trial to be held in Freetown in February 2009 (the Charles Taylor trial is still proceeding in The Hague) when it handed down a trial judgment in *Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao* (RUF or Revolutionary United Front case).[48] In October, the Appeals Chamber confirmed nearly all the convictions.[49] Former RUF Interim Leader Issa Hassan Sesay and Senior RUF Commander Morris Kallon were each convicted of sixteen counts of war crimes and crimes against humanity, and former RUF Security Chief Augustine Gbao was convicted on fourteen counts.[50] The charges included the first-ever convictions by an international tribunal for forced marriage as a crime against humanity and for attacks against U.N. peacekeepers.[51] The charges also included convictions for the recruitment and use of child soldiers, extermination, rape, sexual slavery, murder, enslavement and forced labor (primarily in the diamond mines), and looting and burning civilian structures.[52] The charges stem from the period of May 1997 through February 1998, when the AFRC (Armed Forces Revolutionary Council) and the RUF jointly ruled Sierra Leone through a power sharing military junta, after suspending the constitution and outlawing all opposition parties.[53]

The conviction is notable because the defendants were convicted based on their involvement in a "Joint Criminal Enterprise," and not on their direct involvement or direction of the alleged offenses. A "Joint Criminal Enterprise" (JCE), similar to the concept of conspiracy in American jurisprudence,[54] is not a new concept in international criminal law and has been used extensively relating to militias or government groups.[55] But it has rarely been used to find that an entire government was set up and run as a "Joint Criminal Enterprise." That is, however, exactly what the Trial Chamber did in this case.

As it is used in customary international criminal law, JCE provides that all members of a group that has a common criminal purpose will be personally liable for the crimes committed by the group that were intended to further the common purpose.[56] Where the "accused intended the commission of the crime in question and intended to participate in a common plan," liability attaches through "basic" JCE.[57] The participants can also be liable for unanticipated crimes outside the plan if under the circumstances it is *foreseeable*

48. Prosecutor v. Issa Hassan Sesay, Case No. SCSL-04-15-T, 32072-32905 (Mar. 2, 2009), *available at* http://www.sc-sl.org/scsl/Public/SCSL-04-15-PT-RUF/SCSL-04-15-T-1235.pdf.

49. Prosecutor v. Issa Hassan Sesay, Case No. SCSL-04-15-A, pp. 5167-5728 (Oct. 26, 2009).

50. Press Release, Special Court For Sierra Leone Office Of The Prosecutor, Prosecutor Welcomes Convictions In Ruf Appeals Judgment (Oct. 26, 2009), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=ITUGDfogLfQ%3d&tabid=196.

51. *Id.*

52. *Id.*; *see also Sesay*, Case No. SCSL-04-15-A, ¶ 107.

53. *Sesay*, Case No. SCSL-04-15-A, ¶ 9.

54. *See, e.g.*, Witkin & Epstein, California Criminal Law, Elements §§ 68-97 (Witkin Legal Inst., 3d ed. 2000).

55. *Vladimir Tochilovsky*, Jurisprudence of the International Criminal Courts and the European Court of Human Rights, Indictment 17-22 (2008).

56. *Sesay*, Case No. SCSL-04-15-A, ¶ 467.

57. *Id.* ¶ 475.

that one of the members of the group might perpetrate such a crime, and the accused willingly took that risk (extended JCE).[58]

The Trial Chamber found that the high-ranking members of the AFRC and the RUF agreed to form a joint government by creating a joint Supreme Council. The Supreme Council was created for the otherwise legitimate objective of controlling the territory of Sierra Leone, but with the common criminal purpose of doing so by means of the crimes charged to control the lucrative diamond trade in the country.[59] The Appeals Chamber specifically found that JCE liability could apply even though the objective was legitimate, as long as the means were criminal.[60]

The Trial Chamber found that Sesay and Kallon were members of the Supreme Council, which the junta used to subdue the civilian population by violent means and massive human rights abuses.[61] The Chamber held that the accused did not need to participate or contribute to all of the crimes committed by the JCE to be liable, as long as they had knowledge of the wider purpose and made a significant contribution to the JCE.[62] The Appeal Chamber also held that although Gbao was not a member of the Council, the Trial Chamber was reasonable in finding that he acted in concert with the senior leaders based on circumstantial evidence.[63]

