

Developments in international criminal justice in Africa during 2009

*Cecile Aptel**

Extraordinary Lecturer, Centre for Human Rights, University of Pretoria, South Africa; Senior Fellow, International Center for Transitional Justice, New York, USA

*Wambui Mwangi***

Political Affairs Officer with the United Nations, New York, USA

Summary

An overview of 2009 shows the dramatic influence of developments pertaining to international criminal justice in shaping not only legal but also political and human rights discourses in Africa. This contribution, which reviews selected events in 2009, includes a selective analysis of the work of two important international jurisdictions – the International Criminal Court and the International Criminal Tribunal for Rwanda. This year, the ‘hybrid’ Special Court for Sierra Leone concluded its last trial and appeal in Freetown and heard the testimony of Charles Taylor. Both are significant for the pursuit of justice in Sierra Leone. In Kenya, the failed efforts to establish a special tribunal and the attempts to prosecute suspected pirates apprehended off the coast of Somalia, shape the debate on the prosecution of international crimes in domestic judicial spheres. The first case before the African Court on Human and People’s Rights, concerning Hissène Habré, and the attempts to establish a criminal chamber to try crimes defined under international law within the African Court are touched upon. Events in Sudan are highlighted, including the International Criminal Court’s arrest warrant against the President of Sudan, and the report by the African Union Panel on Darfur.

* BA (Aix-Marseille), LLM (College of Europe), MLitt (Dublin); cecileaptel@yahoo.co.uk

** LLB (Bristol), LLM (Liverpool), Barrister-in-Law (England & Wales); wambui.mwangi@gmail.com. The views expressed are personal to the authors and do not necessarily reflect those of the United Nations or of any other particular organisation.

1 Introduction

Over the last year international criminal jurisdictions based or operating in Africa, notably the permanent International Criminal Court (ICC),¹ the United Nations (UN) International Criminal Tribunal for Rwanda (ICTR)² and the Special Court for Sierra Leone (SCSL),³ have continued their efforts to investigate, prosecute and try individuals for 'core international crimes': genocide, crimes against humanity and war crimes.

This overview of recent developments summarises some of the main developments pertaining to the ICTR and to the SCSL, before examining current proceedings before the ICC in Uganda, the Democratic Republic of the Congo, Central African Republic, Sudan and Kenya, that occurred in 2009. The review also examines efforts to investigate and prosecute international crimes in national jurisdictions, including developments pertaining to the crime of piracy, which has gained prominence as the international community seeks ways to bring those suspected of piracy to justice. Finally, it assesses the progress in the case against Hissène Habré in Senegal, before concluding on the challenges international criminal justice faces at the beginning of 2010.

2 Rwanda

Different transitional justice mechanisms continue to be used to foster accountability for international crimes committed in the early 1990s in Rwanda. Domestically these are conducted by the Rwandese national criminal judicial system and the *Gacaca* courts and, internationally,

¹ The Statute of the ICC was adopted in Rome in July 1998 (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 will also be competent over the crime of aggression when state parties to the Rome Statute agree on a definition of this crime.

² United Nations Security Council Resolution 955 (1994) of 8 November 1994 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> (accessed 31 March 2010).

³ 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> (accessed 31 March 2010). 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).

by the UN's International Criminal Tribunal for Rwanda.⁴ Both the *Gacaca* courts and the ICTR are in the process of winding down their operations.

As of January 2010, the ICTR has concluded the trials of 39 accused, of which eight have been acquitted.⁵ Thirteen cases are in the process of being tried in the first instance or pending judgment, including three cases involving multiple defendants (the so-called *Government II* case concerning members of the 1994 interim government, the *Military II* case concerning high-ranking military officers, and the *Butare* case, the longest running trial before the ICTR). Two detained accused still await the start of their trials and nine await the finalisation of appeals against their convictions in the first instance.

In the course of 2009, the ICTR rendered six judgments at first instance⁶ and two appellate judgments.⁷ Of note, in the case of *The Prosecutor v Protais Zigiranyirazo*, the Appeals Chamber, in an unprecedented move, reversed the conviction and directly acquitted Zigiranyirazo, without sending the case to be retried.⁸

As indicated in our review last year, the ICTR was conceptualised as an *ad hoc* entity with limited temporal jurisdiction and a definitive time-span. As a subsidiary organ of its parent body, the United Nations Security Council, its 'completion strategy' has been closely monitored and the conclusion of the development of the framework of the residual mechanism that will replace the ICTR is expected soon. In accordance with Security Council Resolutions 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004, the ICTR continues to pursue this completion strategy which is based on two main pillars: the completion of all high-profile pending cases without delay, and the transfer of cases involving lower-ranking accused to domestic jurisdictions.⁹ In 2009, the Security Council extended the terms of office of several

⁴ n 2 above. The ICTR was established by the UN Security Council in 1994 'to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994'. See art 1 of the ICTR Statute.

⁵ For up-to-date status of ICTR cases, see <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx> (accessed 31 March 2010).

⁶ See the cases of (a) Bagaragaza Michel (ICTR-05-86) – sentenced to eight years; (b) Kalimanzira Callixte (ICTR-05-88) – sentenced to 30 years; (c) Nsongiyumva Anatole (ICTR-96-12) – acquitted and since relocated; (d) Nshogoza Léonidas (ICTR-2007-91) – sentenced to 10 months; (e) Renzaho Tharcisse (ICTR-97-31-DP) sentenced to life; (f) Rukundo Emmanuel (ICTR-01-70) – sentenced to 25 years.

