

# Developments in international criminal justice in Africa during 2008

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## Summary

*The year 2008 saw important developments in international criminal justice in Africa. In 2008, all cases before the International Criminal Court involved African states. An overview of these cases is provided. The International Criminal Tribunal for Rwanda in 2008 rendered its decision in the Bagosora case, and further implemented its completion strategy. This contribution provides an overview of these developments. In respect of the Special Court for Sierra Leone, the authors provide a summary and analysis of the Appeals Chamber's judgments in the Brima, Kamara and Kanu case and the case concerning the Civil Defence Forces. Developments towards the establishment of a Special Tribunal for Kenya, following the post-electoral violence in late 2007, are also reviewed.*

## 1 Introduction

This is the first review on recent developments pertaining to international criminal justice published in this journal, signalling the intent of the editors to reflect the growing importance of such issues.

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Undoubtedly, the field of international criminal justice has grown tremendously over the past 15 years. Dormant since the International Military Tribunals of Nuremberg and Tokyo, established in the aftermath of World War II,<sup>1</sup> international justice was re-awakened in the early 1990s, at the end of the Cold War, notably with the establishment by the United Nations (UN) of the International Criminal Tribunals for the Former Yugoslavia<sup>2</sup> and for Rwanda.<sup>3</sup>

The success of these two jurisdictions boosted the project to create a permanent and universal international criminal court, which was concretised in Rome in July 1998, when 120 states signed the Statute of the International Criminal Court (ICC). This Statute entered into force in 2002, triggering the temporal jurisdiction of the ICC.<sup>4</sup>

Parallel to the establishment of the ICC, other efforts in the fight against impunity for grave international crimes led to the creation of so-called 'hybrid' courts, established by way of an agreement between the UN and the government of the country concerned, and mixing international and local judges, prosecutors and personnel, as well as elements of substantive international criminal law and of domestic laws. Hybrid courts include the Special Panels in East Timor,<sup>5</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>6</sup> the Special Court for Sierra Leone<sup>7</sup> and the War Crimes Chamber in the Court of Bosnia-

<sup>1</sup> The International Military Tribunal of Nuremberg was established by the London Charter issued on 8 August 1945. The International Military Tribunal for the Far East (Tokyo Tribunal) was established by the Charter of the International Military Tribunal for the Far East proclaimed on 19 January 1946.

<sup>2</sup> United Nations Security Council Resolution 808 (1993) [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_808\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf) and Resolution 827 (1993) [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_827\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf) (accessed 31 January 2009).

<sup>3</sup> United Nations Security Council Resolution 955 (1994) <http://69.94.11.53/ENGLISH/Resolutions/955e.htm> (accessed 31 January 2009).

<sup>4</sup> The ICC is competent for the following grave international crimes: war crimes, crimes against humanity and genocide, as defined in its Statute. It will also be competent over the crime of aggression when state parties to the Rome Statute agree on a definition of this crime.

<sup>5</sup> The Special Panels of the Dili District Court (the East Timor Tribunal) were created in 2000 by the United Nations Transitional Administration in East Timor (UNTAET) to try cases of 'serious criminal offences', including murder, rape and torture, which took place in East Timor in 1999.

<sup>6</sup> The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the Khmer Rouge regime 1975-1979) was created jointly by the government of Cambodia and the UN <http://www.eccc.gov.kh/> (accessed 31 January 2009).

<sup>7</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 <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=200>. This was further to Security Council 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).

Herzegovina.<sup>8</sup> Discussions are ongoing in Kenya to create a special tribunal for Kenya, as reviewed hereunder.

Significantly, the institution of these many hybrid and international criminal jurisdictions has been accompanied by a recrudescence of activities by some national domestic criminal systems to investigate and prosecute grave crimes, either committed in their territory or by their nationals, or sometimes through the use of universal jurisdiction. Looking specifically at Africa, countries like Ethiopia and Liberia have investigated and tried some of their nationals responsible for grave crimes over the recent years. Interestingly, Senegal is the first African country to have recourse to the principle of universal jurisdiction for grave crimes and appears ready to use it against Hissène Habré, the former president of Chad.<sup>9</sup>

The repression of international crimes is thus becoming more generalised, although regrettably still not systematic. This development reflects the importance, to further advance human rights, of credible sanctions against those violating these human rights. Far too often, those responsible for grave violations of human rights benefit from impunity for their crimes. The regrettable truth is that one is more likely to be held accountable for a single murder than for orchestrating the slaughter of hundreds of people. The weight of states' structures, often behind such mass crimes, makes it difficult and unlikely that the national police and criminal system will fully investigate and hold accountable those responsible. However, what this review illustrates is that the deterrent effect of sanctioning those that bear the greatest responsibility for the violation of international humanitarian law is bearing fruit at a small yet increasingly significant rate.

This is the first in a series of reviews that will examine the main developments of international criminal justice in Africa, notably those concerning jurisdictions based in Africa, such as the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), international judicial bodies such as the ICC competent

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<sup>8</sup> The War Crimes Chamber is fully integrated into the domestic Bosnian legal system. Its mandate extends not only to cases referred to it by the ICTY, but also to trying the most sensitive cases brought at a national or local level <http://www.sudbih.gov.ba/?jezik=e> (accessed 31 January 2009).

<sup>9</sup> Hissène Habré is allegedly responsible for the torture and death of about 40 000 individuals. He was first indicted in Senegal in 2000 before courts ruled that he could not be tried there. His victims then turned to Belgium. After a four-year investigation, a Belgian judge issued, in September 2005, an international arrest warrant charging Hissène Habré with crimes against humanity, war crimes and torture. Pursuant to a Belgian extradition request, Senegalese authorities arrested him in November 2005 and asked the African Union to recommend 'the competent jurisdiction' for his trial. On 2 July 2006, the African Union called on Senegal to prosecute Hissène Habré 'in the name of Africa'. In 2007-2008, Senegal removed all legal obstacles to prosecuting Habré by amending its Constitution and laws to permit the prosecution of genocide, crimes against humanity, war crimes and torture no matter when and where the acts occurred.

to investigate and prosecute international crimes committed on the continent, or of some selected national jurisdictions seeking to prosecute international crimes. These reviews will concentrate on efforts to investigate, prosecute and try those individuals responsible for 'core international crimes', namely war crimes, crimes against humanity and genocide. This first issue aims to provide a brief overview of some of the major developments which took place in 2008 at the ICC, ICTR, SCSL and in Kenya. A more detailed review of selected important cases and decisions is offered, but readers are advised to refer to the specific decisions and material cited for complete and further information.