The Appeals Chamber also affirmed the liability of the defendants, even though rank-and-file subordinates of either the AFRC or RUF committed the actual crimes charged. As such, the subordinates were mere agents and were neither members of the Supreme Council nor did they necessarily share the same intent as the council.[64] The Chamber explained that linking the actions in the field to the members of the JCE must be done on a case-by-case basis. A number of factors must be examined: whether a JCE member closely cooperated with the actual perpetrator in order to further the common criminal purpose; whether a JCE member explicitly or implicitly requested that the non-JCE member commit such a crime; or whether a JCE member instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime.[65] A JCE member is not required to have control and influence of each incident or group of non-JCE actors involved.[66] As long as the JCE member used the linked actions "in furtherance of the common criminal purpose," the actions may be imputed to all the JCE members.[67]

The Trial Chamber found that JCE members used rank-and-file fighters to commit crimes that were intended by the JCE members to further the common criminal purpose or were a natural and foreseeable consequence of the implementation of the common purpose.[68] The Appeals Chamber held defendant Gbao, who was not a member of the Supreme Council and would not normally be subject to the imputed liability for events of which he was unaware or uninvolved, to the same standard, on the basis that he "willingly

58. *Id.* ¶¶ 474-75.
59. *Id.* ¶¶ 298-301, 305.
60. *Id.* ¶¶ 294-95.
61. *Id.* ¶¶ 300, 323.
62. *Id.* ¶ 313.
63. *Id.* ¶ 331.
64. *Id.* ¶ 403.
65. *Id.* ¶ 414.
66. *Id.*
67. *Id.* ¶¶ 415, 441.
68. *Id.* ¶ 467.

took the risk" by acting in concert with the senior leaders.[69] This appears to be a notable expansion of the JCE doctrine to certain non-JCE members.[70]

The Trial Chamber took pains to make it clear that the case was not a "trial of the RUF organization," and that JCE is not "guilt by association."[71] Nevertheless, the American Justice Shireen Avis Fisher dissented "fundamentally" on the imposition of vicarious liability on defendant Gbao based on JCE.[72] Because the Trial Chamber found that Gbao did not share the common criminal purpose with the other participants of the JCE, Justice Fisher questioned how he could incur individual criminal responsibility.[73] She called the holding "unprecedented" and declared that it "abandons the keystone of JCE liability as it exists in customary international law."[74] If the accused does share a common criminal purpose, Justice Fisher would find no further basis for imputed liability.[75]

II. Transnational Criminal Law: *Continuing Aggressive FCPA Enforcement is the New Norm*

Over the last few years, the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have all but declared war on international commercial corruption and bribery. Under the auspices of the Foreign Corrupt Practices Act (FCPA), a previously under-enforced statute that has been in effect since 1977, U.S. enforcement authorities have led international anti-corruption enforcement efforts. U.S. authorities have filed at least 125 criminal, civil, and administrative actions against U.S. and foreign companies and individuals subject to the FCPA for bribery of foreign officials, improper books and records, and insufficient internal controls.[76] The United States has also recovered more than US$1.8 billion in criminal fines, civil penalties, and disgorgement in FCPA cases, and has given no indication that it intends to let up on FCPA enforcement in the years to come.

A. Continued Aggressive Enforcement of the Foreign Corrupt Practices Act by U.S. Authorities During 2009

U.S. enforcement authorities continued their aggressive enforcement of the FCPA throughout 2009. After announcing in January 2009 that enforcement of the FCPA was the DOJ's top priority, second only to fighting terrorism,[77] the DOJ and SEC filed twenty-three FCPA enforcement actions from January through November 2009—which is more than 2008 (twenty-one), nearly as many as in 2007 (twenty-eight, the highest year on record), and is second-highest ever for an individual year since the FCPA's enactment