⁷ See ICTR cases of Zigiranyirazo Protais (ICTR-01-7) and Karera François (ICTR-01-74).

⁸ See *The Prosecutor v Protais Zigiranyirazo*, Judgment (Appeals) (Case ICTR-01-73-A), 17 November 2009.

⁹ In addition to the transfer of these cases, the ICTR prosecutor can and has also transferred dossiers concerning suspects who were investigated but not indicted by the ICTR.

permanent and *ad litem* judges so that they may complete ongoing trials and conduct additional trials as soon as possible in order to meet the goals of the Completion Strategy.¹⁰ The reliance of the Security Council on the transfer of cases to domestic courts to ensure a timely completion strategy remains problematic. ICTR judges have repeatedly indicated that they are not satisfied that the accused would receive a fair trial in Rwanda, which is the only country that has publicly indicated interest in hearing these cases. It therefore still remains unclear when the Tribunal will finally close its doors.

3 Sierra Leone

In Sierra Leone, the Special Court for Sierra Leone¹¹ concluded its final trial in Freetown at both first instance and at appeal with the case against the leaders of the Revolutionary United Front (RUF). Save for the case against Charles Taylor, the former President of Liberia whose trial is being conducted in The Hague, the SCSL is in the final stages of its 'completion strategy'.

On 25 February 2009, the SCSL convicted the senior leaders of the RUF — Issa Hassan Sesay, Morris Kallon and Augustine Gbao — of war crimes and crimes against humanity for their roles in Sierra Leone's 11-year civil war that was marked by the use of child soldiers and the issues of forced marriage and sexual slavery.¹² Of significance in the RUF case was the emphasis placed by the Trial Chamber on the gravity of the crime of intentionally directing attacks against personnel involved in humanitarian assistance or peacekeeping missions, issuing the first conviction of its kind in an international tribunal. Both Kallon and Sesay were found guilty of this crime punishable under article 4(b) of the Statute; Gbao was found guilty of aiding and abetting the attacks. This judgment is of particular import in light of the increasing attacks against peacekeepers, more recently in Sudan and Somalia. In its analysis of the gravity of the above crime in the sentencing judgment, the Trial Chamber, referring to the vulnerability of peacekeeping operations and their personnel in (post)-conflict situations, and their 'mandate ... and the purpose of their deployment ... to facilitate peace and security with an objective of bringing to an end ... conflict', emphasised the importance of peacekeeping operations as an 'important instrument used by the

¹⁰ See Security Council Resolutions 1878 (2009) of 7 July 2009 and 1901 (2009) of 16 December 2009.

¹¹ n 3 above.

¹² *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case SCSL-04-15-T) Judgment (Trial) dated 2 March 2009 and Sentencing Judgment dated 8 April 2009. The accused were sentenced to 52, 40 and 25 years respectively. Of the 18 charges, Sesay and Kallon were found guilty of 16 counts and Gbao of 14. None of the accused were convicted for murder or the taking of hostages or found responsible for the attack in Freetown that resulted in over 5 000 deaths in January 1999.

international community for the maintenance of international peace and security and therefore ... adequate protection must be granted'.¹³

On 26 October 2009, the Appeals Chamber, in its final judgment delivered in Freetown, upheld the convictions of Issa Hassan Sesay, Morris Kallon and Augustine Gbao. A large portion of the judgment was dedicated to the judicial notion of joint criminal enterprise.¹⁴

Joint criminal enterprise continues to play a critical role in the trial of Charles Taylor. On 1 May, the Appeals Chamber dismissed the accused's motion dated 14 December 2007 in which he argued that joint criminal enterprise was defectively pleaded in the Second Amended Indictment.¹⁵ Nevertheless, the issue of joint criminal enterprise arose again in the defence motion for a judgment of acquittal, which was dismissed on 4 May 2009, in which the Trial Chamber held that '[i]n relation to the alleged participation of the accused, the Trial Chamber finds that there is evidence that the accused participated in the joint criminal enterprise'.

Taylor himself took the stand on 18 July 2009 and gave evidence for 13 weeks. While he did not deny his relationship with the RUF, he eloquently emphasised his role as a peacemaker, disassociating himself from involvement in the conflict and denying all allegations of support to the RUF. In his defence, Taylor also stressed the challenges and responsibilities he faced as a head of state, and the internationalisation

¹³ This jurisprudential precedent may be of significance in the case against *Bahr Idriss Abu Garda* before the ICC, concerning attacks against personnel of the African Union Mission in Sudan. See section on Sudan below. *Sesay, Kallon and Gbao*, Sentencing Judgment paras 189-194-195. See more generally paras 188-203. For this reason, the Chamber found that the 'inherent gravity of the criminal acts in question [were] exceptionally high'. For intentionally directing an attack against peacekeepers, Sesay was sentenced to 51 years, Kallon to 40 years and Gbao to 25 years (para 204).

¹⁴ On 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.