## 2 The International Criminal Court

The ICC Statute, which was negotiated in 1998 and entered into force in 2002, is mandated to try those responsible for grave international crimes over which it has jurisdiction. Coincidentally, all the cases currently before it concern crimes committed in Africa by African nationals. This focus on Africa has been criticised by many, with the Court sometimes perceived as a 'court for Africa'. However, save for the referral by the Security Council of the situation in Darfur, Sudan, all cases were referred to the ICC Prosecutor by African states. Interestingly, the ICC Prosecutor has chosen not only to investigate crimes committed against civilians, but also those that are perpetrated against peacekeepers.

Below is a review of the main developments which took place in 2008, looking at (1) the first case brought before the ICC, concerning Thomas Lubanga Dyilo; (2) the other cases pertaining to the Democratic Republic of the Congo (DRC); (3) the case against Jean-Pierre Bemba Gombo, former Vice-President of the DRC, charged with crimes committed in the Central African Republic; (4) the situation in Uganda; (5) the situation in Sudan; and (6) the investigation of attacks against peacekeepers in Darfur.

### 2.1 Thomas Lubanga Dyilo (Democratic Republic of the Congo)

The DRC was the first state signatory to the Statute of the ICC to refer a situation to the ICC, in 2003, in what has become known as a 'self-referral', namely requesting the international court to investigate crimes committed in its own territory.<sup>10</sup> On this basis, the Prosecutor opened investigations in Eastern DRC. The first resulting arrest warrant, unsealed in 2006, concerned Thomas Lubanga, the former President of the primarily Hema ethnicity political group, *Union des Patriotes Congolais* (UPC). Having been arrested previously for another alleged crime

<sup>10</sup> The referral was made on 3 March 2004 [http://www.icc-cpi.int/NR/rdonlyres/477CC240-07A5-4FAC-80AC-3A743C2CD649/279970/LRCIS\\_Thomas\\_Lubanga\\_Dyilo\\_Eng.pdf](http://www.icc-cpi.int/NR/rdonlyres/477CC240-07A5-4FAC-80AC-3A743C2CD649/279970/LRCIS_Thomas_Lubanga_Dyilo_Eng.pdf) (accessed 31 January 2009).

by the authorities of the DRC, he was transferred to the seat of the ICC in The Hague in March 2006. The charges against Thomas Lubanga were confirmed on 29 January 2007 following a series of postponements. The trial on merits is due to start in February 2009.<sup>11</sup>

As the first case before the ICC, this case has experienced considerable teething problems. Issues of fair trial and the disclosure of confidential material obtained by the Prosecutor from third parties to assist with the investigations have been the source of considerable debate before the Trial Chamber. On 13 June 2008, the Trial Chamber ruled that 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial',<sup>12</sup> holding that the Prosecutor had incorrectly applied article 53(3)(e) of the ICC Statute when entering into agreements with information providers, with the consequence that a significant body of potentially exculpatory material would be withheld from the accused 'improperly inhibiting [his] opportunities ... to prepare his defence'.<sup>13</sup> As a result, the Trial Chamber indefinitely stayed the proceedings and ordered the unconditional release of Lubanga in July 2008 on the basis that 'a fair trial of the accused is impossible, and the entire justification for his detention has been removed'.<sup>14</sup>

Following an appeal by the prosecution, the Appeals Chamber agreed to grant the Prosecutor's request to suspend the Trial Chamber's decision to release Lubanga and to ensure his presence, agreed to keep him in custody until the appeal was heard.<sup>15</sup> This acted as a catalyst for the Prosecutor to engage in extensive negotiations with the relevant information providers, including the UN. In October 2008, the Prosecutor announced that he had reached agreements with the information providers to disclose all the material to the Trial Chamber. Upon review of the material, the Trial Chamber confirmed, in November 2008, that the trial could proceed.<sup>16</sup> However, it appears from subsequent complaints by the defence counsel that the resultant

<sup>11</sup> An analysis of this procedure and of the salient issues of the trial will be provided in the next issue.

<sup>12</sup> *The Prosecutor v Thomas Lubanga* Case ICC-01/04-01/06 (*Lubanga* trial), Decision on the consequences of non-disclosure of exculpatory materials covered by art 54(3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008 para 93.

<sup>13</sup> *Lubanga* trial (n 12 above) para 92.

<sup>14</sup> *Lubanga* trial, Decision on the release of Thomas Lubanga Dyilo, 2 July 2008 para 34.

<sup>15</sup> *The Prosecutor v Thomas Lubanga* Case ICC-01/04-01/06 (*Lubanga* appeal), Decision on the request of the Prosecutor for suspensive effect of his appeal against the Decision on the release of Thomas Lubanga Dyilo, 7 July 2008 and Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the Decision on the release of Thomas Lubanga Dyilo, 22 July 2008.

<sup>16</sup> *Lubanga* trial, Decision to lift the stay of the proceedings in the *Lubanga* case, 17 November 2008.

effect of this decision was that the documents disclosed were so heavily edited that they were not of much use to the accused.<sup>17</sup>

A lesson to be learnt from this experience is that information provided to the Prosecutor in confidence for the purpose of generating new evidence should be just that, and that the Prosecutor should not rely on this information to the extent that it creates tension with the defence because the providers do not or cannot consent to its disclosure. The concerns of the providers may be rooted in a justifiable measure to protect information that could otherwise adversely affect, for instance, operations of an ongoing peacekeeping mission or the physical integrity of those on the ground. It must be borne in mind that many of the documents that may be made available to the Prosecutor, in this and future cases, will very likely pertain to the activities of ongoing peacekeeping operations, some of which are highly sensitive, containing information that would not only compromise the confidential internal decision-making processes of inter-governmental organisations such as the UN, but also endanger the safety and security of the troops and civilians working on the ground. It is to be hoped that the Prosecutor and the Court will continue to carefully balance the rights of the accused to a fair trial with the need to protect confidential information provided by third parties for purposes of investigation to generate new evidence. In its clarification of which right should be given precedence, the Appeals Chamber noted that the ICC chambers should respect both the right to disclosure and the right to confidentiality.<sup>18</sup>

Another landmark development in the *Thomas Lubanga* case was the clarification of the role of victim participation. One distinguishing feature of the ICC from its *ad hoc* predecessors is the inclusion of the possibility for victims to directly participate in the proceedings. In a Trial Chamber decision dated 18 January 2008,<sup>19</sup> and Appeals Chamber decision dated 6 August 2008,<sup>20</sup> the ICC sought to provide a meaningful role to victims and to clarify the aspects of their participation. Among the principal issues addressed were at what stage victims may participate; which victims may participate; what would participating victims be permitted to do; and matters concerning reparations. The Appeals Chamber confirmed that, although the harm suffered by victims does not necessarily have to be direct, it would need to constitute personal harm under rule 85(a). In addition, participating victims may possibly

<sup>17</sup> S Hanson 'Africa and the International Criminal Court' 24 July 2008 <http://www.globalpolicy.org/intljustice/icc/2008/0724africa.htm> (accessed 31 January 2009).