69. *Id.* ¶ 471.
70. *See* Posting of Guénaël Mettraux, http://www.internationallawbureau.com/blog (Nov. 18, 2009).
71. *Sesay*, Case No. SCSL-04-15-A, ¶ 311.
72. *Id.* at 512 (Fisher, J. dissenting).
73. *Id.* ¶ 1.
74. *Id.*
75. *Id.* ¶ 16.
76. *See generally* Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* (ABA Section of International Law, 2d ed. 2010).
77. Don Lee, *Avery Dennison Case a Window on the Pitfalls U.S. Firms Face in China*, L.A. Times, Jan. 12, 2009, *available at* http://articles.latimes.com/2009/jan/12/world/fg-avery12.

in 1977. Because of these new actions, the DOJ and SEC have jointly secured more than $620 million in fines, penalties, and disgorgement this year and more than $1.6 billion since January 2007. Eleven other cases were wholly or partially resolved in 2009 by plea agreement, trial, or the conclusion of a non-prosecution agreement. The DOJ also has more than 130 open FCPA investigations and has indicated that the number of enforcement actions could grow higher by year's end.[78]

As part of its enforcement strategy, the DOJ is adding up to twenty new lawyers to work on fraud and FCPA-related issues, particularly in the financial services industry.[79] The Federal Bureau of Investigation (FBI) has dedicated resources to investigations of overseas bribery. Similarly, the SEC's Division of Enforcement created a specialized unit dedicated to investigating and prosecuting violations of the FCPA's accounting provisions.[80]

B. Increased Prosecutions of Individuals Under the FCPA

Over the last few years, corporate defendants have borne the brunt, in dollar terms, of FCPA enforcement, as evidenced by the $800 million paid by Siemens to U.S. enforcement authorities in 2008, and $579 million paid by Halliburton and KBR Inc. in 2009. Nevertheless, the DOJ and SEC are increasingly pursuing individual prosecutions, in part for their increased deterrent effect.[81]

In 2009, seventeen individuals were charged with violating the FCPA—an increase of over forty percent from 2008 (twelve) and nearly double the number of individuals charged in 2007 (nine). This increase in individual prosecutions has had a corresponding effect on the number of FCPA cases proceeding to trial. In fact, this past year four individuals chose to fight charges that they violated, or conspired to violate, the FCPA:

- *Frederic Bourke*: Cofounder of handbag maker Dooney & Bourke and an investor in Oily Rock Group Ltd. was convicted of conspiring to violate the FCPA on July 10, 2009, for his knowledge of bribes made by investor consortium leader Viktor Kozeny to Azeri officials, including former president Heidar Aliyev, in order to obtain a controlling interest in, and ultimately profit from, the privatization of the State Oil Company of the Azerbaijan Republic.[82] Bourke was sentenced on November 11 to 366 days in prison and ordered to pay a $1 million criminal fine. He is appealing his conviction.
- *William Jefferson*: This former Louisiana Congressman was convicted of eleven corruption-related charges, including conspiracy to violate the FCPA, in connection with $90,000 in cash found in his freezer that was allegedly to be used to bribe the Nigerian Vice President in order to secure a telecommunications contract for firms in

78. Debevoise & Plimpton, LLP, *DOJ's Mendelsohn Notes Recent Enforcement Trends*, FCPA Update, Sept. 2009, at 7, *available at* http://www.debevoise.com/files/Publication/b576a274-9024-4ab5-880d-92867dc42922/Presentation/PublicationAttachment/c096af80-8948-49ce-90a8-952b6f54ec1d/FCPAUpdateNumber2.pdf.

79. *DOJ to Strengthen Anti-Fraud Unit*, Compliance Reporter, Nov. 16, 2009 (citing remarks by Assistant Attorney General Lanny Breuer).

80. *See* Robert Khuzami, Director, Div. of Enforcement, Sec. & Exch. Comm'n, Remarks before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm.

81. Debevoise & Plimpton, *supra* note 78.

82. United States v. Kozeny, 2009 WL 3294818 (S.D.N.Y. Oct. 13, 2009).

which Jefferson's family members had interests.[83] Jefferson was sentenced on November 13 to thirteen years in prison and ordered to forfeit more than $470,000. He is also appealing his conviction.

- *Gerald & Patricia Green*: These Hollywood movie producers were convicted of paying more than $1.7 million in bribes to a government official with the Tourism Authority of Thailand in order to secure $10 million in contracts, in violation of the FCPA.[84] The Greens are scheduled to be sentenced on December 17, 2009.

Although most companies prefer a negotiated disposition of FCPA charges in order to avoid the possibility of conviction and debarment (among other penalties), individuals facing jail time have seemingly been willing to put the government to its proof. If this trend in individual prosecutions and trials continues, with the accompanying motion and appellate practice, a greater body of case law and a further defining and narrowing of principles and issues in FCPA enforcement may develop and provide greater guidance and clarity to the contours of the FCPA.

C. FCPA Risk in Targeted Industries

The DOJ has made clear that industry-focused investigations (e.g., pharmaceutical, oil and gas, medical device manufacturers, freight forwarders) continue to be an important part of its enforcement strategy. Enforcement officials appear to be operating on the premise that, in response to market pressures and demands, competitors may adopt similar practices and strategies to enhance their competitive positions. Most recently, U.S. enforcement officials announced, for example, that they would be targeting the pharmaceutical industry for the remainder of 2009 and in 2010.

Enforcement officials also continue to prosecute violations of the FCPA in connection with the U.N. Oil for Food program. To date, twelve companies and individuals have resolved books and records, internal controls, and other charges related to participation in the U.N. program, including two companies in 2009, AGCO Limited and Novo Nordisk A/S, resulting in nearly $38 million in criminal fines, civil penalties, and disgorgement.[85] Interestingly, no anti-bribery charges have been brought in connection with the uncovered misconduct because all Oil for Food program payments were made directly to the government of Iraq and not to any individual foreign official. As a result, prosecutors have relied on charging violations of the FCPA's accounting provisions, as well as other federal charges including mail and wire fraud, conspiracy, and violations grounded in travel undertaken in furtherance of a corrupt endeavor.

D. Increased International Cooperation with OECD Countries

U.S. enforcement authorities have increased the resources devoted to combating international corruption and bribery. They have also increased their level of coordination and cooperation with international enforcement authorities, particularly in OECD countries

83. *See* United States v. Jefferson, Criminal Action No. 1:07-cr-00209-TSE (E.D. Va. Aug. 5, 2009).

84. *See* United States v. Green, Criminal Action No. 2:08-cr-00059 (GW) (C.D. Cal. Mar. 11, 2009).

85. United States v. AGCO Ltd., No. 09-cr-00249 (D.D.C. 2009); U.S. Sec. & Exch. Comm'n v. AGCO Corp., No. 09-cv-01865 (D.D.C. 2009); United States v. Novo Nordisk A/S, No. 09-cr-00126 (D.D.C. 2009); U.S. Sec. & Exch. Comm'n v. Novo Nordisk A/S, No. 09-cv-00862 (D.D.C. 2009).

with similar implementing legislation, through the use of mutual legal assistance treaties (MLATs) and otherwise.

Such cooperation is often essential to prosecuting FCPA cases, which involve tracing funds and obtaining evidence in multiple jurisdictions. For example, in the press release announcing the settlement of the Halliburton/KBR matter, the SEC acknowledged the assistance of foreign authorities in Europe, Asia, Africa, and the Americas.[86]

E. Looking Forward to 2010

FCPA enforcement, already a priority of the DOJ and SEC, should be expected to continue at a high level in 2010. Increased U.S. enforcement resources and activities, combined with 130 open investigations and the effects of the global economic crisis (e.g., greater competition for business, increased pressure to make corrupt payments, decreased legal and compliance resources, increased participation of foreign governments in traditionally private businesses) suggest that 2010 may be the biggest enforcement year to date. Increased enforcement in certain targeted industries, particularly the pharmaceutical industry, and among senior executives of companies where misconduct is uncovered is also expected. Finally, increased international cooperation and coordination will continue to be the norm, as will multi-jurisdictional investigations and prosecutions.

86. Press Release, Sec. & Exchange Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* http://www.sec.gov/news/press/2009/2009-23.htm (stating that the case "demonstrates the close and cooperative working relationships that have developed in FCPA investigations among the SEC, the U.S. Department of Justice, and foreign law enforcement agencies and securities regulators").