¹⁵ *Prosecutor v Taylor* (Case SCSL-2003-01-T) Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE dated 14 December 2007 ('Original Defence Motion'). The Trial Chamber had permitted both parties to file new submissions in light of the Appeals Chamber's judgment in the case of *Prosecutor v Brima & Others* (*Prosecutor v Brima & Others* (Case SCSL-2004-16-A), Judgment (Appeals) dated 22 February 2008, filed on 3 March 2008). It subsequently dismissed the defence's motion in an oral decision on 19 February 2009 (*Taylor* Transcript, 19 February 2009 24052 In 26 – 24053 In 3.) The majority of the Trial Chamber in Impugned Decision on 27 February 2009 had held that the Second Amendment needed to be read as a whole (*Taylor*, Prosecution's Second Amended Indictment, 29 May 2007 para 33.) It also held that the prosecution had fulfilled the pleading requirements of the alleged joint criminal enterprise and provided sufficient details to put the Defence on notice of the case against him, although in agreement with the majority of the bench on that there was sufficient material presented by the prosecutor to put the defence on notice, in his dissent, Justice Lasik held that the Second Amended Indictment defectively pleaded joint criminal enterprise as a mode of liability at paras 6-23 (*Taylor*, Decision on Public Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE dated 27 February 2009).

of the Sierra Leonean conflict. The defence also attempted to discredit many of the witnesses called by the prosecution by drawing attention to the inconsistencies in their evidence.¹⁶

Of particular interest in both the *Taylor* and *RUF* cases has been the overwhelming evidence pointing to the significance of diamonds in the conflict, which mirrors the findings of the Sierra Leone's Truth and Reconciliation Commission.¹⁷

On 18 March 2009, the government of Rwanda entered into an agreement with the SCSL on the enforcement of sentences handed down by the SCSL.¹⁸ The convicted accused were transferred to the newly-built Rwandan Mpanga Prison on 31 October 2009. This prison has a special wing that was specifically constructed to house ICTR prisoners in order to enable the transfer of convicted persons to Rwanda in accordance with article 26 of the ICTR statute.¹⁹

As the Special Court winds down its operations in Freetown, it embarks on the challenging task of leaving a durable legacy for the country and the region as part of the transitional justice mechanisms put in place against the background of the Lomé Peace Accords of 1999 (Lomé Agreement).²⁰ The Court's most significant contribution to the development of international criminal jurisprudence includes the first convictions in the history of international courts for the crimes of intentional attacks on peacekeeping personnel, forced marriages and the

¹⁶ In order to secure a conviction, the prosecution will need to demonstrate the command responsibility that it alleges Taylor had over the RUF as well as his participation in a joint criminal enterprise with the guerrilla group to gain control over Sierra Leone by committing crimes that amount to crimes against humanity and war crimes. The Taylor defence aims to distance him from the RUF, thus undermining the prosecution's argument of JCE.

¹⁷ See also more generally JL Hirsch *Sierra Leone: Diamonds and the struggle for democracy* (2001).

¹⁸ Amended Agreement between the Special Court for Sierra Leone and the government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone, 18 March 2009 <http://www.sc-sl.org/LinkClick.aspx?fileticket=WNTKRbiUNNc%3d&tabid=176> (accessed 31 March 2010).

¹⁹ Rwanda, as evidenced by this transfer, continues to assert that it has put in place the requisite conditions and procedures in accordance with UN standards to enable the ICTR to transfer its convicted persons to Mpanga Prison. This bold initiative to accept the SCSL-convicted persons by Rwanda is likely to play a critical role in future decisions concerning where to house ICTR-convicted persons once the ICTR concludes its activities.

²⁰ The Lomé Peace Accords were signed on 7 July 2009 between the government of Sierra Leone and the RUF. The agreement also provided for the establishment of a Truth and Reconciliation Commission (TRC) that was created in 2002 'to establish a historical record of violations and human rights abuses from July 7, 1991 – 1999; to address impunity; to respond to the needs of victims; to promote healing and reconciliation; and to prevent a repetition of such events in Sierra Leone'. Its final report was published on 27 October 2004.

recruitment and use of child soldiers.²¹ However, several residual issues remain that will need to be addressed after the life of the SCSL. 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 convicted persons and issues concerning their provisional release where applicable; and the role the site upon which the SCSL was built could play in Sierra Leone's future. These questions will need to be determined before the conclusion of the *Taylor* case to ensure that the legacy of this Court is not relegated to obscurity.²²

4 Uganda

The ICC's involvement in Uganda commenced in 2004. Its investigation, opened on the basis of a 'self-referral' from the government of Uganda,²³ led to the issuance of arrest warrants against senior leaders of the Lord's Resistance Army (LRA) in October 2005.²⁴ With no realistic prospect of arresting these individuals, the cases were essentially stalled in 2009.

Nevertheless, there were interesting jurisprudential developments at the ICC pertaining to the representation of victims²⁵ and the admissibility of cases in light of the complementarity principle.²⁶ On the latter, ICC Pre-Trial Chamber II clarified that²⁷

[c]omplementarity is the principle reconciling the states' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same

²¹ On this last crime, see C Aptel 'International criminal justice and child protection' in UNICEF-Harvard University *Children and transitional justice: Truth-telling, accountability and reconciliation* (2010).

²² Special Court for Sierra Leone: Completion Strategy, June 2009 <http://www.sc-sl.org/LinkClick.aspx?fileticket=yiUyKldB3OY%3d&tabid=176> (accessed 31 March 2010).

²³ The referral by the government of Uganda was announced in January 2004.

²⁴ The four individuals are Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.

²⁵ See eg decisions in *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo & Dominic Ongwen* (Case ICC-02/04-01/05) dated 9 February 2009 and 10 March 2009.

²⁶ *Kony & Others*, decision on the admissibility of the case under art 19(1) of the Statute dated 10 March 2009. See also dismissal of the defence appeal of this decision — *Kony & Others*, judgment on the appeal of the defence against the 'Decision on the admissibility of the case under article 19 of the Statute' of 10 March 2009 dated 16 September 2009.

