

## Developments in international criminal justice in Africa during 2010

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### Summary

*2010 was a significant year in the development of international criminal jurisprudence in Africa. The continent is approaching the closure of two of its greatest champions in this area of international law – the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). The article provides an overview of the ICTR's successor, the Residual Mechanism, as well as the complexities of the transition. With regard to the SCSL, a brief analysis is given of the Charles Taylor trial and the contribution of its 'infamous' witnesses. In relation to the International Criminal Court, the Review Conference and the Situations in the Democratic Republic of Congo, Darfur, Sudan and Kenya dominate the discussion, which focuses primarily on the enforcement of ICC warrants of arrest, the amendments to the Rome Statute and the practical application of the principle of complementarity. Developments related to the international community's responsibility to combat piracy off the coast of Somalia are also reviewed.*

### 1 Introduction

In this, the third review of developments in international criminal justice in Africa, we witness the implementation of international criminal law against a backdrop of dramatic political events. This is particularly evident in the investigations by the Prosecutor of the International Criminal

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Court (ICC).<sup>1</sup> In 2010, there was limited judicial development in ICC cases concerning the Situation in the Central African Republic and no progress in the situation concerning Uganda. This paper focuses its attention on the results of the landmark ICC Kampala Review Conference, the developments in the ICC situations in the Democratic Republic of the Congo and Darfur, Sudan, and concludes with the implications of the dramatic events surrounding the officials allegedly responsible for the 2008-2009 post-election violence in Kenya.

The implementation of international criminal law in the area of piracy gained momentum in 2010 with the appointment of a Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia. This article seeks to briefly examine a few of the 25 proposals presented by the Special Advisor in his report to the Secretary-General including, *inter alia*, the establishment of specialised Somali 'piracy' courts in Somaliland and Puntland, as well as in a third state, to prosecute those suspected of acts of piracy.

Strategies aimed at the completion of the Special Court for Sierra Leone (SCSL)<sup>2</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>3</sup> were centre stage in 2010. This year marked the beginning of the last leg for the SCSL with the trial of Charles Taylor drawing to a close, signifying the end of a hybrid tribunal that has significantly contributed to the development of international law. The review of the ICTR briefly examines the establishment of a so-called Residual Mechanism, a significant first in international law, where the Security Council has created a body to take over the residual and legacy issues of the ICTR.

In brief, this review summarises some of the main developments pertaining to the ICTR (section 1); and to the SCSL (section 2); before examining developments in the ICC (section 3); the proceedings in the situations in the Democratic Republic of the Congo (section 4); Darfur, Sudan (section 4); and Kenya (section 5). In view of the significance of the prosecution of pirates, the review also summarises developments in this burgeoning area of international criminal law (section 6).

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<sup>1</sup> The Statute of the International Criminal Court was adopted in Rome in July 1998 (often referred to as the 'Rome Statute') by 120 states and entered into force in 2002, triggering the temporal jurisdiction of the ICC. The Court is competent for war crimes, crimes against humanity and genocide, as defined in its Statute, and, since June 2010, also the crime of aggression.

<sup>2</sup> The Special Court for Sierra Leone was set up by an agreement between the government of Sierra Leone and the UN to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. This was further to Security Council Resolution 1315 (2000) of 14 August 2000 which requested the Secretary-General 'to negotiate an agreement with the government of Sierra Leone to create an independent special court consistent with this resolution ...' (para 1).

<sup>3</sup> The International Criminal Tribunal for Rwanda was established pursuant to Security Council Resolution 955 (1994) of 8 November 1994.

## 2 Rwanda

### 2.1 Judicial developments at the ICTR

While the judicial developments at the ICTR are of significant importance, the focus of the article is on the Residual Mechanism, as well as issues for consideration such as the continuity of trials, the protection of witnesses and victims, and the legacy of this *ad hoc* tribunal.<sup>4</sup> In summarising, in 2010 the ICTR concluded five trials at first instance and two cases on appeal. This included the re-trial of Tharcisse Muvunyi, convicted for direct and public incitement to commit genocide and sentenced to 15 years' imprisonment. By January 2011, of the 75 indictments issued by the ICTR Prosecutor, the trials of 54 accused have been concluded, eight of which were acquittals. Twenty-one cases are in the process of being tried in the first instance or judgment is pending. Judgments in three leading cases involving several ministers (in the so-called 'Government II' case), high-ranking military officers (in the so-called 'Military II' case) and in the Butare case, involving the only female defendant, are expected in 2011. Four cases concerning five accused, which include the cases of the former Minister of the Interior and the former Director-General for the Ministry of Foreign Affairs, remain unresolved, with judgments expected in the latter half of 2011.<sup>5</sup> As of January 2011, ten fugitives remained at large.<sup>6</sup>

Of the accused who are detained while awaiting the commencement of their trials in 2010, one is Jean Bosco Uwinkindi, a former pastor and fugitive who was arrested in Uganda on 30 June 2010, and transferred to the ICTR on 2 July 2010.<sup>7</sup> In November 2010, the Prosecutor filed a request to transfer the Uwinkindi case to the Rwandan authorities for trial in the High Court of Rwanda pursuant to rule 11*bis* of the ICTR Rules of Procedure and Evidence.<sup>8</sup> Following the submission in early 2011 of *amici* briefs by the government of Rwanda, Human Rights Watch and the International Criminal Defence Attorneys' Association,

<sup>4</sup> For a comprehensive examination of the judicial developments at the ICTR, see K Margetts & P Hayden 'Current developments at the *ad hoc* international criminal tribunals' (2010) 8 *Journal of International Criminal Justice* 649–693; K Margetts & K Kappos 'Current developments at the *ad hoc* international criminal tribunals' (2010) 8 *Journal of International Criminal Justice* 1333–1380; and K Margetts & K Kappos 'Current developments at the *ad hoc* international criminal tribunals' (2011) 9 *Journal of International Criminal Justice* 481–518.

<sup>5</sup> Security Council Report on the completion strategy of the International Criminal Tribunal for Rwanda 5 November 2010, UN Doc S/2010/574) para 34.

<sup>6</sup> n 5 above, para 27.

<sup>7</sup> n 5 above, para 21. Idelphonse Nizeyimana was also detained and awaiting trial in 2010. His trial commenced on 17 January 2011, <http://www.unict.org/Portals/0/Case/English/Nizeyimana/minutes/2011/01-110117.pdf> (accessed 31 March 2011).

<sup>8</sup> *Prosecutor v Jean-Bosco Uwinkindi* Case ICTR-2001-75-I, Prosecutor's request for the referral of the case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 4 November 2010.

the Trial Chamber in this case is expected to give its decision on the Prosecutor's request in 2011.<sup>9</sup> It is also of note that on 4 November 2010, the Prosecutor instituted a second round of requests to refer the cases of fugitives Fulgence Kayishema, a former Inspector Police, and Charles Sikubwabo, a former Bourgmestre, to the authorities of Rwanda.<sup>10</sup>

## 2.2 ICTR Residual Mechanism

The Security Council in Resolution 1503 (2003) of 28 August 2003 called upon the ICTR to take all possible measures to complete its investigations by the end of 2004, to complete all trials by the end of 2008 and to complete its work in 2010. It was at this stage that the Council requested that the President and Prosecutor of the ICTR report on a bi-annual basis on the implementation of what came colloquially to be known as the 'completion strategy'.<sup>11</sup> However, over the last seven years, the ICTR did not appear to gain the necessary momentum on the road to closure envisaged by the Council when it drafted and adopted Resolution 1503 (2003). In a previous review of developments of international criminal justice in Africa in 2009, the authors indicated that the completion of the remaining ICTR cases, including those on appeal, would signal time for the closure of the ICTR.<sup>12</sup>

In 2010, however, important legislative changes marked the end of the ICTR with the adoption of Security Council Resolution 1966 (2010) of 22 December 2010. The Resolution also heralded the establishment of the temporary International Residual Mechanism for Criminal Tribu-

<sup>9</sup> See *Uwinkindi* Case ICTR-2001-75-R11bis; Human Rights Watch: Request for leave to appear as *amicus curiae* pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence, 3 December 2010; *Uwinkindi* Case ICTR-2001-75-R11bis, Invitation to the government of Rwanda to make submissions as *amicus curiae*, pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence, on the Prosecution's 11bis motion, 18 January 2011; *Uwinkindi*, Case ICTR-2001-75-R11bis, Request for permission to file an *amicus curiae* brief by the International Criminal Defence Attorneys Association (ICDAA), concerning the Prosecutor's request for referral of the case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11bis of the Rules (Rule 74 of the Rules of Procedure and Evidence) 21 January 2011.

<sup>10</sup> See *Prosecutor v Fulgence Kayishema* Case ICTR-01-67-R11bis, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence 4 November 2010; *Prosecutor v Charles Sikubwabo* Case ICTR-95-1D-R11bis, Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 4 November 2010.

<sup>11</sup> Security Council Resolution 1503 of 28 August 2003, paras 6 & 7.

<sup>12</sup> For a discussion on the status of the ICTR's completion strategy in 2009, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2009' (2010) 10 *African Human Rights Law Journal* 267-268.

nals (Mechanism) to carry out the outstanding functions of, *inter alia*, the ICTR as of 1 July 2012.<sup>13</sup>

Briefly, in 2009 the Secretary-General issued a report to provide the Security Council with options for the location of the ICTR's archives and the seat of the Residual Mechanism.<sup>14</sup> In this report, the Secretary-General recommended several other areas for consideration, including (a) the maintenance of jurisdictional and structural continuity during and after the transition to the Mechanism;<sup>15</sup> (b) the necessity of adequate support for future trials conducted by the Mechanism;<sup>16</sup> (c) the preservation, security and access procedures for the Tribunal's archives, including their use by the Mechanism;<sup>17</sup> (d) various options for the geographical location of the Mechanism and its archives;<sup>18</sup> and (e) the continued enforcement of existing international agreements and contracts and of witness protection orders.<sup>19</sup>

The establishment of the Mechanism raises several questions that could potentially impact the development of international criminal law in Africa, a few of which are addressed below. The Mechanism consists of two branches: one in Arusha to house the Rwanda residual issues; the other in The Hague for the International Tribunal for the former Yugoslavia (ICTY). The Mechanism mirrors the structural architecture of the ICTR, but is expected to share a President, Prosecutor and Registrar with the ICTY. It is not yet clear from the Statute how this structure will operate in practice. The fusion of the three heads of the various organs of the Mechanism will require the Residual Mechanism to address unique challenges that have proven to be intrinsic to the individual *ad hoc* tribunals. These include issues related to archives; the pursuit of fugitives; correlating the political landscape in the Horn of Africa; the

<sup>13</sup> See Security Council Resolution 1966 of 22 December 2010. For purposes of clarity, it is important to distinguish the functions of the ICTR Residual Mechanism from completion strategy and subsequent legacy issues. The Residual Mechanism will carry out the ICTR's functions that will persist after the ICTR has been formally terminated, such as the enforcement of sentences and issues relating to protected witnesses. The completion strategy refers to the tasks that the ICTR must complete prior to its closure, such as the conclusion of trials. These are long-term projects continuing the ICTR's previous outreach functions and include the management and preservation of archives.

<sup>14</sup> Security Council Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals of 21 May 2009 (S/2009/258).

<sup>15</sup> n 14 above, sec V.

<sup>16</sup> n 14 above, sec VI.

<sup>17</sup> n 14 above, secs 12-14, 22, 30-35 & 43.

<sup>18</sup> n 14 above, sec VII.

<sup>19</sup> n 14 above, secs 11, 18-19, 23, 42 & sec VI.B.

continued use of *ad litem* judges that have already served over three years; and the referral of cases.

The issue of jurisdiction raises its own particular challenges. The Mechanism will have the power to prosecute those whom the ICTR has indicted and who are among the most senior leaders suspected of being responsible for the crimes outlined in articles 1 to 7 of the ICTR Statute. In addition, the Mechanism may prosecute those not considered senior leaders provided that it has exhausted all reasonable efforts to refer the cases to national jurisdictions. The Mechanism is also expected to assist national authorities who seek assistance in the investigation, prosecution and trial of suspects as well as providing assistance in the tracking of fugitives whose cases have been referred. As we watch the developments in the proposed referral of the *Uwinkindi*, *Kayishema* and *Sikubwabo* cases to Rwanda, the emphasis on referrals to national jurisdictions raises some significant questions. In recent years, Africa has witnessed the rise of various transitional mechanisms, including prosecutions, to address post-conflict situations. It is also significant that, as of December 2010, 31 out of 53 African nations are state parties to the Rome Statute. This illustrates, at the very least, a political commitment to advance the development of international criminal law in Africa. If African nations were in a position to seriously consider offering their assistance in accepting referrals from the ICTR or the Mechanism, it could serve to fast-track the development of international criminal law in the domestic sphere. However, without a clear understanding of the assistance that may or could be provided, the lack of the appropriate judicial tools and mechanisms to conduct trials of an international character may perpetuate a reluctance to accept such cases.

First, in his report, the Secretary-General states that, of the ten fugitives still at large, it is likely that the Mechanism would conduct only four trials. The rest are targeted for referral to national jurisdictions. Considering the unique character of criminal prosecutions, while certain jurisdictions have experience in carrying out prosecutions of this nature, in Africa only Rwanda appears to be willing and able to accept cases referred to it from the ICTR. The reluctance of many African states to accept such cases may be attributable to, for example, a lack of resources, a lack of the relevant domestic statutory instruments to carry out such prosecutions or an aversion to the political implications of holding such trials, particularly if the defendants were to be acquitted. Similarly, outside the continent, other jurisdictions have been reluctant to accept referrals for political reasons and due to statutory limitations related to the enforcement of sentences that may not be commensurate with the crimes charged. The ICTR Prosecutor previously has attempted without much success to transfer five cases to Rwanda pursuant to Rule 11*bis* of the ICTR's Rules of

Evidence and Procedure.<sup>20</sup> The Trial Chamber dismissed his requests for various reasons, including concerns over the application of the death penalty for crimes of genocide, the adequacy of protection for defence witnesses and ethnic bias potentially affecting the impartiality of the trials.<sup>21</sup> If the ICTR Trial Chamber continues to dismiss the Prosecutor's requests to transfer cases to Rwanda, the new Prosecutor of the Mechanism will be faced with the challenge of identifying states who are both willing and able to accept referrals of at least six of the cases involving fugitives pending before the ICTR.

It is also possible that the above challenges will be increased by issues of a lack of co-operation. The ICTR has faced significant challenges to obtain co-operation of member states when attempting to gain access to witnesses or evidence or to those allegedly harbouring fugitives, even through a subsidiary organ of the Security Council.<sup>22</sup> While the Resolution calls for co-operation by member states with the Mechanism, it stops short of calling for member states to co-operate with national jurisdictions tracking fugitives or carrying out investigations or prosecutions. The very nature of the ICTR as a subsidiary organ of the Council enables it to put pressure on 'un-co-operating' states, in the knowledge that, at least theoretically, it has the weight of the Council behind it. Practice in the *ad hoc* tribunals demonstrates that efforts by states who are willing to wield their combined political, diplomatic and economic clout can effect substantial results in the arrest and surrender of fugitives. For example, the direct diplomatic pressure linked to the prospective accession to the European Union (EU) led Serbia in

<sup>20</sup> See *Prosecutor v Michel Bagaragaza* Case ICTR-2005-86-11bis, Prosecutor's Request for Referral of the Indictment to the Kingdom of Norway, 15 February 2006; *Prosecutor v Fulgence Kayishema* Case ICTR-01-67-R11bis, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 11 June 2007; *Prosecutor v Yussuf Munyakazi* Case ICTR-97-36-R11bis, Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *Prosecutor v Gaspard Kanyarukiga* Case ICTR-2002-78-R11bis, Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *Prosecutor v Ildephonse Hategekimana* Case ICTR-00-55B-R11bis, Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007.

<sup>21</sup> *Bagaragaza*, Decision on Rule 11bis Appeal, 30 August 2006; *Munyakazi*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (AC), 8 October 2008; *Kanyarukiga*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (AC), 30 October 2008; *Hategekimana*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (AC), 4 December 2008; and *Kayishema*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (TC), 16 December 2008.

<sup>22</sup> Eg, in June 2010, the Security Council took note of the ICTR Prosecutor's report concerning Kenya's lack of co-operation in the case of the ICTR fugitive Felicien Kabuga. See also Security Council Resolution 1963 (2010) of 29 June 2010 (S/RES/1963 (2010)).

2005 to surrender 20 indicted persons to the ICTY and two indictees in 2007 and 2008, which included the former Bosnian Serb leader Rado-van Karadzic. In Africa, international pressure in 2006 played a critical role in the surrender and transfer of former Liberian president Charles Taylor to the SCSL.

In the absence of such a provision, or clear assurances of assistance from member states willing to accept referrals of cases from the ICTR, a lack of co-operation or a lack of appropriate political/economic leverage, may serve to discourage states from stepping forward to assist in the investigation, prosecution and trials of the remaining cases.

The protection of witnesses and victims remains a grave concern. In order to be able to conduct effective investigations and prosecutions, national jurisdictions will need to be assured of unfettered access to the public and confidential documents and archives held by the ICTR. While public documents do not present a significant problem, it is not yet clear how the Mechanism or the ICTR will provide access to confidential material held by the ICTR, including that of protected witnesses and victims. In the specific example of requests for transfer of cases to Rwanda, the protection of defence witnesses raises specific concerns.

As indicated above, the ICTR's transition to the Residual Mechanism remains vague and intangible. The next year will give the opportunity for Security Council members and the United Nations (UN) to iron out the problems that could hamper a smooth transition. It is also the opportunity for African nations, with the appropriate assistance, to assume the responsibility for the tracking, investigation and prosecution of fugitives. After all, whatever the Mechanism becomes is, in effect, part of the ICTR's legacy.

### **3 Sierra Leone**

As the ICTR battles with the weight of completion and hand-over to the Residual Mechanism, the SCSL is ending its work. All trials and appeals in Freetown have been concluded. During 2010, the UN and the Management Committee that oversees the financial aspects of the Court commenced discussions related to the handing over of the SCSL premises and archives to the Sierra Leonean government.

In the trial of Charles Taylor, former President of Liberia, in The Hague, the defence's case was replete with dramatic events such as the re-opening of the prosecution's case to include the testimony of Naomi Campbell.

Previously, the development of international criminal justice in Africa in 2009 and 2010 was examined, as well as the concept of Joint Criminal Enterprise and the significant emphasis by the Prosecutor on

this concept in the Taylor trial.<sup>23</sup> Since its beginning in 2009 when giving evidence for a period of 13 weeks, the defence in the Charles Taylor case has maintained its strategy that Taylor had no control over the Revolutionary United Front (RUF), to undermine the prosecution's allegations that Taylor commanded and assisted the RUF during the indictment period.

The Trial Chamber addressed several important legal issues concerning the re-opening of the prosecution's case to call three new witnesses, the exclusion of evidence that the defence claimed fell outside the scope of the indictment and a request for an investigation into the prosecution's conduct during its investigations.

In an unprecedented move, the Trial Chamber allowed the prosecution to re-open its case to call three new witnesses to provide evidence on an issue central to the prosecution of Taylor — his participation in a joint criminal enterprise that involved the sale of diamonds to fund the RUF and its purchase of arms used in the commission of crimes in Sierra Leone. This evidence was necessary to contradict Taylor's evidence in 2009 that he had never possessed diamonds. Despite the fanfare and theatrics leading to the appearance of these three witnesses, the prosecution was able to demonstrate in the evidence given by Mia Farrow and Carole White that, contrary to Naomi Campbell's public utterances and evidence, Campbell was aware that Taylor was going to give her diamonds, a matter she discussed with Taylor's Minister of Defence, before they were delivered to her hotel room.<sup>24</sup>

Of interest was also the Prosecutor's use of inconsistent statements that had been illegally obtained from Issa Sesay<sup>25</sup> when he was apprehended in 2003, to illustrate Sesay's delivery of diamonds to Taylor. The defence filed a motion to object to the introduction of these statements, in view of the decision of the Trial Chamber in *Prosecutor v Sesay and Others*, which had previously deemed them inadmissible. The prosecution argued that Sesay's rights as an accused during his trial were distinguishable from his status as a witness. The Trial Chamber, Ssebutinde J dissenting, interestingly fixated on procedure as opposed to the substance in its decision. It held that, as the prosecution had not filed a specific request to use the statements, the defence's objection was premature. In its view, the prosecution was merely advising the Chamber that it would eventually use the statements in cross-exam-

<sup>23</sup> For the development of this notion and the way it has been formulated before the SCSL, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 274; and Aptel & Mwangi (n 12 above) 269-270.

<sup>24</sup> *Prosecutor v Taylor* Case SCSL-03-01-T, Trial Transcript 5, 9-10 August 2010.

<sup>25</sup> Issa Sesay is the former interim leader of the Revolutionary United Front (RUF) rebel group. He was convicted and sentenced to 52 years' imprisonment by the SCSL for war crimes and crimes against humanity. Further to an enforcement of sentence agreement between the SCSL and Rwanda, he is currently serving his sentence in Kigali.

ination. In her dissenting opinion, Ssebutinde J held that there was a distinction between statements obtained in 'legally-acceptable circumstances and which may legitimately be used' and those 'obtained in illegal or illegitimate circumstances rendering their admission into evidence and/or use in cross-examination an embarrassment to the administration of justice'. In her opinion, Sesay's statements fell into the latter category.<sup>26</sup> This opinion was to be reiterated the following day when the defence attempted to cross-examine Sesay on his inconsistent statements. In a unanimous decision, the Trial Chamber found that the introduction of the statement would constitute 'fresh evidence' and ruled that, in view of the fact that the statement had been involuntarily taken from Sesay, and went to proving Taylor's guilt, its would violate Taylor's right to a fair trial. The Chamber reiterated that 'fresh evidence' that contained probative evidence of the guilt of the accused was permissible only in circumstances where (i) it was in the interests of justice; (ii) did not violate the fair trial rights of the accused; and (iii) the prosecution could establish 'exceptional circumstances' for admitting the new evidence.<sup>27</sup>

It is difficult, however, to ascertain how much weight will be attributed to Sesay's evidence in the Taylor trial. Most of his evidence appeared to corroborate Taylor's account of events, primarily that he was not the commander of the RUF and therefore not responsible for the crimes committed by the RUF or Armed Forces Revolutionary Council (AFRC) during the Sierra Leone civil war; that he only met with Taylor once on the issue of the release of the UN peacekeepers; that after the withdrawal of the National Patriotic Front of Liberia (NPFL) fighters in Sierra Leone, Taylor cut off all contact with the RUF until the peace talks in 1999; and that the war in Sierra Leone was not about diamonds. However, he also contradicted the testimony he gave at his own trial, particularly in relation to his subsequent travels to Monrovia, and contradicted Taylor's evidence concerning his relationship with Foday Sankoh.<sup>28</sup>

Financial resources have been a consistent area of concern for the SCSL and, in December 2010, following a request from the Secretary-General, the General Assembly agreed to supplement the SCSL's

<sup>26</sup> *Taylor*, Decision on Defence Motion to Exclude Custodial Statements of Issa Sesay, 12 August 2010.

<sup>27</sup> *Taylor*, Trial Transcript, 13 August 2010 62 (22-28), citing *Taylor*, Decision on prosecution motion in relation to the applicable legal standards governing the use and admission of documents by the Prosecution during cross-examination of 30 November 2009.

<sup>28</sup> *Taylor*, Trial Transcript, 16-26 August 2010. Foday Sankoh was the former leader of the Revolutionary United Front (RUF). He was indicted by the SCSL on counts of war crimes and crimes against humanity. Sankoh died of natural causes whilst in custody on 29 July 2003. The SCSL prosecutor withdrew the indictment on 3 December 2003. For further information, visit the Special Court for Sierra Leone website <http://www.sc-sl.org/CASES/FodaySankoh/tabid/187/Default.aspx> (accessed 31 March 2011).

voluntary contributions to enable it to continue to function until the end of its mandate in February 2012.<sup>29</sup> However, as the final trial before the SCSL comes to a close, the Court's completion strategy remains in the balance. As the UN exits from Sierra Leone, efforts to ensure that the legacy of the Special Court is preserved are underway. In October 2010, the SCSL Registrar advised the Secretary-General that the security provided by the UN Mission in Liberia (UNMIL) would not be required beyond January/February 2011 as the sensitive 'evidence and archives would be completely transferred from the Special Court to The Hague in December 2010, and its international staff would be reduced accordingly.'<sup>30</sup>

However, by December 2010, several residual issues had not yet been completed and handed over to the appropriate authorities. These include matters concerning: the continued protection of witnesses, particularly those considered vulnerable; the maintenance and management of its archives which are an important record of the crimes that were committed in Sierra Leone during the civil war and, together with records of the Truth and Reconciliation Commission, are of important educational and heritage value; the supervision of the enforcement of sentences of the convicted persons and issues concerning the provisional release of its convicted prisoners, if applicable; and what role the site upon which the SCSL was built could play in Sierra Leone's future. These questions, while being discussed at various levels, will need to be finalised prior to the conclusion of the Taylor case to ensure that the legacy of this Court is not relegated to obscurity.<sup>31</sup>

#### 4 International Criminal Court: General comments

As of 2010, the ICC conducted investigations and prosecutions in five situations: three situations referred to the ICC by the states themselves – Uganda, the Democratic Republic of the Congo and the Central African Republic; the situation in Darfur, Sudan, referred to the ICC by the UN Security Council; and the situation in Kenya, where the Prosecutor sought and was granted authorisation to initiate an investigation

<sup>29</sup> See General Assembly Request for a subvention to the Special Court for Sierra Leone: Report of the Secretary-General of 11 November 2010 (A/65/570); General Assembly, Press Release 'Fifth Committee takes up first performance report for 2010-2011 Budget Cycle – Increased Regular Budget Funding for Sierra Leone Tribunal' of 13 December 2010 (GA/AB/3976).

<sup>30</sup> Security Council 'Letter dated 11 February 2011 from the Secretary-General addressed to the President of the Security Council' of 15 February 2011 (S/2011/74).

<sup>31</sup> Special Court for Sierra Leone: Completion Strategy, June 2009, <http://www.sc-sl.org/LinkClick.aspx?fileticket=33ry0RskMjI%3D&tabid=53> (accessed 31 March 2011). See also Special Court for Sierra Leone Seventh Annual Report of the President of the Special Court for Sierra Leone of June 2009 to May 2010, <http://www.sc-sl.org/LinkClick.aspx?fileticket=33ry0RskMjI%3D&tabid=53> (accessed 31 March 2011).

concerning crimes against humanity committed between 1 June 2005 and 26 November 2009. In addition, the ICC has been conducting preliminary examinations in, *inter alia*, Côte d'Ivoire and Guinea.<sup>32</sup> In the above situations under investigation, the Prosecutor has brought charges against 14 individuals — all for crimes committed on the African continent. Of these, only four of the accused are detained by the ICC. Of the arrest warrants issued for the situation in Darfur, Sudan, only three of those accused have voluntarily appeared before the ICC. The arrest warrants in the situation in Uganda remain outstanding for four accused — Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.

In 2010, save for the start of the trial of Jean-Pierre Bemba Gombo on 22 November 2010, there was limited judicial development in the ICC Situation in the Central African Republic and none in the Situation in Uganda.

One significant development, however, was the first ever ICC Review Conference held in Kampala, where state parties took advantage of the unique opportunity to re-affirm their commitments and obligations to the Court. Overlooking the shores of Lake Victoria, the Review Conference took stock of the last eight years, examining primarily the issues and challenges related to co-operation, complementarity, war crimes and the codification of the crime of aggression.

One of the important developments at the Review Conference was the amendment to the Rome Statute so as to include a definition of the crime of aggression and the jurisdictional conditions for prosecution.<sup>33</sup> The crime of aggression falls under article 5 of the Rome Statute. Although the ICC has been able to exercise jurisdiction over war crimes, genocide and crimes against humanity, the crime of aggression was previously beyond its jurisdictional grasp due to the absence of a definition of the crime or the applicable conditions. In essence, the new amendment seeks to address this vacuum.

Under the amendment, the UN Security Council may refer a situation in which an act of aggression appears to have occurred, under chapter VII of the UN Charter, irrespective of whether the situation involves a state party of the Rome Statute or not.<sup>34</sup> Interestingly, however, the ICC will be required to seek a Security Council resolution under chapter VII to bring aggression charges against a national of a state that is

<sup>32</sup> UN General Assembly, 65th session Report of the International Criminal Court to the United Nations for 2009/10, 19 August 2010 (A/65/313).

<sup>33</sup> See ASP Doc Report of the Working Group on other amendments: The definition of the crime of aggression (ICC-ASP/8/Res.6/Anx.II) <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Rome+Statute+amendment+proposals.htm> (accessed 31 March 2011).

<sup>34</sup> ICC Review Conference of the Rome Statute, 31 May-11 June 2010, <http://www.kampala.icc-cpi.info/> (accessed 31 March 2011).

not party to the Rome Statute.<sup>35</sup> In the event that the Security Council fails to make this determination within six months, it is within the ICC Prosecutor's authority to commence an investigation *proprio motu* or further to a request from an ICC state party. The Security Council still retains the power to suspend such an investigation by resolution. However, this resolution would have to be annually re-instated. State parties may exempt themselves from jurisdiction over the crime of aggression by submitting a declaration of non-acceptance to the ICC, but only if the Security Council has not determined that a crime of aggression has occurred. Non-state parties do not fall under the ICC's jurisdiction in the event that the Prosecutor commences an investigation. It is not expected that this amendment will come into force before 2017. This amendment was the product of considerable discussion and compromise, amid concerns on the implementation of the amendment, its impact on the use of force, and whether the Security Council should have oversight over the ICC's application of the crime.<sup>36</sup>

Also of note is the adoption by the Review Conference of an amendment to article 8 of the Rome Statute, to insert three new war crimes in armed conflicts not of an international character, namely, the use of poison or poisoned weapons; the use of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and the use of bullets that expand or flatten in the body.<sup>37</sup> In view of the changing nature of contemporary conflict from the international to the domestic, this 'weapons amendment' heralds a significant move in the harmonisation of international humanitarian law as well as the protection of civilians and combatants.

The Review Conference was also a unique opportunity for the ICC to forge stronger links with African state parties and observers, as well as victims in the region. Despite the absence of the inclusion of the request by the ICC to open a liaison office in Addis Ababa in the decisions of the African Union (AU) Summit that was also held in Kampala the following month, discussions are ongoing, signifying this as an important step in improving the co-operation and relationship between African states and the ICC.

<sup>35</sup> T Lindberg 'Aggression in the Court: The International Criminal Court's newest authority' 22 August 2010 2 <http://www.foreignaffairs.com/articles/66579/tod-lindberg/aggression-in-the-court> (accessed 31 March 2011).

<sup>36</sup> For a comprehensive overview of the discussions, consultations and agreements made during the Kampala Review Conference, see the blog 'The ICC Review Conference: Kampala 2010' <http://iccreviewconference.blogspot.com/> (accessed 31 March 2011).

<sup>37</sup> The use of the listed weapons was previously included under art 8.2(b) of the Statute in cases of international armed conflict. See Report of the Working Group on other amendments: Amendment to article 8 of the Rome Statute (ICC-ASP/8/Res 9/Anx. VIII) <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Rome+Statute+amendment+proposals.htm> (accessed 31 March 2011).

The enforcement of arrest warrants, however, remains a significant challenge for the ICC. The ICC's success in this regard is directly related to the co-operation it receives from state parties to fulfil its mandate. In the absence of its own enforcement mechanism, the ICC is dependant on the co-operation of states. However, discussions in early 2010 illustrate that the ICC may have found a solution to this obstacle. In an enlightening interview in March 2010 on Christine Amanpour's 'Seeking Global Justice', the United States noted that, whilst it was not intent on signing the Rome Statute, it was, however, very interested in working more closely with the ICC, including by assisting in the enforcement of its arrest warrants.<sup>38</sup> At first glance, this relationship would be of benefit to state parties in view of the absence of an ICC enforcement mechanism and the complete reliance on state co-operation in such matters. However, the implications of developing and cementing this relationship could potentially reflect negatively on the impact and the credibility of the work of the ICC in Africa and, more generally, on that of international criminal law on the continent.

It is not, however, enough to relegate the enforcement and execution of arrest warrants to the ICC or the military force of one or more states (whether a state party or not to the Rome Statute). As the ICC begins to spread its net further afield, the circumstances facing the current situations before the ICC could easily be replicated. State parties should consider sharing this burden as a key component of their co-operation obligations, working hand-in-hand with inter-governmental and regional organisations. As commented on by one human rights group, 'where a territorial state in which ICC suspects are located is unable to carry out arrests, it cannot simply become no one's responsibility at all. Instead, responsibility must be shared between state parties.'<sup>39</sup>

## 5 International Criminal Court: Democratic Republic of the Congo

Of note with respect to the situation in the Democratic Republic of the Congo was the arrest in Paris in October 2010 and subsequent transfer in early 2011 of Callixte Mbarushimana — a case that highlights the crucial importance of state co-operation to enable the ICC to fulfil its mission. Mbarushimana was arrested and charged under article 25.3(d)

<sup>38</sup> HH Koh 'The Obama administration and international law' at the Annual Meeting of the American Society of International Law, 25 March 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm#> (accessed 31 March 2011); and CNN's Amanpour 'Seeking global justice' interviewing the US Ambassador-at-Large for War Crimes Issues and the Special Advisor to the Prosecutor at the ICC, 24 March 2010, <http://archives.cnn.com/TRANSCRIPTS/1003/24/ampr.01.html> (accessed 31 March 2011).

<sup>39</sup> Human Rights Watch Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference (2010), <http://www.hrw.org/fr/node/90282/section/2> (accessed 31 March 2011) 26.

of the Statute with war crimes (attacks against the civilian population, destruction of property, murder, rape, inhumane treatment and torture) and crimes against humanity (torture, rape, inhumane treatment and persecution) committed in 2009 in the eastern part of the DRC.<sup>40</sup> As the leader of an ethnic-Hutu rebel group with alleged links to the 1994 Rwandan genocide, Mbarushimana was previously investigated by the ICTR for crimes committed in the 1994 Rwandan genocide, but the case was closed in 2002 without indictment. In April 2001, a request for his extradition by the Rwandan authorities was denied by international judges in Kosovo, on the basis that Rwanda still applied the death penalty as well as the weakness of the indictment.<sup>41</sup> This case is bound to be of interest to those who have followed the various proceedings that have attempted to bring Mbarushimana to justice within the last decade.

In the case against Thomas Lubanga Dyilo, the defence began the presentation of its evidence in January 2010. However, in July 2010, as a result of the prosecution's refusal to comply with an order to disclose the relevant identifying information for an intermediary, the Trial Chamber, for the second time in the history of this case, stayed the proceedings and ordered the release of the accused. In its decision, the Trial Chamber found that the Prosecutor could not be 'allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides they are inconsistent with his interpretation of his obligations'. In this regard, the Trial Chamber decided it was 'necessary to stay these proceedings as an abuse of process ... because of [(a)] material non-compliance with the Chamber's Orders of 7 July 2010 ... [and, (b)] the Prosecutor's clearly evinced intention not to implement the Chamber's orders'. The Trial Chamber found that 'the fair trial of the accused was no longer possible and justice cannot be done' and therefore issued a stay of proceedings.<sup>42</sup> On 15 July 2010, the Trial Chamber rendered an oral decision ordering the unconditional release of the accused.<sup>43</sup> Upon

<sup>40</sup> For warrants of arrest and charges, see 'Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana' 11 October 2010 (ICC-01/04-01/10-1) and 'Warrant of Arrest for Callixte Mbarushimana' 11 October 2010 (ICC-01/04-01/10-2).

<sup>41</sup> See United Nations Administrative Tribunal Judgment 1192 2-3. See also Hiron-delle 'ICTR/Mbarushimana — File of Former UN Official Suspected of Genocide Transferred to Rwanda' 9 March 2005, <http://www.hirondellenews.com/content/view/2119/1182/> (accessed 31 March 2011); and Radio Netherlands Worldwide International Justice Tribune Archive: Proceedings in Kosovo of 1 June 2001, [http://www.rnw.nl/international-justice/article/proceedings-kosovo?quicktabs\\_1=0](http://www.rnw.nl/international-justice/article/proceedings-kosovo?quicktabs_1=0) (accessed 31 March 2011).

<sup>42</sup> *Prosecutor v Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with VWU, 8 July 2010, paras 28 & 31 (ICC-01/04-01/06-2517-Red).

<sup>43</sup> *Lubanga*, Transcript of 15 July 2010 17 (ICC-01/04-01/06-T-314-ENG).

appeal by the prosecution, the Appeals Chamber in October reaffirmed the authority of the Trial Chamber, finding that the failure of the Prosecutor to comply with judicial orders could undermine a fair trial. However, the Appeals Chamber reversed the stay of proceedings and decision to release Lubanga, finding that the Trial Chamber should first have imposed sanctions on the Prosecutor to bring about compliance before imposing a stay of proceedings.

In 2010, Human Rights Watch reported that Bosco Ntaganda, the alleged Deputy-Chief of the General Staff with the Patriotic Forces for the Liberation of Congo (FPLC) was implicated in the assassination of, *inter alia*, at least eight persons and the arrests of another seven in Eastern Congo and Rwanda. Bosco remains at large and efforts to capture him, real or otherwise, have thus far proven ineffective.<sup>44</sup>

## 6 International Criminal Court: Darfur, Sudan

On 15 June 2010, the ICC unsealed the summons of appearance for two suspects in the situation in Darfur, Sudan, Abdallah Banda and Saleh Mohammed Jerbo Jamus.<sup>45</sup> Banda and Jamus made their first appearance voluntarily before the ICC on 17 June 2010 and were charged with committing war crimes during an attack on African Union Mission to Sudan (AMIS) peacekeepers in September 2007, which resulted in the deaths of 12 AMIS soldiers.

Together with Bahar Idriss Abu Garda, whose charges were examined in the 2009 review of the developments of international criminal justice in Africa,<sup>46</sup> the accused were charged with three counts of war crimes under article 25(3)(a) of the Rome Statute, namely, (a) violence to life, in the form of murder, whether committed or attempted, within the meaning of article 8(2)(c)(i) of the Statute; (b) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission, within the meaning of article 8(2)(e)(iii) of the Statute; and (c) pillaging, within the meaning of article 8(2)(e)(v) of the Statute.<sup>47</sup> In November 2010, the Pre-Trial Chamber

<sup>44</sup> Human Rights Watch 'DR Congo: ICC-Indicted War Criminal Implicated in Assassinations of Opponents' 13 October 2010, <http://www.hrw.org/en/news/2010/10/12/dr-congo-icc-indicted-war-criminal-involved-assassinations-opponents> (accessed 31 March 2011).

<sup>45</sup> *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Summons to Appear for Abdallah Banda Abakaer Nourain, 15 June 2010 (ICC-02/05-03/09-3); Summons to Appear for Abdallah Banda Abakaer Nourain, 15 June 2010 (ICC-02/05-03/09-2).

<sup>46</sup> See Aptel & Mwangi (n 12 above) 278.

<sup>47</sup> For charges, see, *Nourain and Jamus*, Summons to Appear for Abdallah Banda Abakaer Nourain, 15 June 2010 (ICC-02/05-03/09-3); Summons to Appear for Abdallah Banda Abakaer Nourain, 15 June 2010 (ICC-02/05-03/09-2).

granted the suspects' request that the confirmation hearing be held in their absence, waiving their rights to be present.<sup>48</sup>

Of particular interest in this case is the Prosecutor's application in December 2010, which objected to the representation of two victims by counsel whom he alleged also represent the interests of two groups, the Sudan International Defence Group (SIDG) and the Sudan Workers Trade Unions Federation (SWTUF). In his application, the Prosecutor alleged that these groups had publicly affirmed support for the government of Sudan and acted as its proxies and, furthermore, that counsel was attempting to use these proceedings to express the views of a government that has refused to recognise the authority and jurisdiction of the ICC. Concerns raised by the prosecution include the potential leaking of confidential material posing risks to persons and the proceedings. Noting that the ICC had previously dismissed interventions by these groups, the Prosecutor requested that the Pre-Trial Chamber terminate the representation of these victims by counsel or, in the alternative, limit the scope of observations that counsel may make on behalf of victims.<sup>49</sup> Both Banda and Jamus supported the Prosecutor's objections on the basis of the two groups' affiliations with the government of Sudan.<sup>50</sup> Counsel challenged the allegations that the groups were 'proxies' of the government of Sudan and that no conflict of interest had been demonstrated by the Prosecutor or the accused. In addition, counsel maintained that clients should be entitled to choose their own legal representation.<sup>51</sup> This is not the first case in which counsel has attempted to intervene in cases concerning the situation in Darfur, Sudan, on behalf of these two groups. It will therefore be interesting to see if the Trial Chamber chooses to address the questions

<sup>48</sup> *Nourain and Jamus* 'Decision on issues related to the hearing on the confirmation of charges, 17 November 2010 (ICC-02/05-03/09); Decision on the confirmation of charges', 7 March 2011 (ICC-02/05-03/09-121-CORR-RED). The Pre-Trial Chamber confirmed the charges against the Banda and Jamus on 7 March 2011.

<sup>49</sup> See *Nourain and Jamus* 'Prosecution Objection to the Continued Representation of Victims a/1646/10 and a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon', 6 December 2010 (ICC-02/05-03/09). Previous applications on behalf of these groups include 'Application on behalf of Citizens' Organizations of The Sudan in relation to the Prosecutor's Applications for Arrest Warrants of 14 July 2008 and 20 November 2008' 11 January 2009 (ICC-02/05-170), in which the Pre-Trial Chamber dismissed the Application finding that the issues were unrelated to the matters before the Chamber; Decision on Application under Rule 103' 4 February 2009 (IC-02/05-185). The Appeal of the decision was also dismissed on the grounds that neither group was a party in the proceedings and therefore lacked standing. See Decision on the Application for Leave to Appeal the Decision on Application under Rule 103, 19 February 2009 (ICC-02/05-192).

<sup>50</sup> *Nourain and Jamus* 'Defence application to restrain legal representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries' 6 December 2010 (ICC-02/05-03/09).

<sup>51</sup> *Nourain and Jamus* 'Submission by Legal Representatives for Victims a/1646/10 and a/1647/10 in light of Urgent Prosecution Objection' 7 December 2010 (ICC-02/05-03/09-115).

that these applications raise, namely, any implications to the principle of victim participation, and if the ICC can dictate the choice of a victim's legal representation.

In the case of Omar Al-Bashir, the Prosecutor appealed the decision of the Pre-Trial Chamber not to issue a warrant of arrest in respect of the crime of genocide on 4 March 2009. In its decision dated 3 February 2010, the Appeals Chamber reversed the Trial Chamber's decision on the basis that an erroneous standard of proof was applied and remanded the matter back to the Pre-Trial Chamber 'for a new decision, using the correct standard of proof'. Of particular note, the Appeals Chamber clarified that 'the standards of "substantial grounds to believe" and "beyond reasonable doubt" are higher standards of proof than "reasonable grounds to believe"' and, therefore, when considering an application for an arrest warrant pursuant to article 58.1 of the Rome Statute, the Pre-Trial Chamber 'should not require a level of proof that would be required for the confirmation of charges or for conviction'. Accordingly, the Appeals Chamber found that the Pre-Trial Chamber had acted erroneously when it denied 'to issue a warrant of arrest under article 58.1 of the Statute on the basis that "the existence of ... genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution"'.<sup>52</sup>

Subsequently, on 12 July 2010, the Pre-Trial Chamber issued its Second Decision on the Prosecution's Application for a Warrant of Arrest, finding that there was sufficient evidence to establish reasonable grounds to believe that Bashir was 'criminally responsible under article 25.3(a) of the Statute as an indirect perpetrator or as an indirect co-perpetrator, for those charges of genocide under articles 6(a), 6(b) and 6(c) of the Statute'. On this basis, the Pre-Trial Chamber issued a second self-executing warrant of arrest for Bashir's alleged criminal responsibility under article 25.3(a) of the Statute for (a) genocide by killing, within the meaning of article 6(a) of the Statute; (b) genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute; and (c) genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction within the meaning of article 6(c) of the Statute'.<sup>53</sup>

The issuing of this second warrant of arrest was not met with universal acceptance. At the AU Summit in Kampala in July 2010, the AU reiterated its commitment in the fight against impunity, but expressed its disappointment that the Security Council had not acted

<sup>52</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir* Judgment on the appeal of the Prosecutor against the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir 3 February 2010 (ICC-02/05-01/09-73) paras 30, 33 & 34-39.

<sup>53</sup> *Bashir* Second Decision on the Prosecution's Application for a Warrant of Arrest 12 July 2010 (ICC-02/05-01/09-94) para 43.

on the request to defer the proceedings against Bashir and reiterated its request for deferral pursuant to article 16 of the Rome Statute. It further stressed its concern over the conduct of the ICC Prosecutor for making 'egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir of Sudan and other situations in Africa'.<sup>54</sup> On 3 August 2010, the Intergovernmental Authority on Development (IGAD) issued a statement stating its concerns that the issuing of the second warrant of arrest for Bashir would have a 'negative impact on the progress in the democratic transformation of Sudan following the April 2010 general election and the ongoing smooth implementation of the Comprehensive Peace Agreement (CPA) facilitated by IGAD in 2005'.<sup>55</sup> IGAD went further to state that the allegations of genocide were unsupported by the 'United Nations International Commission of enquiry, the former AU Mission in Sudan (AMIS) and the AU/UN Hybrid Operation in Darfur (UNAMID)'.<sup>56</sup> In conclusion, IGAD called on the Security Council to act on the calls by the AU and IGAD to defer the indictment against Bashir, in the 'interests of peace, justice, reconciliation and stability in Sudan and the entire Horn of Africa region'.<sup>57</sup> Despite the opening remarks by the Chairperson of the AU at the AU Summit in July 2010, that the arrests warrants against Bashir threatened African security, 'undermining African solidarity and African peace and security',<sup>58</sup> it could be argued that the statements emanating from this Summit were remarkably less hostile in comparison to those made in Sirte the year before. The cracks in the seams of the previously united front behind Bashir appear to be widening. For example, after considerable debate, two significant draft paragraphs seeking (a) non-co-operation with the ICC in the arrest and surrender of President al-Bashir; and (b) an attack on the ICC Prosecutor, were eliminated from the final draft of the Summit's conclusions. It would appear that the political environment has shifted, illustrating that the position of African nations on whether or not to co-operate with the ICC with respect to Bashir is no longer as rigid.

Despite the issuing of the second warrant of arrest, the difficulty of enforcing ICC warrants of arrest was starkly illustrated when Bashir

<sup>54</sup> African Union 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec 270(Xiv) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)' 25-27 July 2010 (Assembly/AU/Dec 296(XV)).

<sup>55</sup> Intergovernmental Authority on Development (IGAD) 'ES Statement on Chamber of the International Criminal Court' 3 August 2010, [http://igad.int/index.php?option=com\\_content&view=article&id=234:es-statement-on-chamber-of-the-international-criminal-court&catid=61:statements&Itemid=150](http://igad.int/index.php?option=com_content&view=article&id=234:es-statement-on-chamber-of-the-international-criminal-court&catid=61:statements&Itemid=150) (accessed 31 March 2011).

<sup>56</sup> As above.

<sup>57</sup> As above.

<sup>58</sup> Institute for Security Studies 'The International Criminal Court that Africa Wants' 17 <http://www.issafrica.org/uploads/Mono172.pdf> (accessed 31 March 2011).

travelled to Kenya, a state party of the Rome Statute, to attend celebrations for the promulgation of the new Kenyan Constitution. In its decision dated 27 August 2010, the Pre-Trial Chamber noted Kenya's obligation to co-operate with the ICC in the enforcement of the two warrants of arrest that were yet to be executed further to Security Council Resolution 1593 (2005) of 31 March 2005, and requested that the Security Council and the Assembly of State Parties take whatever action they deemed appropriate.<sup>59</sup> Bashir's presence in Kenya in August 2010 was a blatant reminder that an international court with no enforcement powers other than the co-operation of state parties has implications for the credibility of that court as well as the fight against impunity. Despite criticism from various member states, civil society and human rights groups, Kenya was unapologetic, officials stating that 'Kenya's obligations under the Court were not the only factors that influenced the country's policy regarding Sudan'.<sup>60</sup> Interestingly, Kenya's official line was that 'Bashir was invited to the constitution celebrations in Nairobi "as the head of a friendly, neighbouring country"', citing Kenya's 'legitimate and strategic interest in ensuring peace and stability in the sub-region and promoting peace, justice and reconciliation in Sudan'.<sup>61</sup> Following an application by the Prosecutor notifying the Court of the possible travel of Bashir to Kenya for an IGAD summit on 30 October 2010, on 25 October 2010, the Pre-Trial Chamber sought observations of the impending visit from Kenya, requesting information on any impediment that would prevent Kenya from carrying out its obligations under the Statute. Kenya simply advised that the meeting would not be held in Kenya.<sup>62</sup> In December 2010, the Prosecutor brought to the Court's attention the possibility of Bashir travelling to Senegal and Zambia — both state parties to the Rome Statute.<sup>63</sup> As the dust settles,

<sup>59</sup> Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, 27 August 2010 (ICC-02/05-01/09-107).

<sup>60</sup> Voice of America 'Kenya Defends Bashir Visit as Necessary for Regional Peace' 29 August 2010 <http://www.voanews.com/english/news/africa/Kenya-Defends-Bashir-Visit-as-Necessary-for-Regional-Peace--101753813.html> (accessed 31 March 2011).

<sup>61</sup> See CNN News 'Kenya, African Union defend Bashir visit' 31 August 2010, [http://articles.cnn.com/2010-08-31/world/kenya.bashir.visit\\_1\\_al-bashir-new-constitution-president-mwai-kibaki?s=PM:WORLD](http://articles.cnn.com/2010-08-31/world/kenya.bashir.visit_1_al-bashir-new-constitution-president-mwai-kibaki?s=PM:WORLD) (accessed 31 March 2011). See also Global Security 'Kenya Defends Bashir Visit as Necessary for Regional Peace' 29 August 2010, <http://www.globalsecurity.org/military/library/news/2010/08/mil-100829-voa03.htm> (accessed 31 March 2011).

<sup>62</sup> See *Prosecutor v Bashir* 'Prosecution notification of possible travel to a State Party in the case of *The Prosecutor v Omar Al Bashir*' 22 October 2010 (ICC-02/05-01/09-116); 'Decision requesting observations from the Republic of Kenya' 25 October 2010 (ICC-02/05-01/09-117); 'Transmission of the reply from the Republic of Kenya' 29 October 2010 (ICC-02/05-01/09-119).

<sup>63</sup> See *Prosecutor v Bashir*, 'Prosecution notification of possible travel to a State Party in the case of *The Prosecutor v Omar Al Bashir*' 8 December 2010 (ICC-02/05-01/09-122).

it is not clear what repercussions, if any, will be visited upon Kenya or any other African state as a result of their lack of co-operation.

## 7 International Criminal Court: Kenya

The review of Kenya in the 2010 analysis of developments in international criminal justice in Africa, the focus was on the dramatic failure of the Kenyan authorities in 2009 to establish a national mechanism to examine the crimes committed during the post-election violence in 2007-2008, in accordance with the recommendations of the Commission of Inquiry into the Post-Election Violence (CIPEV), commonly referred to as the Waki Commission.<sup>64</sup> This review, however, will concentrate on the launch by the ICC Prosecutor of an ICC investigation into crimes against humanity with respect to Kenya, and ensuing developments over the course of 2010.

The situation in Kenya is a prime example of the principle of complementarity. On 29 November 2009, pursuant to article 15 of the Rome Statute, the Prosecutor had previously sought authorisation, *proprio motu*, to commence an investigation into the situation in Kenya in relation to the post-election violence of 2007-2008.<sup>65</sup> On 11 January 2010, two professors submitted an application seeking to file observations on the Prosecutor's submission and to appear as *amici curiae*.<sup>66</sup> Considering the precedent-setting nature of the Prosecutor's request, they wished to address the ICC on, *inter alia*, the parameters 'for the exercise of jurisdiction in circumstances where a state with a functioning judicial system has not referred a situation' to the ICC. Although the Pre-Trial Chamber was not of the view that the submissions would assist it in reaching 'a proper determination on the Prosecutor's request', it is clear that this is an issue that will resurface in the course of these proceedings before the ICC.<sup>67</sup>

The Pre-Trial Chamber appeared to have taken a cautious approach to the Prosecutor's request and in February 2010 requested additional information and clarification in two specific areas from the Prosecutor. First, the Pre-Trial Chamber sought clarity on the acts that were carried out in furtherance of a state and/or organisational policy as required

<sup>64</sup> CIPEV investigated the violence following the contested results of the Kenyan presidential elections in December 2007. A copy of its final report is available at <http://www.communication.go.ke/media.asp?id=739> (accessed 31 March 2011). See also Aptel & Mwangi (n 12 above) 283-285.

<sup>65</sup> Situation in Kenya, Prosecutor's Request for Authorisation of an Investigation pursuant to Article 15, 26 November 2009 (ICC-01/09-3). See also Aptel & Mwangi (n 12 above) 284.

<sup>66</sup> Situation in Kenya, Request by Professors Max Hilaire and William A Cohen to Appear as *Amicus Curiae*, 11 January 2010 (ICC-01/09-8).

<sup>67</sup> Situation in Kenya, Decision on Application to Appear as *Amicus Curiae* and Related Requests, 3 February 2010 (ICC-01/09-14).

under article 7.2(a) of the Rome Statute. Secondly, in accordance with regulation 49.2(c) of the Regulations of the Court, the Pre-Trial Chamber requested that the Prosecutor indicate the persons or groups of persons involved, and, pursuant to regulations 33 and 34 of the Regulations of the Office of the Prosecutor, identify the incidents that would be the focus of the investigation and the person or group of persons who appeared most responsible. In addition, the Prosecutor was requested to provide further information on any domestic investigations with respect to the potential cases.<sup>68</sup>

The Pre-Trial Chamber on 31 March 2010 granted by majority the Prosecutor's request to commence investigations. The Pre-Trial Chamber authorised the investigation covering a period from 1 June 2005 (the date that the Rome Statute came into force in Kenya) to 26 November 2009 (the date of the filing of the Prosecutor's request). While the threshold applicable at this stage of proceedings is relatively low, the powerful dissenting opinion by Judge Hans-Peter Kaul raises interesting questions. Judge Kaul found that the crimes committed in Kenya did not meet the statutory threshold of crimes against humanity. He disagreed with the majority on the requirements of the 'state or organisational policy' under article 7.2(a). In his view, such a policy would have to have been adopted by a state or at the policy-making level of a state-like organisation. Most striking was his analysis of the potential negative effects of this decision on the efficacy of international criminal justice. Some of the concerns he raised included the possible (a) infringement on 'state sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute'; (b) broadening almost indefinitely the 'scope of possible ICC intervention'; and (c) conversion of the ICC into a 'hopelessly overstretched, inefficient international court, with related risks for its standing and credibility'. His concerns culminated in the view that the potential inability of the ICC to tackle all the situations which could fall under its jurisdiction would result in an arbitrary selection of situations to investigate 'to the dismay of the numerous victims in the situations disregarded by the Court who would be deprived of any access to justice without any convincing justification'.<sup>69</sup>

Between March and early December 2010, political tensions in Kenya steadily heightened in advance of the Prosecutor's applications for a summons to appear against six named individuals: William Samoei Ruto; Henry Kiprono Kosgey; Joshua Arap Sang; Francis Kirimi

<sup>68</sup> Situation in Kenya, Decision Requesting Clarification and Additional Information, 18 February 2010 (ICC-01/09-15).

<sup>69</sup> Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 (ICC-01/09-19).

Muthaura; Uhuru Muigai Kenyatta; and Mohammed Hussein Ali.<sup>70</sup> On 13 December 2010, Kenya's cabinet met to consider the implications of the summons to appear, raising speculations that the Kenyan authorities may fail to co-operate with the ICC as promised. According to a presidential press service statement, the Cabinet agreed to move forward to create a 'local tribunal' to conduct the necessary prosecutions.<sup>71</sup> Subsequently, a local MP issued a notice of motion to have Kenya withdraw as a state party to the Rome Statute by repealing the International Crimes Act.<sup>72</sup> However, while a state party may technically withdraw from the Rome Statute pursuant to article 27, this would take effect only a year following the written notification to the Secretary-General. In respect of investigations commenced prior to the withdrawal of a state becoming effective, they remain valid after that date. Although the motion to repeal the International Crimes Act (2008) was rejected on 21 December 2010, the following day Kenya's Parliament passed a motion urging the government to withdraw from the Rome Statute. This was accompanied by diplomatic efforts to enlist the support of other African nations in calling for a Security Council deferral of the Kenyan cases pursuant to article 16 of the Rome Statute. The move was dismissed by the Prime Minister as futile.<sup>73</sup>

In an attempt to suspend the issuing of the summons, on 1 December 2010 Ruto filed observations on the Prosecutor's investigations into the situation in Kenya.<sup>74</sup> In brief, he questioned the independence and impartiality of the Prosecutor's investigation, the validity of the reports by the Waki Commission and Kenya National Commission for Human Rights reports as relied upon by the Prosecutor.

In November 2010, the Pre-Trial Chamber decided to set in advance the substantive and procedural framework for the participation of victims, in view of the divergence of approaches taken by different chambers and the absence of guidance from the Appeals Chamber to possible scenarios that could lead to such participation. Accordingly,

<sup>70</sup> Situation in Kenya, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010 (ICC-01/09-31-Red) and Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-30-Red), both dated 15 December 2010.

<sup>71</sup> *The Standard* 'Fresh plan to block Ocampo' 14 December 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=2000024647&cid=4&ttl=Fresh%20plan%20to%20block%20Ocampo> (accessed 31 March 2011).

<sup>72</sup> The International Crimes Act was gazetted on 5 June 2009. In the *Kenya Gazette* notice, the Act came into force on 1 January 2009, [http://www.kenyalaw.org/Downloads/Acts/The\\_International\\_Crimes\\_Act\\_2008.pdf](http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf) (accessed 31 March 2011).

<sup>73</sup> DPA 'Kenyan premier dismisses move to block ICC trials' 23 December 2010 [http://www.monstersandcritics.com/news/africa/news/article\\_1607639.php/Kenyan-premier-dismisses-move-to-block-ICC-trials](http://www.monstersandcritics.com/news/africa/news/article_1607639.php/Kenyan-premier-dismisses-move-to-block-ICC-trials) (accessed 31 March 2011).

<sup>74</sup> Situation in Kenya, Application for Leave to Submit Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 1 December 2010 (ICC-01/09-32-Anx-A).

the Pre-Trial Chamber issued a set of three different hypotheses to assist the Chamber in its assessment of the merits of the victim's applications, and whether the issue raised is linked to the judicial proceedings.<sup>75</sup>

On 15 December 2010, the Prosecutor submitted the two applications. In the event that the applications are granted, it is his intention to request that the cases are joined and tried by the same Trial Chamber. If the applications are joined, this will be the biggest multi-accused trial the ICC has conducted since its inception. At this embryonic stage, it can only be assumed that the ICC will have learned from the lessons and challenges the ICTR laboriously witnessed over the last decade in its trials with multiple defendants.

In his application for summons against Ruto, Kosgey and Sang, the Prosecutor submits that there are reasonable grounds to believe that these individuals bear criminal responsibility under article 25 of the Statute for murder, torture, deportation or forcible transfer and persecution as crimes against humanity.<sup>76</sup> Interestingly, these charges are based purely on political affiliation and not ethnicity. Both Ruto and Kosgey are MPs and prominent leaders of the Orange Democratic Movement (ODM) political party. Sang, a prominent supporter of ODM, is the host of a call-in programme on a radio station, Kass FM.<sup>77</sup> In brief, the Prosecutor submits that these three individuals prepared a criminal plan to attack supporters of the Party of National Unity (PNU) in a uniform fashion to gain power in the Rift Valley Province, and ultimately in Kenya, and to punish and expel from the Rift Valley Province those perceived to support the PNU.

In relation to Muthaura, Kenyatta and Ali, the Prosecutor alleges that in response to Ruto, Kosgey and Sang's planned attacks on PNU supporters, as well as to deal with protests by the ODM, Muthaura, Kenyatta and Ali developed and executed a plan to attack perceived ODM supporters in order to keep PNU in power.<sup>78</sup> This plan included the deployment of administration police into ODM strongholds where they used excessive force against civilian protestors, indiscriminately

<sup>75</sup> Situation in Kenya, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2011 (ICC-01/09-24). By 29 March 2010, the Victims Participation and Reparations Section had received 396 representations from individual victims and victim communities. See Situation in Kenya, Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and Annexes 1 and 5, 29 March 2010 (ICC-01/09-17-Corr-Red).

<sup>76</sup> Situation in Kenya, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 15 December 2010 (ICC-01/09-30-Red).

<sup>77</sup> Ironically, the case against Sang bears stark similarities to the ICTR *Media* case. See *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (Judgment and Sentence), ICTR-99-52-T, 3 December 2003, <http://69.94.11.53/ENGLISH/cases/Ngeze/judgement/mediatoc.pdf> (accessed 31 March 2011).

<sup>78</sup> Situation in Kenya, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010 (ICC-01/09-31-Red).

killing over 100 ODM supporters. In addition, Muthaura and Kenyatta met with the Mungiki criminal organisation in order to retaliate against the attacks of PNU supporters, which killed over 150 ODM supporters. The Prosecutor submitted that there were reasonable grounds to believe that these individuals bore criminal responsibility under article 25 of the Rome Statute for murder, deportation or forcible transfer, rape and other forms of sexual violence, persecution and other inhumane acts as crimes against humanity. Similarly, these charges are based purely on political affiliation and not ethnicity.

Considering the political shenanigans that dominated the discussion on whether anyone would be held accountable for the crimes committed during the 2007-2008 post-election violence in Kenya, it is a significant step that in the coming months, charges will be confirmed for six individuals alleged to have been the most responsible for the crimes committed. While this does not promise to be an easy prosecution, of the multiple challenges that the prosecution will face, of the most immediate concern appears to be the protection of witnesses. It is worth noting that threats against witnesses have increased since the Prosecutor announced his intention to open a Kenya investigation. In 2010, the government enacted amendments to the Witness Protection Act (2006), an important element in reforming the Kenyan witness protection system.<sup>79</sup> As part of Kenya's co-operation with the ICC, such a system will go a long way to ensuring the security of victims and witnesses in this case. However, considering that the newly-established witness protection agency will require considerable resources in order to be fully operational, it is doubtful that it will be of much assistance to the ICC in the coming months.

## 8 Piracy

The increase in piracy off the coast of Somalia has resulted in the phoenix-like resurrection of what had become an almost obsolete area of international law. With visible consequences on the international maritime trade and the global economy as a whole, the international community has been grappling with what action to take to stem the increase of piracy and to institute a long-term solution to the problem.

It was in this vein that on 27 April 2010, the Security Council, in Resolution 1918 (2010) of 27 April 2010, requested that the Secretary-

<sup>79</sup> Witness Protection (Amendment) Bill, 2010. See also *Christian Science Monitor* 'Threat to Kenya's ICC witnesses: Traitors will be dealt with 'ruthlessly'' 15 December 2010, <http://www.csmonitor.com/World/Africa/2010/1215/Threat-to-Kenya-s-ICC-witnesses-Traitors-will-be-dealt-with-ruthlessly> (accessed 31 March 2011). United Nations Office of Drugs and Crime 'One step closer to witness protection in Kenya' 14 January 2010, <http://www.unodc.org/unodc/en/frontpage/2010/January/one-step-closer-to-witness-protection-in-kenya.html> (accessed 31 March 2011).

General draft a report on the possible options for the prosecution and imprisonment of those suspected of acts of piracy and armed robbery at sea off the coast of Somalia, specifically exploring options for creating either special domestic chambers possibly with international components, a regional tribunal or an international tribunal, and corresponding imprisonment arrangements. In July 2010, the Secretary-General presented the Security Council with a detailed report, without drawing any conclusions, that addressed the possible options to combat the problem of piracy off the coast of Somalia, covering three main areas: (a) the enhancement of the UN's current efforts to build the capacity of regional states to prosecute and imprison those responsible for acts of piracy; (b) the establishment of a Somali court or special chamber within the national jurisdiction of another state, with or without the participation of the UN; (c) the establishment of an international or regional tribunal for piracy either via an international agreement or under chapter VII of the UN Charter, with UN participation. The report also stressed that, irrespective of the option adopted by the Security Council, the key to sustaining any long-term results in this regard would necessitate long term assistance to Somalia and its regions to develop the requisite capacity.<sup>80</sup>

In his report, the Secretary-General explored the possibility of amending the statutes of the ICC, the International Tribunal for the Law of the Sea, and the African Court on Human and Peoples' Rights. However, this option was considered unsatisfactory in view of the fact that the matter was not addressed by state parties at the ICC Review Conference in June 2010, and both the latter two judicial entities lack criminal jurisdiction.

Following discussions of the report and its options on 25 August 2010, the Security Council welcomed the Secretary-General's proposal to appoint a Special Advisor on the legal issues related to piracy off the coast of Somalia, whose role was to identify any additional steps that could be adopted to assist member states, especially those in the region, to prosecute and incarcerate those who engaged in piracy, and to explore the willingness of states in the region to serve as potential hosts for any of the options that proposed the establishment of a judicial mechanism.<sup>81</sup>

<sup>80</sup> Security Council, Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results, 26 July 2010 (S/2010/384).

<sup>81</sup> See Security Council Presidential Statement, 25 August 2010 (UN Doc S/PRST/2010/16).

In January 2011, the Secretary-General circulated the report of the Special Advisor to members of the Security Council for their consideration.<sup>82</sup> The report of the Special Advisor made 25 proposals that could be adopted to improve on the current solutions, covering four main areas: (a) *operational*, including greater self-protection measures, strengthening naval operations, monitoring the coastline and increased co-operation with authorities in Somaliland and Puntland; (b) *jurisdictional*, including incorporation of the UN Convention of the Law of the Sea (UNCLOS) into domestic laws, increasing the number of states willing to conduct prosecutions, the adoption of universal jurisdiction over acts of piracy, the adoption of a legal framework for detention at sea, guidelines for the collection of evidence, issues concerning witnesses, the transfer of suspects and convicted persons, and increasing correctional capacities in the region; (c) *preventative*, including by giving Somaliland and Puntland greater economic autonomy, investigating allegations of illegal fishing and maritime pollution, development of a land-based coastguard function, building the capacity of the regional police, and applying sanctions on instigators; and (d) *suppression*, including by improving the legislative framework to counter piracy, building Somalia's correctional capacity, strengthening the rule of law in Somalia, and establishing an *ad hoc* 'extraterritorial' Somali court in a third state.

Under proposal 25 in his report, the Special Advisor advocates the establishment of specialised courts in the Somali regions of Puntland and Somaliland, as well as an *ad hoc* 'extraterritorial' Somali court in a third state, that would eventually be transferred to Mogadishu.<sup>83</sup> This proposal, he explains, is expected to reduce the 'legal corpora' to be dealt with by the naval forces patrolling the regional seas and ensure consistency in the handling of suspects. In the author's view, proposal 25 is also of particular interest considering it suggests a solution to the burden of the prosecution of suspected pirates being borne primarily by one state, Kenya. Further, the mechanisms in Puntland and the third state would enjoy universal jurisdiction, but Somaliland would (by choice) limit its jurisdictional basis to acts committed on its territorial waters or by persons from that region. The report argues that this proposal would serve to strengthen the rule of law in Somalia and the 'extraterritorial' court would be the vehicle for the international support to achieve this goal. Not surprisingly, the report proposes

<sup>82</sup> Security Council, Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, 24 January 2011 (S/2011/30).

<sup>83</sup> n 82 above, 38-45. In his report, the Special Advisor notes that, of the 738 individuals transferred to 13 national jurisdictions for trial in the past four years, 75% were in Africa (Somalia 372; Kenya 136; Seychelles 47; Tanzania 1), with 16% (120) in Yemen. While just under half of the cases appear to have been transferred to Somalia (Somaliland and Puntland specifically), there is insufficient information about these trials, and the judicial and correctional capacities in these regions, to provide readers with an accurate analysis of their efficacy and application of international law.

establishing an 'extraterritorial' court in Arusha, in view of the ICTR winding down its operations, leaving a vacuum that could be filled by a judicial mechanism of this nature. Such an arrangement, the report concludes, could exist without the participation of the UN, its *ad hoc* nature making it less costly and more flexible.

The suggestions made by the Special Advisor raise several concerns related to implementation, a few of which are addressed below. These include the number and length of the prosecutions that these bodies will be expected to handle, the applicability of universal jurisdiction, and the adherence to certain conditions of transfer, such as the treatment of suspects, and respect for human rights and due process. In his report, the Special Advisor notes that since December 2008, over 2 000 suspects were apprehended by the naval forces off the coast of Somalia.<sup>84</sup> Of these, some 738 have been transferred to national jurisdictions for prosecution. Although proposal 25 is an important step in the right direction, it is clearly insufficient to handle the volume of prosecutions without a considerable financial injection from the international community and a sustainable political commitment to build the requisite capacities in the region. At this stage in the fight against piracy, it is not clear whether such a commitment would be forthcoming. Furthermore, it is difficult to ascertain how the judicial and correctional systems in Somaliland and Puntland will be upgraded to the necessary levels in such a relatively short period to handle these cases. It is also important to note that proposal 25 would be competing for funds with other initiatives to combat piracy, such as those set up by the International Maritime Organisation and the Contact Group on Piracy off the Coast of Somalia, as well as states' own national efforts in the region and elsewhere.

The Special Advisor also estimates that the cumulative funding required for a period of three years for the legal, jurisdictional and correctional component would be in the region of \$25 million. However, he also advises that the establishment of an extraterritorial mechanism could exist without the participation of the UN — a luxury that the ICTR and, to a certain extent the SCSL, enjoyed — to reduce costs and increase flexibility. In his view, the Court in the third state would operate on a needs basis. In view of current estimates, this remains a short-term fix to a long-term problem. Based on the lucrative nature of this crime, it is difficult to assume that the volume of arrests will significantly drop in the coming years. Moreover, judging from other hybrid tribunals created in the past decade, a significantly larger budget than that suggested would be required to adequately resource a judicial entity that would be expected to handle at a minimum 1 000 piracy suspects a year, not accounting for the systems in Somaliland and Puntland.

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<sup>84</sup> n 82 above, 21.

While the report of the Special Advisor makes some reasonable suggestions on how to address the problem of piracy off the coast of Somalia, considering the challenges associated with Kenya and its prosecution of pirates, some difficult questions would need to be answered before the international community embarks on a path that will prove unsustainable in the future.<sup>85</sup>

## 9 Concluding remarks

As the ICTR prepares to change into the Residual Mechanism and the SCSL closes its doors, it is necessary to say a few words on the contribution these two judicial bodies have made to the development of international criminal law in general, and particularly in Africa. The ICTR pioneered the development of international jurisprudence on the crime of genocide: adhering to the definition of genocide in the 1948 Genocide Convention and being the first judicial body to ever apply it in an international criminal law context. It was also the first time that concepts such as war crimes were addressed in the context of an internal conflict — spearheading the way for the indictments subsequently witnessed at the ICC. Other important elements in ICTR jurisprudence include the development of the concept of individual criminal responsibility, the broadening of international criminal law to include rape and sexual violence, and the application of its case law on crimes against humanity to crimes committed against UN peacekeepers. Although some may take issue with some of the pronouncements made by the SCSL, this Court undeniably made an important contribution to the law of war crimes. In its comparably short life, the SCSL has made international criminal law history with the development of law on the conscription and enlistment of child soldiers. It further broadened the prosecutorial scope of gender-based crimes by categorising forced marriage as a crime against humanity. Its jurisprudence also includes extensive discussion on the prohibition of collective punishments, attacks against peacekeepers and the taking of hostages. By taking judicial notice in their cases, both Courts have left a legacy: a historical account of the atrocities that occurred in Rwanda and Sierra Leone.

The milestones created in international criminal law the past year have demonstrated the complexity, interdependence and evolution of this body of law, particularly in Africa. The ICC Review Conference was no different with its adoption of two significant breakthrough

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<sup>85</sup> Kenya currently accounts for over 76% of universal jurisdiction prosecutions of suspected pirates captured by other member states. Some of the challenges include the length of proceedings; the availability of witnesses; and the practical implementation of obligations contained in the piracy prosecution bilateral agreements, which include clauses on the conditions of imprisonment and treatment of prisoners.

amendments to its Statute on the Crime of Aggression and the insertion of three additional war crimes. At present, the amendment of the Rome Statute concerning the crime of aggression rather mystifyingly gives the Security Council primacy in the initiation of a prosecution while allowing the Prosecutor to go against what we would assume would be specific instructions of the very same council.

It is difficult to examine the events of the past year without casting an eye on the ripple effects the developments above will have. The political landscape is shifting, and with that come different challenges for the international criminal justice landscape in Africa. Little did Kenya understand that, by ratifying the ICC Statute, five years later its citizens will witness the confirmation of charges against the prominent 'Ocampo Six' accused of being most responsible for the crimes committed in the 2007-2008 post-election violence in Kenya. The ICC Prosecutor will also address the situation in Libya, Libya joining Darfur, Sudan in its previously infamous spot as the only state to have been referred to the ICC by the Security Council.<sup>86</sup> The phoenix-like highlighted this aspect of international criminal law. Such is the engagement of the international community on this issue that, despite general apathy for all things tribunal, the idea of creating a special tribunal to try those suspected of piracy is being seriously discussed. In Senegal we see a complete change of heart in the government, which asserts that it is ready to create an African Union Special Tribunal, on the heels of the Special Court for Sierra Leone, to try Hissène Habré.<sup>87</sup> This extraordinary move comes in the wake of the 2009 matter brought before the International Court of Justice by Belgium over Senegal's failure to prosecute the former Chadian head of state. Another important development in West Africa was a recent application brought before the ECOWAS Court of Justice for an injunction to restrain the ECOWAS Heads of State and Government from employing military force against Laurent Gbagbo in Côte d'Ivoire.<sup>88</sup>

<sup>86</sup> See ICC 'Situation in the Libyan Arab Jamahiriya' (ICC-01/11) <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/ICC0111/> (accessed 31 March 2011).

<sup>87</sup> The Court of Justice of ECOWAS, in the matter of *Hissène Habré v the Republic of Senegal*, 18 November 2010, judgment ECW/CCJ/JUD/06/10. In this judgment, the Court of Justice of ECOWAS held that Habré could only be tried in an 'ad hoc special tribunal of an international character'. The African Union drew up a set of proposals for discussion with the Senegalese authorities. The next review of international criminal justice will examine these proposals to set up the special tribunal and the developments in 2011 in setting up the Special Court. See also Human Rights Watch 'Senegal: Accept AU plan for Hissène Habré case' 22 March 2011, <http://www.hrw.org/fr/news/2011/03/22/senegal-accept-au-plan-hiss-ne-habr-case> (accessed 31 March 2011).

<sup>88</sup> Community Court of Justice of ECOWAS, in the matter of *Godswill Mrakpor v Authority of Heads of State and Government of the ECOWAS and UNOCI*, 5 January 2011 (ECW/CCJ/APP/17/10). See also African Diplomacy 'Côte d'Ivoire: Laurent Gbagbo sues ECOWAS' 15 February 2011, [http://www.africandiplomacy.com/index.php?option=com\\_content&view=article&id=502%3Acote-divoire-laurent-gbagbo-sues-ecowas&catid=73%3Abridge-the-gap&Itemid=55&lang=en](http://www.africandiplomacy.com/index.php?option=com_content&view=article&id=502%3Acote-divoire-laurent-gbagbo-sues-ecowas&catid=73%3Abridge-the-gap&Itemid=55&lang=en) (accessed

The gigantic strides that have been made in Africa in the last decade have borne remarkable fruit and yet also herald even more complex challenges ahead. Despite the sparse and selective application of international justice, it is evident that there is momentum in the right direction. It is important to remember that the prize at the end of this particular rainbow remains the fight against impunity and for accountability.

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31 March 2011).