<sup>18</sup> *Lubanga* appeal, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled Decision on the consequences of non-disclosure of exculpatory materials covered by art 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 21 October 2008.

<sup>19</sup> *Lubanga* trial, Decision on victim participation, 18 January 2008.

<sup>20</sup> *Lubanga* appeal, Decision on the participation of victims in the appeal, 6 August 2008.

lead evidence pertaining to the guilt or innocence of the accused when requested, and challenge the admissibility or relevance of evidence in the trial proceedings.<sup>21</sup>

## 2.2 Other cases concerning alleged crimes committed in the DRC (Germain Katanga and Mathieu Ngudjolo, Bosco Ntaganda)

The arrest in February 2008 of Mathieu Ngudjolo, former leader of the National Integrationist Front (FNI) and a colonel in the national army of the government of the DRC, was the result of an effective co-ordinated effort between the Congolese government, the ICC and Belgian authorities, unique in that Mathieu Ngudjolo was not in custody when the ICC warrant of arrest was unsealed. What makes this case one to watch in 2009 are reports that in August 2006, Mathieu Ngudjolo signed a peace agreement with the Congolese government and was granted amnesty, prior to his appointment to the rank of colonel in October 2006 in the regular armed forces of the DRC.<sup>22</sup> During his first appearance before the Court, Mathieu Ngudjolo also argued that the case against him amounted to double jeopardy in view of the trial previously held against him in the DRC, where he was acquitted of all charges based on identical facts to those described in the warrant of arrest. This matter will probably be raised again during the trial.

The arrest and transfer of Mathieu Ngudjolo followed that of 31 year-old Germain Katanga in October 2007, former leader of the Patriotic Resistance Force in Ituri (FRPI) and the youngest person to be brought before the ICC for trial. Germain Katanga is alleged to have been an ally to the FNI. In March 2008, Pre-Trial Chamber I decided to join the cases of Mathieu Ngudjolo and Germain Katanga further to a request from the prosecution who argued alleged co-responsibility for crimes committed during and after the attack on the village of Bogoro.<sup>23</sup> On 30 September 2008, after almost four months of hearings, which included the participation of 57 victims, the Pre-Trial Chamber confirmed seven counts of war crimes and three counts of crimes against humanity, including the enlistment of children under the age of 15 to actively participate in hostilities.<sup>24</sup>

On 29 April 2008, the ICC unsealed the fourth warrant of arrest issued in the DRC context for Bosco Ntaganda, alleged former Deputy-Chief

<sup>21</sup> As above.

<sup>22</sup> Statement of the Deputy Prosecutor, Fatou Bensouda, to the media regarding the surrender of Mathieu Ngudjolo, 7 February 2008 3.

<sup>23</sup> *The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* Case ICC-01/04-01/07 (*Katanga & Ngudjolo* trial), Decision on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008.

<sup>24</sup> *Katanga & Ngudjolo* trial, Decision on the confirmation of charges, 30 September 2008. The Pre-Trial Chamber found insufficient evidence to try them for inhuman treatment, outrages upon personal dignity and inhumane acts.

of the general staff of the *Forces Patriotiques pour la Libération du Congo* (FPLC), and alleged current chief of staff of the *Congrès national pour la défense du peuple* (CNDP) armed group, active in North Kivu.<sup>25</sup> Bosco Ntaganda, a co-accused in the trial of Thomas Lubanga, is charged with three war crimes, including the enlistment and conscription of children under the age of 15 to actively participate in hostilities. He is yet to be arrested by the Congolese authorities who, it is reported, are considering appointing him to a senior position in the Congolese army.<sup>26</sup>

### 2.3 Jean-Pierre Bemba Gombo (Central African Republic)

Interestingly, Jean-Pierre Bemba Gombo, the first person to be indicted by the ICC for crimes committed in the Central African Republic (CAR), was one of four vice-presidents in the DRC transitional government from 2003 to 2006. He was the President and Commander-in-Chief of the *Mouvement de Libération du Congo* (MLC), a rebel group which became the main opposition party in the DRC. After receiving the second highest number of votes in the 2006 Presidential elections, Jean-Pierre Bemba was elected to the DRC Senate in 2007.

According to the ICC Prosecutor, Jean-Pierre Bemba and his MLC forces were invited by the then President of the CAR, Ange-Félix Patassé, to assist in putting down a *coup* attempt led by François Bozizé, Patassé's former army Chief of Staff. It was in this context that Jean-Pierre Bemba's MLC forces are alleged to have carried out horrific crimes, including mass rapes, killings and looting against the civilian population in the CAR. François Bozizé succeeded in the *coup* and in 2004 requested that the ICC investigate crimes committed during the 2002-2003 rebellion. In May 2007, the office of the Prosecutor of the ICC announced the opening of an investigation in the CAR.

On 23 May 2008, the Pre-Trial Chamber found that there were reasonable grounds to believe that Jean-Pierre Bemba bore individual criminal responsibility for war crimes and crimes against humanity committed in the CAR from 25 October 2002 to 15 March 2003. Jean-Pierre Bemba was arrested in May 2008 in Brussels and transferred to the ICC in July 2008 on the basis of a warrant of arrest for three counts of war crimes and five counts of crimes against humanity.<sup>27</sup> The confirmation of charges hearing in the case against Jean-Pierre Bemba has been postponed on three separate occasions and is now scheduled to be heard in 2009.

<sup>25</sup> *The Prosecutor v Bosco Ntaganda* Case ICC-01/04-02/06, Warrant of Arrest, 22 August 2006, which was made public pursuant to the Pre-Trial Chamber's Decision to unseal the warrant of arrest against Bosco Ntaganda, 28 April 2008.

<sup>26</sup> Bosco Ntaganda was General Laurent Nkunda's second-in-command until General Nkunda was arrested by the Rwandan authorities in January 2009. The DRC have issued an international warrant for his arrest.

<sup>27</sup> *The Prosecutor v Jean-Pierre Bemba Gombo* Case ICC-01/05-01/08, Warrant of Arrest, 23 June 2008.



## 2.4 The situation in Uganda

In the case against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, judicial developments in 2008 were limited due to the lack of arrest of any suspects. In an effort to bring peace to Northern Uganda, a deal was signed in February 2008 in Juba, Sudan, envisaging that certain 'international crimes' would be tried in a special section of the High Court of Uganda, in a bid to suspend action by the ICC. However, the failure of Joseph Kony to appear to sign the peace agreements resumed the violence in Uganda in April 2008. The Prosecutor, during the spate of new attacks by the Lord's Resistance Army in 2008, reiterated the urgent need to arrest its leadership. In May 2008, President Museveni created the Special War Crimes Court with the competence to try the leaders of the Lord's Resistance Army for 'international crimes' as was envisaged in Juba. Nevertheless, the ICC indictments against the three accused still stand.

The investigation by the ICC of the situation in Northern Uganda and the resulting arrest warrants illustrate the tensions between criminal accountability and justice, on the one hand, and ongoing peace mediation efforts, on the other.

## 2.5 The situation in Sudan

The investigation by the ICC of the situation in Darfur, Sudan, was triggered by the UN Security Council acting under chapter VII in Resolution 1593 (2005) of 31 March 2005. In its resolution, the Security Council called upon the government of Sudan to co-operate fully and provide any necessary assistance to the ICC, despite it not being a state party to the ICC.

The ICC has since opened a formal investigation and issued warrants for the arrest of State Minister for Humanitarian Affairs, Ahmed Harun, and a militia leader, Ali Kushayb, for crimes committed in the Darfur region. Sudan has to date refused to co-operate with the ICC and hand over the suspects. The Prosecutor has stressed the non-compliance of the Sudanese government with Resolution 1593 (2005) on several occasions in his regular reports to the Security Council and the General Assembly.<sup>28</sup> During the introduction of his seventh report at the Security Council meeting held on 5 June 2008, the Prosecutor emphasised the need for a Security Council presidential statement requesting full co-operation from the Sudanese authorities in accordance with Resolution 1593 (2005). On 16 June 2008, the Security Council issued a presidential statement urging Sudan's co-operation with the Prosecutor.<sup>29</sup>

<sup>28</sup> See *Fourth Report of the International Criminal Court to the UN for 2007/08* (A/63/323) of 22 August 2008; 5905th Meeting of the Security Council, 5 June 2008; 6028th Meeting of the Security Council, 3 December 2008.

<sup>29</sup> Statement by the President of the Security Council, 16 June 2008, S/PRST/2008/21.

The Prosecutor's application to the Pre-Trial Chamber on 14 July 2008 seeking a warrant for the arrest of the Sudanese President, Omar al-Bashir, has been met with nothing if not controversy and widely disparate views.<sup>30</sup> The timing of this request, its political context and possible consequences and, more generally, the possible tension between this request and ongoing peace-making efforts have been the subject of heated debate in all circles, from the halls of the African Union (AU) to the carpeted floors of the Security Council. The Prosecutor in his application states that there are reasonable grounds to believe that Omar al-Bashir bears criminal responsibility for genocide, crimes and war crimes committed in Darfur. The government of Sudan has since made every effort to persuade other member states, especially those in the AU, that the security situation on the ground in Darfur is improving, with the aim of securing a suspension of the case by the Security Council. Several member states and regional bodies, such as the AU and the League of Arab States, have indeed called for the Security Council to pass a resolution deferring the case for 12 months pursuant to article 16 of the Statute of the ICC. The ramifications of such a decision are complex and will certainly impact on the credibility of the ICC, testing its independence from political intervention.

So far, the government of Sudan has eluded its responsibility to protect its own people and its obligation to co-operate with the ICC. If the assertions by the Sudanese government of progress on the ground in stopping the violence are genuine and substantiated, if there are genuine efforts directed at peace negotiations in Darfur and advancing the North-South Comprehensive Peace Agreement, and if the interests of peace justify such a course of action, the Security Council could justifiably exercise its power under article 16 of the Rome Statute to suspend any prosecutions against Omar al-Bashir for 12 months. Failing that, the Security Council should be seeking alternative measures to effectively pressure Khartoum to stop the violence and let the court process proceed.

## 2.6 Attacks against African Union peacekeepers in Darfur

On 20 November 2008, the ICC Prosecutor took a momentous step when he requested the first-ever warrants of arrest for an attack against the AU Mission in Sudan (AMIS) based in Haskanita, Darfur.<sup>31</sup> The attack, which took place on 29 September 2007, killed 12 peacekeepers and civilian police officers. Since July 2008, the United Nations-African Union Mission in Darfur has also been subject to several attacks from both rebel

<sup>30</sup> The Situation in Darfur, Sudan: The Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir, 14 July 2008 [http://www2.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary\\_20081704ENG.pdf](http://www2.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary_20081704ENG.pdf) (accessed 31 January 2009). The ICC issued the arrest warrant against President Bashir on 4 March 2009.

<sup>31</sup> The Situation in Darfur, Sudan: Summary of the Prosecutor's Application under Article 58, ICC- 02/05, 20 November 2008.

and Sudanese government forces. Attacks against international peace-keeping operations not directly involved in hostilities are prohibited by the laws of war and the ICC Statute. Such attacks pose a significant threat to the international community's ability to protect civilians, conduct humanitarian activities in general, and maintain international peace and security. This was starkly illustrated by the response by AMIS after this attack to adopt stricter security guidelines, curtail all its activities and confine staff to their bases. Ultimately, the repression of crimes committed against peacekeepers is crucial to guarantee their protection, which in turn is critical to the civilian population they guard.

### 3 The United Nations International Criminal Tribunal for Rwanda

The ICTR, an *ad hoc* jurisdiction which was established by the UN Security Council in 1994, is due to complete all its activities in the coming years and to close its doors.<sup>32</sup> Important developments in the course of 2008 have been (1) efforts to clear the judicial docket; (2) the judgment rendered in the case of Theoneste Bagosora and others; and (3) the developments pertaining to the completion strategy, especially those relating to the Rule 11 *bis* Prosecutor's request to transfer cases to Rwanda.

#### 3.1 Clearing the judicial docket: Overview of judicial activities

A significant development for the ICTR in 2008 was the conclusion of all but one of the multi-accused cases.<sup>33</sup> The long-running *Butare* case came to a close in November after seven and a half years of trial;<sup>34</sup> and the so-called *Government II* case,<sup>35</sup> as well as the *Military II* case,<sup>36</sup> likewise after five-year trials.

By the end of 2008, the ICTR had rendered several major judgments, notably in the cases concerning Athanase Seromba,<sup>37</sup> Tharcisse

<sup>32</sup> The Completion Strategy proposed by the ICTR was endorsed by UN Security Council Resolution 1503. Other documents on the completion strategy are available at <http://69.94.11.53/default.htm> (accessed 31 January 2009).

<sup>33</sup> The exception concerns the case of *Karempera & Others* (Case ICTR-98-44), involving three accused.

<sup>34</sup> Case ICTR-98-42.

<sup>35</sup> Case ICTR-99-50.

<sup>36</sup> Case ICTR-00-56.

<sup>37</sup> Case ICTR-2001-66. Athanase Seromba was a Catholic priest at Nyange Parish, Kivumu Commune, Kibuye Prefecture. His trial commenced on 20 September 2004, and he was originally convicted and sentenced on 13 December 2006. The Appeals Chamber on 12 March 2008 overturned the conviction of Athanase Seromba for aiding and abetting genocide and extermination as a crime against humanity and substituted convictions for committing genocide and extermination as a crime against humanity for his role in the destruction of the church in Nyange Parish, causing the death of approximately 1 500 Tutsi refugees sheltering inside. The Appeals Chamber increased his sentence from 15 years' imprisonment to imprisonment for the remainder of his life.

Muvuni,<sup>38</sup> Siméon Nchamihigo,<sup>39</sup> Simon Bikindi<sup>40</sup> and Protais Zigiranyirazo.<sup>41</sup> Another three additional judgments were pending, in the cases of Tharcisse Renzaho,<sup>42</sup> Emmanuel Rukundo<sup>43</sup> and Bizimungu and Others.<sup>44</sup>

Two important trials commenced in 2008 in the case concerning Lieutenant-Colonel Ephrem Setako, a former senior officer in the Rwandan armed forces and director of the Judicial Affairs Division of the Rwandan Ministry of Defence,<sup>45</sup> and the case concerning Callixte Kalimanzira, former Acting Minister of the Interior of Rwanda in April and May 1994, began on 5 May 2008 before Trial Chamber III.<sup>46</sup>

### 3.2 The judgment in *The Prosecutor v Théoneste Bagosora and Others*

On 18 December 2008, the ICTR rendered judgment in one of its most important cases: concerning Colonel Théoneste Bagosora, the *directeur*

<sup>38</sup> Case ICTR-2000-55. Tharcisse Muvunyi served as lieutenant-colonel in the Rwandan armed forces, stationed at the *École des sous-officiers* in Butare Prefecture in 1994. He was convicted by a trial chamber on 12 September 2006. On 29 August 2008, the Appeals Chamber overturned his conviction for genocide, direct and public incitement to commit genocide based on a speech he gave in Gikonko, and other inhumane acts as a crime against humanity. The Appeals Chamber also quashed Muvunyi's conviction for direct and public incitement to commit genocide and ordered a retrial limited to the allegations considered in relation to this incident. Tharcisse Muvunyi remains detained by the ICTR pending retrial.

<sup>39</sup> Case ICTR-01-63. On 12 November 2008, Siméon Nchamihigo was convicted by a trial chamber for genocide, murder and extermination as crimes against humanity, and for other inhumane acts as a crime against humanity. He was sentenced to life imprisonment. His case is currently before the Appeals Chamber.

<sup>40</sup> Case ICTR-01-72. On 2 December 2008, a trial chamber found Bikindi guilty of direct and public incitement to commit genocide based on his exhortations to kill Tutsi in a vehicle outfitted with a public address system on the main road between Kivumu and Kayove in late June 1994. He was sentenced to 15 years' imprisonment. Bikindi was acquitted on all other five counts.

<sup>41</sup> Case ICTR-01-73. On 18 December 2008, a trial chamber convicted Protais Zigiranyirazo of genocide and extermination as a crime against humanity and sentenced him to 20 years' imprisonment. The trial chamber acquitted him of conspiracy to commit genocide, complicity in genocide and murder as a crime against humanity. The case is currently before the Appeals Chamber.

<sup>42</sup> Case ICTR-97-31. Renzaho is charged with genocide, alternatively complicity in genocide, and with murder as a crime against humanity.

<sup>43</sup> Case ICTR-01-70. Rukundo is charged with genocide and crimes against humanity for murder and extermination.

<sup>44</sup> Case ICTR-99-50. The accused in this case are charged with conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity and violations of art 3 common to the Geneva Conventions and Additional Protocol II.

<sup>45</sup> Case ICTR-04-81. Setako is indicted for genocide or, in the alternative, complicity in genocide, murder and extermination as crimes against humanity; as well as serious violations of art 3 common to the Geneva Conventions and Additional Protocol II.

<sup>46</sup> Case ICTR-05-88-I. Kalimanzira is charged with genocide or, in the alternative, complicity in genocide, and direct and public incitement to commit genocide.

*de cabinet* of the Ministry of Defence; General Gratien Kabiligi, the head of the Operations Bureau (G-3) of the army general staff; Major Aloys Ntabakuze, the commander of the elite Para Commando Battalion; and Colonel Anatole Nsengiyumva, the commander of the Gisenyi operational sector.<sup>47</sup> The accused were charged with conspiracy to commit genocide, genocide, crimes against humanity and war crimes, based on direct or superior responsibility, for crimes committed in Rwanda in 1994. Three of the accused, Bagosora, Ntabakuze and Nsengiyumva, were convicted and given life sentences, while Kabiligi was acquitted. The judgment is currently before the Appeals Chamber.

Because of the high-ranking positions of the three convicts and of their particular individual responsibility, the factual findings of this judgment cast an important light on the historical events that unfolded in Rwanda in 1994 and on the planning and commission of the genocide against the Tutsis and the targeting of moderate Hutus. Of particular relevance are the details given pertaining to the events from 6 to 9 April 1994, giving a detailed account of the days immediately after the assassination of the President of Rwanda, including the circumstances of the assassination of the Prime Minister, Agathe Uwilingiyimana.<sup>48</sup>

As noted by the Trial Chamber when it orally rendered its judgment:<sup>49</sup>

The evidence of this trial has reiterated that genocide, crimes against humanity and war crimes were perpetrated in Rwanda after 6 April 1994. The human suffering and slaughter were immense. These crimes were directed principally against Tutsi civilians as well as Hutus who were seen as sympathetic to the Tutsi-led Rwandan Patriotic Front (RPF) or as opponents of the ruling regime. The perpetrators included soldiers, gendarmes, civilian and party officials, *Interahamwe* and other militia, as well as ordinary citizens.

While the elaborate legal analysis mainly reiterates existing jurisprudence, it offers interesting developments pertaining to the crime of conspiracy to commit genocide although, ultimately, the Chamber found that the prosecution had failed to prove beyond reasonable doubt that the accused had conspired amongst themselves or with others to commit genocide.<sup>50</sup>

### 3.3 Completion strategy

The closing of the ICTR has been expected for some time, and the Tribunal has been preparing for it by endeavouring to clear its docket, and transferring cases to domestic jurisdictions, in line with Security Council Resolutions 1503 (2003) of 28 August 2003 and 1534 (2004)

<sup>47</sup> Case ICTR-98-41-T.

<sup>48</sup> Case ICTR-98-41-T, judgment and sentence, 18 December 2008 166-199.

<sup>49</sup> Oral summary of the judgment, *The Prosecutor v Théoneste Bagosora & Others* Case ICTR-98-41-T para 7, available online.

<sup>50</sup> n 48 above, para 2113.

of 26 March 2004.<sup>51</sup> The most critical component of the completion strategy of the ICTR relies on the possibility to transfer the cases involving lower-ranking accused to domestic courts.<sup>52</sup>

Despite consultations with several countries in Africa and beyond, it became progressively clear that most, if not all, of the cases earmarked to be transferred by the ICTR to domestic jurisdictions would have nowhere to go but Rwanda. Yet, despite the willingness of the government of Rwanda to receive these pending ICTR cases for trial and the efforts it has made to this end, including the abolition of the death penalty, any transfer is yet to take place, if it ever takes place. It is only in 2008 that the ICTR trial chambers ruled on the motions requesting the referral of cases concerning five indictees to Rwanda, which had been filed by the Prosecutor the year before, in 2007.<sup>53</sup> These motions, filed under Rule 11*bis* of the ICTR Rules of Procedure and Evidence, were rejected. In the first decision concerning a request for referral of a case to be tried in Rwanda, the Trial Chamber, having noted that Rwanda has made notable progress in improving its judicial system, declares that it is not satisfied that the accused would receive a fair trial in Rwanda.<sup>54</sup> Of particular concern were that he would not be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial, that he would face difficulties in obtaining witnesses residing in Rwanda because they would be afraid to testify, and that, if convicted to life imprisonment in Rwanda, he may risk solitary confinement.<sup>55</sup> The ICTR Appeals Chamber upheld the denial of the referral of a case to Rwanda, notably on the ground that the accused would not obtain the attendance and examination of defence witnesses under the same conditions as the prosecution's witnesses, and also because of the inadequacy of the penalty structure in Rwanda.<sup>56</sup>

Despite the considerable work done by the ICTR to bolster the domestic Rwandan judicial capacity to take on these trials, the likelihood that the ICTR will transfer cases to Rwanda appears to be remote

<sup>51</sup> For a detailed analysis of the completion strategy of the ICTR and its residual issues, see C Aptel 'Closing the UN International Criminal Tribunal for Rwanda: Completion strategy and residual issues' (2008) 14 *New England Journal of International and Comparative Law* 169.

<sup>52</sup> In addition to the transfer of these cases, the ICTR prosecutor can and has also transferred the dossiers concerning suspects who were investigated but not indicted by the ICTR. Many of these cases have been transferred to Rwanda and others to other relevant States, eg those where the suspects reside. One such file was communicated to Belgium.

<sup>53</sup> These motions concern Yussuf Munyakazi, Jean-Baptiste Gatete, Gaspard Kanyarukiga, Idelphonse Hategekimana and Fulgence Kayishema. Fulgence Kayishema is a fugitive; all four others are detained by the ICTR.

<sup>54</sup> Case ICTR 2002-78-R11*bis*, *Prosecutor v Kanyarukiga*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 para 104.

<sup>55</sup> As above.

<sup>56</sup> Case ICTR 97-36-R11*bis*, *Prosecutor v Munyakazi*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*, 8 October 2008.

and it is a very real possibility that this will impact negatively on its timely completion which, as already noted, relies on the possibility to transfer cases for trial to domestic jurisdictions.

The ICTR, which was established because of the incapacity of the Rwandese domestic judiciary to deal with the case load created by the genocide, now, to close down, relies on these very courts. This eventually illustrates the possible complementarity between the international and the national levels in terms of justice. While this was not the original idea behind the establishment of the ICTY and the ICTR, their completion strategies have articulated a model where the international community steps in temporarily, giving time to states to rebuild their capacity to render justice.

#### 4 The Special Court for Sierra Leone

In the course of 2008, the hybrid SCSL commenced the much-anticipated and notorious trial of Charles Taylor, the former President of Liberia. Charles Taylor is charged with 11 counts of war crimes, crimes against humanity and other serious violations of international law committed in Sierra Leone from 30 November 1996 to 18 January 2002. The basis of the prosecution's case is Charles Taylor's alleged role as a major backer of the Sierra Leone rebel group, the Revolutionary United Front (RUF), and close association with a second warring faction, the Armed Forces Revolutionary Council (AFRC). He is also allegedly responsible for Liberian forces fighting in support of the Sierra Leonean rebels. The prosecution has attempted to show a plausible link between Charles Taylor and those who committed atrocities in Sierra Leone, with an emphasis on the role of diamonds and arms sales in the Sierra Leonean conflict.

While Charles Taylor is being tried in The Hague for his alleged responsibility in crimes committed in Sierra Leone, the Truth and Reconciliation Commission of Liberia (TRCL), which is holding hearings on the institutional and thematic contexts of the Liberian war, sought an audience with him on 1 September 2008. Through his lawyer, Charles Taylor declined to be interviewed by the TRCL. This is a significant missed opportunity for the TRCL and more generally for Liberia, relegating a part of the historical record of the Liberian conflict to an empty chapter. Coming after the early tensions that had plagued the relationship between the SCSL and the Sierra Leone Truth and Reconciliation Commission, it magnifies once again the difficulties to ensure full co-operation and mutual reinforcement between different transitional justice mechanisms.

Another significant development at the SCSL has been the closing in August 2008 of the longest-running trial before the Court, the case of three former leaders of Sierra Leone's RUF, Issa Hassan Sesay, Morris Kallon and Augustine Gbao. This was the last trial to be held in

Freetown before the Special Court, leaving only the ongoing trial of Charles Taylor in The Hague. The RUF trial, which lasted for almost four years, heard evidence from 170 prosecution and defence witnesses.<sup>57</sup>

Also, two major final judgments were rendered by the Appeals Chamber of the SCSL: (1) in the case of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, members of the Armed Forces Revolutionary Council (AFRC); and (2) in the case of Moinina Fofana and Allieu Kondewa, members of the Civil Defence Forces (CDF). They are succinctly analysed below.

Finally, as far as the SCSL is concerned, the issue of funding remains critical, and has been particularly problematic in 2008. The SCSL is funded from voluntary contributions from member states and, during its short life, has suffered from a hand-to-mouth existence that is likely to reach critical levels as it concludes its mandate. The lack of funds will affect residual functions — extending beyond the SCSL's existence — such as the future assistance that will be required by protected witnesses.

#### 4.1 Appeals judgment in the case of *Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*

In a landmark appellate judgment of 22 February 2008, the Appeals Chamber of the SCSL held that gender crimes are no longer limited to rape and sexual violence, making a significant contribution to the recognition that the offences of sexual slavery and forced marriage, individually and collectively, form a part of mainstream offences under international criminal law.

On 20 June 2007, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu were convicted of six counts of violations of article 3 common to the 1949 Geneva Conventions and of Additional Protocol II, four counts of crimes against humanity, and a count of other serious violations of international humanitarian law.<sup>58</sup> The Trial Chamber did not enter convictions under counts which charged the offence of sexual slavery and any other form of sexual violence and forced marriage,<sup>59</sup> the majority holding that the charge for the offence of sexual slavery and other forms of sexual violence violated the rule against duplicity.<sup>60</sup> The Chamber also dismissed the count on forced marriage on the ground that the evidence led in support of that count did not establish any offence distinct from sexual slavery.<sup>61</sup> The

<sup>57</sup> The final judgment is expected in late February 2009 and will be analysed in the next issue.

<sup>58</sup> *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, judgment (AFRC Trial Judgment) 20 June 2007 paras 2113, 2114, 2117, 2118, 2121 & 2122.

<sup>59</sup> n 58 above, paras 2116, 2120 & 2123.

<sup>60</sup> n 58 above, para 696.

<sup>61</sup> n 58 above, paras 704-714.



Trial Chamber also acquitted Brima and Kamara of the crime of other inhumane acts as a crime against humanity, charged under count 11 of the indictment.<sup>62</sup> In its analysis of the charge, the Trial Chamber rejected novel arguments that the crime of forced marriage existed independently of related war crimes and crimes against humanity of rape, sexual slavery, imprisonment, forced labour and enslavement, and instead chose to marry sexual and non-sexual aspects into the single crime of sexual slavery. The Trial Chamber dismissed the forced marriage charges for redundancy, ruling that the convictions for sexual slavery encompassed all the alleged conduct of the accused under article 2(g).<sup>63</sup> According to the Trial Chamber, there was ‘no *lacuna* in the law which would necessitate a separate crime of “forced marriage” as an “other inhumane act”.’<sup>64</sup> The crime of forced marriage had also been charged as the war crime of committing ‘outrages upon personal dignity’ (as prohibited by common article 3 of the Geneva Conventions), but the Trial Chamber determined that the facts adduced by the prosecution did not indicate the commission of a non-sexual crime of forced marriage that did not wholly overlap with the crime of ‘sexual slavery’.<sup>65</sup>

The Appeals Chamber, vindicating the dissent by Judge Doherty, disagreed with this analysis and unequivocally held that the crime of forced marriage was not exclusively, or even predominantly, sexual and as such was not encompassed in the crime of sexual slavery. The Chamber saw ‘no reason why the so-called “exhaustive” listing of sexual crimes under article 2(g) of the Statute should foreclose the possibility of charging as “other inhumane acts” crimes which may among others have a sexual or gender component’.<sup>66</sup> There was evidence before the Trial Chamber of the severe physical and mental trauma that the victims had suffered, heightened by social stigmatisation from their communities for their association with members of the warring factions. The Appeals Chamber elaborated that the taking of a so-called ‘bush wife’ went beyond the desire for sex, as the statistics on rape in Sierra Leone revealed that non-consensual sex was readily available to the warring parties.<sup>67</sup> The Appeals Chamber importantly asserted that forced marriage involved the imposition of the status of marriage and a conjugal association by force, or threat of force, including, but not limited to, non-consensual sex in exchange for support and protection.

<sup>62</sup> n 58 above, paras 2116 & 2119.

<sup>63</sup> n 58 above, paras 720-722.

<sup>64</sup> n 58 above, para 713.

<sup>65</sup> n 58 above, para 714.

<sup>66</sup> *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* (AFRC Appeals Judgment) 22 February 2008 para 186.

<sup>67</sup> n 66 above, paras 190-200.

Although the Appeals Chamber ultimately did not enter new convictions for forced marriage, it noted that<sup>68</sup>

society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an 'other inhumane act' capable of incurring individual criminal responsibility in international law.

What this case acutely demonstrates are the pitfalls associated with misunderstanding a gender-based crime solely as a crime of a sexual nature.

Another major aspect dealt with by the Appeals Chamber in this judgment concerns the joint criminal enterprise theory of liability. On 20 June 2007, the Trial Chamber held that 'with respect to joint criminal enterprise as a mode of criminal liability, the indictment [had] been defectively pleaded' and that it would not consider it as a mode of criminal responsibility.<sup>69</sup> The joint criminal enterprise theory of liability is not without its critics and the jurisprudence of the International Tribunal for the Former Yugoslavia has repeatedly illustrated the unease with which some international judges reluctantly handle this concept. While this theory of liability is not explicitly provided for in the Statute of the SCSL, the Prosecutor chose to allege it in this case. The Trial Chamber noted in its judgment that 'to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone' was not criminal conduct within the Statute.<sup>70</sup> The Appeals Chamber disagreed with the Trial Chamber and held that<sup>71</sup>

[a]lthough the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute. The Trial Chamber took an erroneously narrow view by confining its consideration to paragraph 33 and reading that paragraph in isolation. Furthermore, the Trial Chamber erred in its consideration of 'evidence' adduced at trial to determine whether the indictment was properly pleaded.

It is interesting to note that the Prosecutor has similar allegations in his case against Charles Taylor. It is highly likely that, in view of the completion strategy of the SCSL that may result in a roster of judges to sit on the possible appeal of Charles Taylor, the Appellate Chamber may be composed of judges other than those that currently serve on the SCSL Appeals Chamber. This 'new' bench may not be as forgiving, and the prosecution would therefore be wise to ensure that it pleads all material facts, including the precise mode of liability under article 6 of the Statute that it intends to rely on.

<sup>68</sup> n 66 above, para 202.

<sup>69</sup> n 66 above, para 85.

<sup>70</sup> AFRC Trial Judgment, paras 66-70.

<sup>71</sup> Afrc Appeal Judgment, para 84.

## 4.2 Appeals judgment in the case concerning the Civil Defence Forces

The second appeals judgment rendered in 2008 concerns Moinina Fofana and Allieu Kondewa, accused persons in the ‘controversial’ case of the Civil Defence Forces, also known as the CDF.<sup>72</sup> This case was previously joined to that of the late Samuel Hinga Norman, a man many in Sierra Leone considered a hero, and whose trial before the Court was baffling to those who testified to ‘his’ liberation of Sierra Leone from the rebel forces. On 2 August 2007, the majority of the Trial Chamber, Judge Thomas dissenting and acquitting both defendants on all counts, found Moinina Fofana and Allieu Kondewa guilty of very serious and multiple violations of international humanitarian law.<sup>73</sup>

While the blanket acquittal by the Sierra Leonean judge was predictable, many were caught by surprise by the mitigating circumstances put forward by the Trial Chamber when sentencing the accused. Despite finding the accused guilty of acts of a ‘barbaric’, ‘brutal’ and ‘very serious’ nature, many of which were committed ‘on a large scale’,<sup>74</sup> the Trial Chamber mitigated the sentences because the ‘CDF/Kamajors was a fighting force that was mobilised and was implicated in the conflict in Sierra Leone to support a legitimate cause which ... was to restore the democratically elected government of President Kabbah ...’<sup>75</sup> Although there is a broad discretion afforded to international judges in determining the appropriate mitigating and aggravating considerations in their application to individual cases, this discretion is, and should be, constrained by principles that are consistent with international criminal and humanitarian law. This was the response from the Appeals Chamber which held, Judge King dissenting, that the Trial Chamber had erred in considering political motives or fighting in a ‘just cause’ as mitigating factors in sentencing an accused standing trial for crimes against humanity and serious violations of international humanitarian law.<sup>76</sup> All parties to a conflict are equally obligated to respect and adhere to international humanitarian law principals, irrespective of the side of the conflict they belong to. To hold otherwise wholly defeats the fundamental purpose of laws of war and established principles enacted to protect those not taking part in the conflict.

<sup>72</sup> In addition to the issues summarised below, the Appeals Chamber, by majority, entered two new convictions against both accused for murder and inhumane acts as crimes against humanity and increased Moinina Fofana’s sentence from six to 15 years and Allieu Kondewa’s sentence from eight to 20 years. *Prosecutor v Fofana & Kondewa* Special Court for Sierra Leone, Case SCSL-04-14-T, judgment (CDF Trial Judgment) 2 August 2007 paras 187–192.

<sup>73</sup> *Fofana & Kondewa* (n 72 above) paras 290–292.

<sup>74</sup> *Fofana & Kondewa* (n 72 above) Sentencing Judgment, 9 October 2007 paras 45–58.

<sup>75</sup> *Fofana & Kondewa* (n 72 above) paras 82 & 83.

<sup>76</sup> *Fofana & Kondewa* (n 72 above) Appeals Judgment, 28 May 2008 paras 529–535.

Although the Appeals Chamber, in part, criticised the Trial Chamber's approach in not permitting the amendment of the indictment to include forced marriage as a separate crime, it was not able to correct the stark omission created in what will comprise of the final record of the CDF's atrocities during the conflict in Sierra Leone.<sup>77</sup> In contrast to the AFRC judgment reviewed above, this is a classic example of how a trial record can be irrevocably altered by the unbalanced exclusion of gender-based crimes.

## 5 Developments in Kenya

Following the post-electoral violence and crimes committed in Kenya in late 2007 and early 2008, several transitional justice initiatives have been launched, including the establishment of a Commission of Inquiry into Post-Election Violence, mandated to investigate the facts and circumstances surrounding the violence, and the conduct of state security agencies in their handling of it.<sup>78</sup> In its report issued in October 2008, the Commission recommended, *inter alia*, the establishment of a Special Tribunal for Kenya to investigate, prosecute and try those bearing the greatest responsibility for the crimes, particularly crimes against humanity, related to the 2007 general elections in Kenya.<sup>79</sup> It was envisaged that the Special Tribunal would be a Kenyan court applying predominantly Kenyan law, sitting in that country, and composed of Kenyan and international judges, prosecutors and staff.

The Commission included a schedule for the establishment of this Tribunal, and stipulated that, if the Tribunal failed to be enacted, established or commence functioning by a given date, 'a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court'.<sup>80</sup> Interestingly, the Commission itself prepared the list and apparently handed over copies to the top political leadership of Kenya, as well as to Kofi Annan, who headed the Panel of Eminent African Personalities which mediated the Kenya national dialogue and reconciliation.

It seems that the prospect that the ICC could investigate the situation in Kenya has prompted a foison of activities around the establishment

<sup>77</sup> CDF Trial Judgment (n 72 above) para 429.

<sup>78</sup> This is one of the commissions established by the National Dialogue and Reconciliation which was brought about by the political crisis ensuing from the disputed general elections results at the end of 2007. Its terms of reference were published in the *Kenya Gazette* of 23 May 2008.

<sup>79</sup> Report of the Commission of Inquiry into Post-Election Violence, 15 October 2008. The full report is available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf> (accessed 31 January 2009).

<sup>80</sup> n 79 above, Recommendation 5 473.

of a Special Tribunal. Several drafts have been prepared and discussed by the parliament of Kenya, prompting numerous debates in Kenya on the need for accountability for grave crimes, and the best mechanism to do so.<sup>81</sup> What appears particularly challenging and important in the case of Kenya is that most observers agree that sanctioning those bearing the greatest responsibility in past political violence is likely to deter further crimes and political unrest.

## 6 Concluding remarks

This selective synopsis of the major developments uniquely illustrates the growing importance of such issues. It demonstrates that the fight against impunity has taken hold in all four corners of the continent in a manner that deserves further scrutiny, particularly in its connection with the evolving political landscape. Future reviews will attempt to capture the growing trends in Africa in this area and analyse the consequences in both the international and domestic arenas.

The landmark legacies that will be inherited from the ICTR and the SCSL will serve the ICC and domestic jurisdictions well as they find their own way down bumpy roads on similar jurisprudential journeys. The year 2009 will not prove to be an easy year. The conclusion of the Charles Taylor trial is heavily dependent on the generosity of the SCSL's donors at a time of global financial constraints and 'tribunal fatigue'. The ICTR is yet to find willing and legally-able recipients for its pending cases if it is to meet its completion deadlines. The decision whether to establish a special tribunal in Kenya or request the ICC Prosecutor to investigate the alleged crimes will certainly impact on the country's future. There have been rumblings in Liberia regarding the establishment of a Special Tribunal and 2009 will confirm if they will bear fruit.

As for the ICC, while lauding its efforts to further accountability in Africa, it is important to reiterate that for the credibility of international justice in general, and of the Court in particular, it should begin to cast its net further afield to other parts of the world. In addition, as a lesson learned from the heavily-laden indictments exhibited at the ICTY and the ICTR that led to lengthy and cumbersome trials, the ICC Prosecutor should be commended for his decision to issue concise indictments. However, charges should be calibrated carefully, not only to fully reflect the full extent of grave violations of international criminal law and of the criminal responsibility, but also to ensure that victims are given a forum to seek justice, and that their rights to participate in the proceedings, and to eventually seek reparation, are recognised.

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<sup>81</sup> An official draft bill was due to be examined in early 2009. This will be analysed in the next issue.