²⁷ *Kony & Others*, decision on the admissibility of the case under art 19(1) of the Statute dated 10 March 2009, para 34.

crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed.

It noted that '[o]nce the jurisdiction of the Court is triggered, it is for the latter and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case'.²⁸ In conclusion, the Pre-Trial Chamber noted that²⁹

it would be premature and therefore inappropriate to assess the features envisaged for the Special Division and its legal framework. Accordingly, the purpose of the proceedings remains limited to dispelling uncertainty as to who has ultimate authority to determine the admissibility of the case: It is for the Court, and not for Uganda, to make such determination.

Until such time that the leaders of the LRA are arrested and in the custody of the Ugandan authorities, coupled with the commencement of domestic investigations, it is indeed clearly premature to determine whether Uganda will be found willing and genuinely able to investigate and prosecute the LRA leadership for the alleged international crimes.

Uganda, however, continues to build its domestic judicial capacity to try the leaders of the LRA for 'international crimes'. Further to the establishment in 2008 of a special War Crimes Division composed of three High Court judges and a unit in the Department of Public Prosecutions to investigate and prosecute these crimes, the Ugandan Parliament is expected in 2010 to adopt legislation to incorporate international crimes (as defined under the ICC Statute) into its domestic legislation. Interestingly, this bill is expected to be adopted before the 'review conference on the Rome Statute' to be held in Kampala in May or June 2010 by the major state parties to the Rome Statute.

5 The Democratic Republic of the Congo

Similar to Uganda and the Central African Republic, the investigations into the crimes committed in the Democratic Republic of the Congo (DRC) were the product of a self-referral.³⁰ All, bar one, of the detained accused at the ICC are from the DRC, and cases under the 'Situation in the Democratic Republic of Congo' were the first to be heard before the ICC.³¹

²⁸ n 28 above, para 45.

²⁹ n 28 above, para 51.

³⁰ The referral was made on 3 March 2004. On this basis, the ICC prosecutor opened investigations in Eastern DRC.

³¹ The individuals from the DRC currently in ICC custody are Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui, all charged in connection with crimes committed in the DRC. Jean-Pierre Bemba, hailing from the DRC, is charged for crimes allegedly committed in the Central African Republic (see section below).

5.1 Thomas Lubanga Dyilo

The first trial before the ICC — of Thomas Lubanga Dyilo, former President of the *Union des Patriotes Congolais* (UPC) and leader of the *Forces patriotiques pour la libération du Congo* (FPLC) — opened on 26 January 2009.³² This first case has been beset with numerous start-up challenges prior to and during the commencement of the trial.³³

Thomas Lubanga Dyilo is accused of enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities. Interesting questions were raised concerning the protection of victims and the role that they play in the proceedings.

The protective measures that provided for vulnerable witnesses (particularly children and those who witnessed or were victims of crimes as children) were tested with the testimony of the first prosecution witness, a former child soldier. Proceedings were suspended when during his testimony he recanted his evidence and appeared frightened. The witness appeared again a few days later, under increased protective measures, with fewer persons present in the courtroom and in the public gallery, and a decision that the witness testify without any prompting or interruptions from the prosecution or the defence and, importantly, be shielded from the direct view of the accused. As both the prosecution and defence are bound to call vulnerable witnesses to provide evidence of crimes they witnessed or were victims of, it is important to ensure that these witnesses are not only duly informed of the aims, objectives and limitations of the trial process, but are also provided with culturally-appropriate psychological support.³⁴

The role of victims in determining the charges against an accused was also raised in this trial. The judges had granted 101 persons victim status, authorising them under the Rome Statute to participate in the proceedings. In May 2009, legal representatives for a victim group, predominantly children formerly associated with armed groups and their families, requested the addition of new charges against Lubanga. They argued that, in addition to the existing charges for recruiting and using child soldiers, Lubanga had committed other crimes against the

³² *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Thomas Lubanga Dyilo* (Case ICC-01/04-01/06). It is also in that case that the ICC issued its first arrest warrant, unsealed in 2006. Having been previously arrested by DRC authorities for a different crime, Lubanga was transferred to the ICC in March 2006. The charges against him were confirmed on 29 January 2007 following a series of postponements.

³³ For an analysis of these issues, notably pertaining to the disclosure of confidential material obtained by the prosecutor from third parties to assist with the investigations, as well as the clarification of the definition of 'a victim' before the ICC, see Aptel & Mwangi (n 14 above).

³⁴ For more analysis on these issues, see C Aptel 'Children and accountability for grave crimes: The role of the ICC and other international courts' Innocenti Working Paper (2010), Florence, UNICEF Innocenti Research Centre.

children, notably sexual slavery and inhumane and cruel treatment.³⁵ Their request was denied.³⁶

The trial has since progressed and the prosecution concluded its case on 14 July 2009, having called 28 witnesses, including three experts. The defence's case is ongoing, with a judgment expected in the course of 2010.

5.2 Germain Katanda and Mathieu Ngudjolo Chui

On 24 November, the second trial under the 'Situation in the Democratic Republic of the Congo' opened with the cases against Germain Katanga³⁷ and Mathieu Ngudjolo.³⁸ These two individuals are jointly tried on 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.³⁹

³⁵ *Lubanga* 'Demande conjointe des Représentants Légaux des Victimes aux Fins de Mise en Oeuvre de la Procédure en Vertu de la Norme 55 du Règlement de la Cour' dated 22 May 2009. Surprisingly, the prosecutor in his response of 29 May 2009 limited himself to stating that '[i]f the Chamber considers that it might be appropriate to [consider the possibility of modifying the legal characterisation of the facts] it will give the participants notice and invite submissions. In that event, the prosecution will provide its factual and legal response.' See also *Lubanga*, Prosecution's Response to the Legal Representatives, 'Demande conjointe des Représentants Légaux des Victimes aux Fins de Mise en Oeuvre de la Procédure en Vertu de la Norme 55 du Règlement de la Cour', dated 29 May 2009.

³⁶ On 14 July 2009, the Trial Chamber issued its 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'. The Appeals Chamber reversed this decision, ruling that the Trial Chamber's finding that the legal characterisation of the facts may be subject to change was based on a flawed interpretation of Regulation 55. The Appeals Chamber did not rule on the question of whether the majority of the Chamber erred in determining that the legal characterisation of the facts may be changed to include crimes under arts 7(1)(g), 8(2)(b)(xxvi) [*sic*], 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute because the Trial Chamber had not yet done a detailed review of the questions in this issue. See *Lubanga*, judgment on the Appeals of Mr Lubanga Dyilo and the prosecutor against the decision of Trial Chamber 1 of 14 July 2009 entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court' dated 8 December 2009.

³⁷ Germain Katanga, arrested in October 2007, was a former leader of the Patriotic Resistance Force in Ituri (FRPI).

³⁸ Mathieu Ngudjolo Chui, arrested in February 2008, was a former leader of the National Integrationist Front (FNI) and a Colonel in the National Army of the government of the DRC.

³⁹ *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Case ICC-01/04-01/07), Decision on the Confirmation of Charges, dated 30 September 2008. Pre-Trial Chamber I authorised the joinder of the cases of Mathieu Chui and Katanga following a prosecutorial request which alleged co-responsibility for crimes committed during and after the attack on the village of Bogoro. See *Katanga and Chui*, Decision on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui, dated 10 March 2008.

In a subsequent important development prior to the commencement of the trial, Katanga challenged the principle of complementarity, as applied in his case, arguing that he could be tried in the DRC. Interestingly, the Congolese government replied that its judicial system had neither the capacity — due to security concerns and insufficient resources — nor the intention of investigating or prosecuting Katanga.⁴⁰ The distinction between unwillingness and inability risks being blurred in this context, questioning the fundamental basis and application of the complementarity principle, and also potentially undermining the underlying principles according to which states themselves remain primarily responsible for investigating and prosecuting international crimes.⁴¹

5.3 Bosco Ntaganda

The ambiguous position of states *vis-à-vis* their responsibility for the investigation and prosecution of cases that fall under the jurisdiction of the ICC was also highlighted in the case of Bosco Ntaganda, where the position of the government of the DRC is less clear.

Bosco Ntaganda was the former Deputy-Chief of the General Staff of the FPLC, and charged jointly with Thomas Lubanga for alleged war crimes committed in Ituri, including the enlistment and conscription of children under the age of 15 to actively participate in hostilities.⁴² He later joined the *Congrès national pour la défense du peuple* (CNDP) where he served as chief of staff, apparently closely associated with Laurent Nkunda, until the latter was arrested by the Rwandan authorities in January 2009. Some have argued that the DRC and Rwanda had reached a political agreement pursuant to which Ntaganda helped oust Nkunda, replaced him, led the integration of the CNDP into the Congolese national army and was himself integrated as a senior commander into the Congolese army.⁴³ Strikingly at odds with the arguments presented by the government of the DRC in the *Lubanga* case, the government here has openly stated that it will not pursue Ntaganda's arrest in the interests of peace, given his critical role in the integration of the CNDP troops into the Congolese national army.⁴⁴

⁴⁰ See *Katanga and Chui* (n 39 above) *Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut)* dated 16 June 2009.

⁴¹ n 41 above, paras 76-78.

⁴² *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Bosco Ntaganda* (Case ICC-01/04-02/06), Warrant of Arrest dated 22 August 2006. This warrant was made public pursuant to the Pre-Trial Chamber's *Decision to unseal the warrant of arrest against Bosco Ntaganda* dated 28 April 2008.

⁴³ See International Center for Transitional Justice 'Focus: Bosco Ntaganda', February 2009 http://www.ictj.org/static/Factsheets/ICTJ_DRC_BoscoNtaganda_fs2009.pdf (accessed 31 March 2010).

⁴⁴ As above.

Over six years have elapsed since the DRC referred the situation of the crimes committed in its territory to the ICC. While the above contribution of the ICC is important in the fight against impunity for grave international crimes in that country, much more remains to be done. The current geographical focus of the work of the ICC concentrates on crimes committed in the Ituri region from 2002 to 2003 and appears limited when examined against a backdrop of wide-ranging, grave crimes committed in other parts of the DRC since 2002.⁴⁵ In addition, the ICC has been criticised by some for its relatively narrow set of charges in each case: The decision to charge Thomas Lubanga only for recruiting and using child soldiers has been criticised as too limited because of widespread allegations that he committed many other international crimes, including killings and sexual crimes.⁴⁶ While the attention given by the ICC to the recruitment and use of child soldiers is extremely important, it should not be to the exclusion of other crimes committed against child soldiers and more generally other children and victims.

In general, all serious international crimes committed in the DRC prior to the entry into force of the Rome Statute in 2002 fall outside the temporal jurisdiction of the ICC. In the DRC, it is the military justice system that retains and exercises jurisdiction over such crimes.⁴⁷ The UN Office of the High Commissioner for Human Rights completed a mapping of these crimes in 2009, apparently raising concern about their massive scale and grave nature. In view of the need to provide the DRC with the legislative tools to address these crimes and bring the perpetrators to justice, it is imperative that the DRC adopts the proposed ICC Bill incorporating the Rome Statute into domestic law and transferring jurisdiction over these crimes from the military justice system to the civilian courts.⁴⁸

⁴⁵ The ICC prosecutor has also alluded since 2008 to a third investigation into crimes committed in the North and South Kivu, but this was not publicly concretised until recently.

⁴⁶ In a 'Joint Letter to the Chief Prosecutor of the International Criminal Court' dated 31 July 2006, eight international human rights organisations (including Human Rights Watch) indicated that this 'undercut the credibility of the ICC' as well as limited victims' participation; http://www.iccnw.org/documents/DRC_joint_letter_eng.PDF (accessed 31 March 2010).

⁴⁷ In 2002, the DRC transitional legislature granted Congolese military courts exclusive jurisdiction over international crimes, including civilian suspects or accused. Despite art 156 of the 2006 Constitution of the DRC, which limits the jurisdiction of military justice to members of the armed forces and of the police, the exclusive jurisdiction of military courts has not yet been abrogated.

⁴⁸ The draft bill was submitted to the Congolese National Assembly in March 2008.

6 Central African Republic

In the Central African Republic (CAR), as in the cases of the DRC and Uganda, the ICC undertook investigations in this case further to a 'self-referral'.⁴⁹ The focus of the ICC investigation in the CAR is on allegations of crimes committed by the *Mouvement de Libération du Congo* (MLC) led by Jean-Pierre Bemba during their intervention in the CAR in 2002 and 2003, following the *coup* mounted by François Bozizé, former Chief of Staff of the Central African armed forces, against former President Ange-Félix Patassé.⁵⁰ According to the ICC prosecutor, Jean-Pierre Bemba as the leader of the MLC, under command or superior responsibility, committed grave international crimes, including mass rapes, killings and looting in the CAR.

Bemba was arrested in 2008.⁵¹ The hearing to confirm the charges against him was repeatedly postponed until 12 January 2009, and the charges against him were entered on 15 June 2009.⁵² He is charged as a military commander on two counts of crimes against humanity (rape and murder) and on three counts of war crimes (rape, murder and pillaging). His trial is expected to commence this year.⁵³ Bemba has repeatedly challenged his preventive detention, requesting bail, but remains detained pending full determination of the matter.⁵⁴

⁴⁹ *The Situation in the Central African Republic in the Case of The Prosecutor v Jean-Pierre Bemba Gombo* (Case ICC-01/05-01/08). On 22 May 2007, the prosecutor announced the opening of an investigation in the CAR; <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB> (accessed 31 March 2010).

⁵⁰ Jean-Pierre Bemba was the President and Commander-in-Chief of the MLC. He was one of four Vice-Presidents in the DRC transitional government from 2003 to 2006, and a runner-off in the 2006 DRC presidential elections. In 2007, he was elected to the DRC Senate where he led the opposition against President Joseph Kabila. On 23 May 2008, the ICC Pre-Trial Chamber found that there were reasonable grounds to believe that Bemba bore individual criminal responsibility for war crimes and crimes against humanity committed in the CAR from 25 October 2002 to 15 March 2003; *Bemba*, Warrant of Arrest Replacing the Warrant of Arrest issued on 23 May 2008 dated 10 June 2008.

⁵¹ Bemba was arrested in May 2008 in Brussels, Belgium, and transferred to the ICC in July 2008 on three counts of war crimes and five counts of crimes against humanity.

⁵² See *Bemba*, decision pursuant to arts 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo dated 15 June 2009.

⁵³ On 18 September 2009 the case was referred to the ICC Trial Chamber III for trial.

⁵⁴ See *Bemba*, Decision on application for interim release dated 20 August 2008, Decision on application for interim release dated 16 December 2008 and Decision on application for interim release dated 14 April 2009; all of which rejected Bemba's applications for interim release. A decision by the Pre-Trial Chamber on 14 August 2009 granted Bemba conditional release 'until decided otherwise' in its 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal

7 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. The ICC has since issued four warrants of arrest for crimes committed in the Darfur region against President Omar Hassan Ahmad Al Bashir (President of the Sudan), Ahmed Harun (State Minister for Humanitarian Affairs), Ali Kushayb (militia leader) and Bhar Idriss Abu Garda (Chairperson and General Co-ordinator of Military Operations of the United Resistance Front).⁵⁵

In the case against Bahr Idriss Abu Garda (Abu Garda), the Pre-Trial Chamber unsealed its decision ordering his appearance, having found on 17 May 2009 that there were reasonable grounds to believe that he was criminally responsible (directly or indirectly) as a co-perpetrator of the attacks against African Union (AU) peacekeepers.⁵⁶ Abu Garda appeared on 18 May 2009, charged under article 8 of the Rome Statute on three counts of war crimes committed during an attack at the military group site Haskanita against the AU Mission in Sudan on 29 September 2007. A decision pertaining to the confirmation of these charges is expected to take place in 2010.

On 4 March 2009, in the case against Omar Hassan Ahmad Al Bashir, the Pre-Trial Chamber reviewed the evidence provided by the prosecutor in his application of 14 July 2008 and found that there were 'reasonable grounds to believe' that Al-Bashir had committed five counts of crimes against humanity and two counts of war crimes.⁵⁷ The Chamber did

Republic of Germany, the Italian Republic and the Republic of South Africa', pending a decision in which state the accused would be released and under what conditions. The prosecutor appealed this decision and on 3 September 2009, the Appeals Chamber rendered its 'Decision on the Request of the Prosecutor for Suspensive Effect' which suspended the decision to grant Bemba interim release pending a decision on the merits of the prosecution's appeal.

⁵⁵ In this 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. For a discussion on the warrants of arrest for Bashir, Harun and Kushayb, see Aptel & Mwangi (n 14 above).

⁵⁶ *Situation in Darfur, Sudan, In the case of the Prosecutor v Bahar Idriss Abu Garda* (Case ICC-02/05-02/09), 'Public Redacted Version – Decision on the Prosecutor's Application under Article 58' dated 7 May 2009.

⁵⁷ *Situation in Darfur, Sudan, In the Case of the Prosecutor v Omar Hassan Ahmad Al Bashir (Omar Al Bashir)* (Case ICC-02/05-01/09) 'Public Redacted Version: Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' dated 4 March 2009. These charges comprised murder, extermination, forcible transfer, torture and rape, constitutive of crimes against humanity under art 7 of the Rome Statute, and intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities, and pillaging, constitutive of war crimes under art 8 of the Statute. One area not examined in this article were reports in 2009 of indiscriminate or disproportionate attacks on civilians in Mogadishu by insurgent groups and members of the transitional federal government of Somalia's security forces, as well as allegations

not include the crime of genocide in the warrant of arrest that was subsequently issued, the majority finding that the material provided by the prosecutor in support of his application failed to provide reasonable grounds to believe that Al-Bashir acted with the specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups. The prosecutor appealed this decision.⁵⁸

On the question of immunity, the Pre-Trial Chamber concluded that the 'current position of Omar Al-Bashir as head of a state which is not a party to the [Rome] Statute, has no effect on the Court's jurisdiction over the present case'.⁵⁹ Noting that a core goal of the Rome Statute is to put an end to impunity for those who commit 'the most serious crimes' which 'must not go unpunished', the Chamber held that it was guided by the principals detailed in articles 27(1) and (2) of the Rome Statute which provide (a) for equality of treatment without 'distinction based on official capacity'; (b) that official capacity in and of itself does not provide for an exemption from criminal responsibility or reduction in sentence; and (c) that 'immunities which may attach to the official capacity of a person ... shall not bar the Court from exercising its jurisdiction'. Alternative sources of law as provided for in articles 21(1)(b) and (c) of the Rome Statute, the Chamber noted, would only be resorted to in the event that there was a '*lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules' which could not be filled by the 'application of the criteria of interpretation provided for in articles 31 and 32 of the Vienna Convention on the Law of Treaties and article 21(3) of the Statute'. In addition, the Chamber noted that by referring the matter to the Court, the Security Council had 'accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the [applicable] statutory framework ... as a whole'.⁶⁰

The decision to indict Al-Bashir has been plagued by intense and polarised legal and political controversy. Prior to the issuance of the warrant of arrest for Al-Bashir, two Sudanese non-governmental organisations (NGOs) filed a motion arguing that the warrant would have detrimental implications for the peace-building process in Sudan;

of the use of mortars and heavy artillery by the African Union Mission to Somalia (AMISOM) in civilian populated areas during fighting – see Amnesty International 'Public statement, Somalia: Civilians pay the price of intense fighting in Mogadishu' 4 March 2009, AI index: AFR 52/002/2009 <http://www.amnesty.org/en/library/info/AFR52/002/2009/en> (accessed 31 March 2010). The implications in international criminal and humanitarian law will be explored further in the next report.

⁵⁸ On 6 July 2009, the prosecutor appealed this decision, submitting to the Appeals Chamber that the majority of Pre-Trial Chamber I erred when requiring that the existence of reasonable grounds to believe that the person has committed the alleged crime must be the only reasonable conclusion from the evidence presented by the prosecutor. A decision by the Appeals Chamber is expected in early 2010.

⁵⁹ *Al Bashir* (n 57 above) para 41.

⁶⁰ *Al Bashir* (n 57 above) paras 42-45.

would not serve the interests of justice; and would entrench negative perceptions of the ICC.⁶¹ The motion referred to other transitional justice alternatives being pursued and which should be permitted to proceed without the involvement of the ICC at this stage.⁶² It encouraged the finding of 'in-Africa' solutions as the 'most sensible route at this time'.⁶³ The Pre-Trial Chamber dismissed the application, ruling that it had⁶⁴

neither the power to review, nor [was] it responsible for, the prosecutor's assessment that, under the current circumstances in Sudan, the initiation of the case against Omar al Bashir and the three alleged commanders of organised armed groups would not be detrimental to the interests of justice.

Similar arguments were put forward by several member states and regional organisations in their call for the Security Council to defer Al-Bashir's case in accordance with article 16 of the Rome Statute. This was illustrated in a meeting of the Security Council in December 2009 where Burkina Faso, whose concerns were shared by the AU, the League of Arab States, the Organisation of the Islamic Conference and the Non-Aligned Movement, argued that notwithstanding the importance of combating impunity, 'the objective of justice could not, in and of itself, bring peace in such a complex conflict without a political solution based on consensus'.⁶⁵

The AU Peace and Security Council, at its 207th meeting in Nigeria on 29 October 2009, echoed the view that 'in-Africa' solutions to post-conflict situations should be sought as it endorsed the comprehensive report by the AU Panel on Darfur (AUPD) chaired by former South African President Thabo Mbeki. Commissioned to provide recommendations 'on how best the issues of accountability and combating impunity on the one hand and reconciliation and healing on the other, could be effectively and comprehensively addressed,' the report does not pur-

⁶¹ ICC Pre-Trial Chamber I, Public document – Application on behalf of citizens' organisations of the Sudan in relation to the prosecutor's applications for arrest warrants of 14 July 2008 and 20 November 2008, ICC-02/05, 11 January 2009. The NGOs represented were the Sudan Workers' Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG).

⁶² In relation to the latter, the two groups referred to the constitutional procedures set out in arts 60 and 61 of the Constitution of Sudan which provide for the investigation and prosecution of Sudanese heads of state and senior officials for crimes of 'high treason, gross violation of this Constitution or gross misconduct in relation to state affairs'; n 61 above, para 29 and fn 30.

⁶³ n 61 above, para 30.

⁶⁴ *Al-Bashir*, Public – Decision on Application under Rule 103 dated 4 February 2009, para 29.

⁶⁵ Meeting of the Security Council, 4 December 2009 (S/PV/6230). See also Meeting of the Security Council, 21 December (S/PV/6251); Meeting of the Security Council, 24 July 2009 (S/PV/6190); and Meeting of the Security Council, 20 March 2009 (S/PV/6096) <http://www.un.org/Depts/dhl/resguide/scact2009.htm> (accessed 31 March 2010).

port to gloss over the crimes committed in Darfur, nor to endorse or criticise the AU's promise not to surrender Al-Bashir to the ICC. Rather, it observes that attempts to dispense justice in Darfur have made little progress, and seeks to make recommendations that interconnect the three pillars of justice, peace and reconciliation in a Sudanese-owned context.⁶⁶ In this regard, the report signifies to the government of Sudan that it could divest the ICC of jurisdiction by pursuing 'credible measures' to address the atrocities committed, but it cannot ignore its duty to deal with the crimes that have been committed in Darfur.⁶⁷ In an interesting reference to the complementarity principle, the report signifies a striking shift by providing legitimate responses to the ICC as opposed to an outright dismissal of its jurisdiction, sending an underlying message that the pursuit of domestic prosecutions would entail significant reforms to the Sudanese criminal justice system.⁶⁸

As for the use of traditional Sudanese reconciliation mechanisms, the Panel stressed that these are to be utilised only for 'those perpetrators who bear responsibility for crimes other than the most serious violations', effectively drawing a line between the 'overwhelming majority of potential criminal cases that must be dealt with by the national system' and Al-Bashir and his three commanders.

Significantly, the report recommends the establishment of a special court as one element of a comprehensive strategy. This court would consist of Sudanese and foreign judges appointed by the AU in consultation with the Khartoum government to try those suspected of committing atrocities in Darfur.⁶⁹ If the proposed court were to be constituted as a new, independent and impartial organisation, adequately protected from political interference, sustainably funded, and with a legal framework guaranteeing fair trials, due process and witness protection, it could usefully contribute to the fight against impunity, particularly in a context where it appears that the population does not trust the domestic system.⁷⁰ Yet, if the proposed court was to fall short of international standards, it would only serve to undermine the ICC and, more importantly, justice.

⁶⁶ 'Darfur: The quest for peace, justice and reconciliation' Report of the African Union High-Level Panel on Darfur (AUPD) as presented to the African Union Peace and Security Council on 29 October 2009 (PSC/AHG/2(CCVII) paras 217 219 221-228 236-238.

⁶⁷ n 66 above, paras 17, 18 & 25.

⁶⁸ n 66 above, paras 206 214-217 229-235 244-245 254-255.

⁶⁹ n 66 above, paras 25 246-254.

⁷⁰ It could be established by an international treaty between the government of Sudan and an international organisation, eg the AU.

8 A Criminal Chamber in the African Court of Justice and Human Rights?

In a related development, on 4 February 2009, the Assembly of Heads of State and Government of the AU called upon its member states not to co-operate in the arrest and surrender of President al-Bashir to the ICC, and requested the Commission of the AU, in consultation with the African Court on Human and Peoples' Rights, expected to become the African Court of Justice and Human Rights (African Court) and the African Commission on Human and Peoples' Rights (African Commission), to 'examine the implications of the [African] Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes'.⁷¹ This position was further affirmed in July 2009 in a separate decision which requested the AU Commission to ensure the early implementation of its earlier decision.⁷² Interestingly, the July 2009 decision also requested that, in preparation of the ICC Review Conference of State Parties to be held in Kampala in 2010, member states consider certain issues related to ICC procedures, including (a) clarification on the immunities of officials whose states are not party to the Statute; (b) a comparative analysis of the implications of the practical application of articles 27 and 98 of the Rome Statute; (c) the possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials.⁷³

Concerning the project to extend the jurisdiction of the African Court, the AU has apparently consulted experts who have drafted a protocol which would establish a Criminal Chamber within the Court. This Chamber would be competent to prosecute and punish African individuals responsible for core international crimes, including at least genocide, crimes against humanity and war crimes.

Several African organisations have voiced their opinion that⁷⁴

[t]he proposal to extend the jurisdiction ...to cover international crimes amount to creating a regional criminal court for Africa. This proposal

⁷¹ Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/3 (XII) