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Linda Strite Murnane

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International Criminal Law

LINDA STRITE MURNANE¹

During 2015, there have been three judgments delivered by the International Criminal Court (ICC), two judgments delivered by the International Criminal Tribunal for the former Yugoslavia (ICTY), and one contempt judgment delivered by the Special Tribunal for Lebanon (STL). The Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Tribunal for Rwanda (ICTR), and the Mechanism for International Criminal Tribunals (MICT) did not issue any judgments during this year. Trial proceedings continued at several international tribunals, with the exception of the International Criminal Tribunal for Rwanda, which has completed its work and turned the remainder of its cases over to the MICT or referred the cases to local jurisdiction during this year.

This article briefly summarizes the judgments, highlighting progress being made in the development of international criminal law and jurisprudence in these courts. Additionally, the article will discuss cases in the past year in which the International Criminal Court has reported it will not proceed.

I. International Criminal Court

In a key development indicating the challenges confronting international courts and tribunals, the International Criminal Court announced on 13 March 2015 that it would terminate the proceedings in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*.² Mr. Kenyatta was charged as an indirect co-perpetrator with five counts of crimes against humanity allegedly committed during the post-election violence in Kenya in 2007–2008.³ The Prosecution alleged that the Kenyan Government had failed to comply with a request

1. Linda Strite Murnane is Chief, Court Management Services Section, for the Special Tribunal for Lebanon (STL). The views expressed in this article are those of the author and do not necessarily reflect the views of the STL.

2. *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Decision on the withdrawal of charges against Mr. Kenyatta, (Mar. 13, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf>.

3. *Case Information Sheet, Prosecutor v. Uhuru Muigai Kenyatta*, INTERNATIONAL CRIMINAL COURT (Mar. 13, 2015), <https://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf>.

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to produce financial and other records related to Mr. Kenyatta that significantly interfered with the ability to continue the effort to prosecute the case.⁴

On 29 November 2013, the Prosecution filed an application for a finding of non-cooperation against the Kenyan Government.⁵ On 3 December 2014, the Trial Chamber rejected the Prosecutor's Application under Article 87(7).⁶ The Trial Chamber rejected the Prosecutor's request on 31 March 2014,⁷ and the Prosecutor was granted leave to appeal.⁸

In its 19 August 2015 judgment on the appeal, the ICC's Appeals Chamber reversed the Trial Chamber's decision and remanded this important issue to the Trial Chamber for a determination of whether Kenya has failed to comply with a cooperation request preventing the Court from exercising its functions and powers under the Statute, and if so, for the Trial Chamber to make an assessment of whether it would be appropriate to refer Kenya's non-compliance to the Association of State Parties.⁹

On 27 February 2015, the ICC Appeals Chamber announced the judgment confirming the Decision of 18 December 2012 taken by Trial Chamber II of the ICC in which Mathieu Ngudjolo Chui was acquitted of charges of crimes against humanity and war crimes.¹⁰ Chui was alleged to be the former leader of the *Front des nationalistes et intégrationnistes* [National Integrationist Front](FNI).¹¹ He had been charged with three counts of crimes against humanity (murder, rape, and sexual slavery) and seven counts of war crimes (using children under the age of 15 to take part in hostilities, directing an attack against a civilian population, willful killing, destruction of property, pillaging, sexual slavery, and rape).¹² The offenses were alleged to have occurred on 24 February

4. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ¶ 1 (Dec. 3, 2014), <https://www.icc-cpi.int/iccdocs/doc/doc1878157.pdf>.

5. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya, (Nov. 29, 2013), (A public redacted version was filed on Dec. 2, 2013. Pursuant to Trial Chamber V(B)'s order ICC-01/09-02/11-900 the application was reclassified at Public on Feb. 12, 2014).

6. *Supra*, note 3 at 46.

7. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on Prosecution's application for finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, (Mar. 31, 2014), <https://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf>.

8. Prosecutor v. Kenyatta, Case No. ICC-01/09/02/11, Prosecution's application for leave to appeal the "Decision on Prosecution's application for finding of non-compliance under Article 87(7) of the Statute", (Dec. 9, 2014), <https://www.icc-cpi.int/iccdocs/doc/doc1881850.pdf>; Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on the Prosecution's request for leave to appeal, (Mar. 9, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1919141.pdf>.

9. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11 OA 5, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ¶ 91-92 (Aug. 19, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc2034599.pdf>.

10. Prosecutor v. Chui, Case No. ICC-01/04-02/12 A, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", ¶ 4 (Apr. 7, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1957802.pdf>.

11. *Situations and Cases, The Prosecutor v. Mathieu Ngudjolo Chui*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/iccdocs/PIDS/publications/ChuiEng.pdf>

12. *Case Information Sheet, The Prosecutor v. Mathieu Ngudjolo Chui*, INTERNATIONAL CRIMINAL COURT (Feb. 27, 2015). <https://www.icc-cpi.int/iccdocs/PIDS/publications/ChuiEng.pdf>

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2003 during an attack on the village of Bogor in the Ituri District of the Democratic Republic of the Congo.¹³

On 3 March 2015, the ICC Appeals Chamber delivered its judgment on the appeals against the Trial Chamber's "Decision establishing the principles and procedures to be applied to reparations" in the case against Thomas Lubanga Dyilo.¹⁴ The Appeals Chamber instructed the Trust Fund for Victims (TFV) to present a draft implementation plan for collective reparations to the Trial Chamber I no later than six months from the date of the judgment.¹⁵ Trial Chamber I issued its decision on the principles to be applied to reparations for victims, and ordered collective reparations to be made to the identified victims.¹⁶ The Trial Chamber set out the principles to award reparations based upon the harm suffered as a result of the commission of any crime within the jurisdiction of the Court.¹⁷ As Mr. Lubanga was not convicted for crimes of sexual violence, the Appeals Chamber held that the victims did not qualify for reparations for those acts.¹⁸

On 10 September 2015, the ICC issued its Decision Terminating Proceedings against Okot Odhiambo based upon findings that he had died on 28 October 2013.¹⁹

The ICC has now issued three final judgments, including those in the cases of Thomas Lubanga Dyilo, Germain Katanga, and Mathieu Ngajjima Chui. The judgment in the case of Jeanne-Pierre Bemba is still pending.²⁰

II. Mechanism for International Criminal Tribunals (MICT)/International Criminal Tribunal for the Former Yugoslavia (ICTY)/International Criminal Tribunal for Rwanda (ICTR)

The ICTY and ICTR continue to move toward completion of their mandate and their activities will merge and be handled by the Mechanism for International Criminal Tribunals (MICT).²¹

On 30 January 2015, the ICTY issued its Appeal judgment in the cases of *The Prosecutor v. Popovic, et al.*, which involved charges arising from events in July 1995 in and around

13. *Id.*

14. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06 A A 2 A 3, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2, (Mar. 3, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1919024.pdf>.

15. *Situations, The Prosecution v. Thomas Lubanga Dyilo*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx.

16. *Case Information Sheet, The Prosecution v. Thomas Lubanga Dyilo*, INTERNATIONAL CRIMINAL COURT (Feb. 10, 2016) <https://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>.

17. *Supra*, note 13 at ¶ 79, 125.

18. *Id.* at ¶ 197-98.

19. Prosecutor v. Kony et al, Case No. ICC-02/04-01/05, Decision terminating proceedings against Okot Odhiambo, (Sept. 10, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc2056713.pdf>.

20. *Case Information Sheet, The Prosecutor v. Jean-Pierre Bemba Gombo*, INTERNATIONAL CRIMINAL COURT (Feb. 10, 2016). <https://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf>.

21. *The Mechanism for the International Criminal Tribunals*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/content/mechanism-international-criminal-tribunals>.

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Srebrenica and Lepa in the Podrinje Region, Eastern Bosnia and Herzegovina.²² The Appeals Chamber considered submissions by the Defense with respect to issues regarding the indictment, admissibility and weight of the evidence, witness credibility, evidence regarding the number of deceased established by the evidence, as well as an issue of alibi as to two of the accused. Additionally, appellants raised issues related to the Trial Chamber's assessment of the expert evidence in the case.²³

The Appeals Chamber also addressed allegations of error submitted by the Prosecution and the Defense regarding genocide, liability for the genocide, the offense of conspiracy to commit genocide, murder as a violation of the laws or customs of war, forcible transfer as a crime against humanity, as well as challenges to joint criminal enterprise, mode of liability for aiding and abetting, and command responsibility.²⁴

The judgment addressed the appeals of five accused who remained in the appeal phase of the case. The Appeals Chamber reversed Popovic's conviction regarding the killing of six Bosnian Muslim men near Trnovo and his conviction for genocide, in Count 1 in part; extermination as a crime against humanity, in Count 3 in part; murder as a violation of the laws or customs of war, in Count 5 in part; and persecution as a crime against humanity, in Count 6 in part; only as those charges involved allegations related to Trnovo. The other convictions against Popovic under Counts 1, 3, 5, and 6 were affirmed, as was his sentence to life imprisonment.²⁵

With respect to the accused Beara, the Appeals Chamber granted the appeal and reversed the conviction for genocide, in Count 1 in part; extermination as a crime against humanity, in Count 3 in part; murder as a violation of the laws or customs of war, in Count 5 in part; and persecution as a crime against humanity, in Count 6 in part; as those convictions related to the killing of six Bosnian Muslim men near Trnovo. All other convictions of Mr. Beara were affirmed, as was his sentence to life-imprisonment.²⁶

Regarding the case of Drago Nikolic, his conviction for genocide, extermination as a crime against humanity, and murder as a violation of the laws or customs of war, were reversed in part for Counts 1, 3, 5 and 6, as they related to offenses arising from the killing of six Bosnian Muslim men near Trnovo. His sentence to 35 years imprisonment was affirmed.²⁷

In the case of the accused Miletic, the Appeals Chamber reversed in Counts 6 and 7 in part, his convictions for persecution and inhumane acts by forcible transfer charged as crimes against humanity. The Appeals Chamber also granted the Prosecution's appeal and convicted the accused Miletic for murder as a violation of the laws or customs of war for killings in Potocari set forth in Count 5, in part. The Appeals Chamber affirmed all other convictions of Mr. Miletic.

22. Prosecutor v. Popovic et al, Case No. IT-05-88-A, Judgment, ¶ 2 (Int'l Trib. for the Former Yugoslavia Jan. 30, 2015), http://www.icty.org/x/cases/popovic/acjug/en/150130_judgement.pdf.

23. *Id.* at p. i-iv.

24. *Id.* at p. iv-xiii.

25. *Id.* at ¶ 2117.

26. *Id.*

27. *Id.*

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With respect to the sentence for Miletic, the Appeals Chamber set aside his 19-year sentence that had been imposed by the Trial Chamber and sentenced the accused to an 18-year prison term.²⁸

The accused, Pandurevic, heard the Appeals Chamber dismiss all grounds of appeal which his team had advanced. The Appeals Chamber granted the Prosecution's appeal for aiding and abetting persecution through murder as a crime in relation to the Milici Prisoners, aiding and abetting extermination as a crime against humanity, and murder as a violation of the laws or customs of war, as well as persecution. Pandurevic was convicted for murder as a crime against humanity and murder as a violation of the laws or customs of war where the crimes were committed by his subordinates at Kozluk and the Branjevo Military Farm between 15 and 16 July 1995. His 13-year prison term was affirmed.²⁹

The Appeals Chamber also issued a judgment on 8 April 2015 in the case of Zdravko Tolimir for crimes committed in the Srebrenica and *_epa* enclaves in Eastern Bosnia in 1995.³⁰ At the time of the alleged offenses, the accused was an Assistant Commander and Chief of the Sector for Intelligence and Security Affairs of the Main Staff of the Army of the Republika Sprska (The VRS).³¹ Mr. Tolimir asserted 25 grounds of appeal.³² Mr. Tolimir was successful in obtaining reversals of convictions for extermination as a crime against humanity and genocide with respect to killings of three *_epa* leaders, genocide through serious mental harm to the Bosnian Muslim population of Eastern Bosnia and Herzegovina based upon forcible transfer of Bosnian Muslims from *_epa*, genocide by inflicting conditions of life calculated to destroy the Bosnian Muslim population of Eastern Bosnia and Herzegovina, and genocide, extermination, and murder as a violation of the laws and customs of war insofar as they related to the killings of six Bosnian Muslim men near Trnovo.³³ Mr. Tolimir's sentence to life imprisonment as well as all remaining convictions were affirmed.³⁴

The ICTR has issued a scheduling order to deliver its Appeals Chamber judgment in the trial of *Prosecutor v. Nyiramasubuko* on 14 December 2015.³⁵ This is the last Appeals judgment that will be delivered from the ICTR, as all remaining cases are to be decided by the MICT.³⁶ The accused in this case are Pauline Nyiramasuhuko, the former Minister of Women's Development, her son, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje.³⁷ They were charged with crimes of genocide, conspiracy to commit genocide, crimes against humanity, and

28. *Id.*

29. *Id.*

30. *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, (Int'l Trib. for the Former Yugoslavia Apr. 8, 2015), http://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf.

31. *Id.* at ¶ 2.

32. *Id.* at ¶ 6.

33. *Id.* at ¶ 649.

34. *Id.*

35. *News, Scheduling Order for the Judgement in the Appeals Case of The Prosecutor vs. Nyiramasubuko et al.*, UNITED NATIONS MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS (Dec. 8, 2015), <http://unictr.unmict.org/en/news/scheduling-order-judgement-appeals-case-prosecutor-vs-nyiramasuhuko-et-al-0>

36. *Id.*

37. *Id.*

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war crimes for crimes committed against Tutsis during the 1994 genocide.³⁸ Sentences ranged from 25 years to life imprisonment.³⁹

III. Extraordinary Chambers in the Courts of Cambodia (ECCC)

The ECCC has an ongoing appeal from case 002/01, the Nuon Chea case.⁴⁰ Trial hearings continued in case 002/02, which involves allegations arising from Trapeang Thma Dam.⁴¹ Cases 003 and 004 were the subject of a request by the Co-Prosecutor for an extension of time to proceed with that case.

IV. Special Tribunal for Lebanon (STL)

The STL is engaged in the trial *in absentia* of five individuals charged with the assassination of the former Lebanese Prime Minister, Rafik Hariri, on 14 February 2005.⁴² Twenty-one others were killed and more than 200 injured in the attack. Trial began on 16 January 2014.⁴³

On 18 September 2015, the Contempt Chamber delivered the first judgment of the court, finding the accused, Karma Mohamed Tahsin Al Khayat, guilty of contempt of the Tribunal as to Count 2 of the Amended Indictment, and acquitting her and the corporate accused, *Al Jadeed* [Co.] S.A.L./New T.V. S.A.L. (N.T.V.), of all other charges.⁴⁴

In Count 2, Ms. Al Khayat was charged with willfully interfering with the administration of justice by failing to remove from the *Al Jadeed* TV's website and *Al Jadeed* TV's YouTube channel information on purported confidential witnesses in the case of *The Prosecutor v. Ayyash, et al.*⁴⁵ Following a sentencing hearing on 28 September 2015, Ms. Al Khayat was sentenced to pay a fine of 10,000 Euro.⁴⁶ The case has been appealed by the *Amicus* Prosecutor and by Ms. Al Khayat.⁴⁷

A second contempt case, In the Case Against *Akbbbar Beirut*, S.A.L. Ibrahim Mohamed Ali Al Amin, is scheduled for a status conference on December 11, 2015, and to hear opening statements in the case on 28 January 2016.⁴⁸

38. *Id.*

39. *Id.*

40. *Caseload, Case 002, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA*, <http://www.eccc.gov.kh/en/case/topic/2>

41. *Id.*

42. *About the Ayyash et al. Trial, Basic Information, SPECIAL TRIBUNAL FOR LEBANON*, <https://www.stl-tsl.org/en/the-cases/about-the-trial#basic-information>.

43. *Id.*

44. In the Case Against *Al Jadeed* [Co.] S.A.L./New T.V. S.A.L. (N.T.V) and Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ, Public Redacted Version of Judgment, p. 51 (Special Tribunal for Lebanon Sept. 18, 2015), <http://www.stl-tsl.org/en/public-redacted-version-of-judgment>.

45. *Id.* at ¶ 51.

46. In the Case Against Karma Mohamed Tahsin Al Khayat, Case No. STL-14-S/CJ, Reasons for Sentencing Judgment, ¶ 2 (Special Tribunal for Lebanon Oct. 6, 2015), <http://www.stl-tsl.org/en/reasons-for-sentencing-judgment-in-the-case-stl-14-05>.

47. *Id.*

48. In the Case Against *Akbbbar Beirut* S.A.L. and Ibrahim Mohamed Ali Al Amin, Case No. STL-14-06/PT/CJ, Scheduling Order (Special Tribunal for Lebanon Oct. 14, 2015), <http://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/filings-stl-14-06/4436-f0111>.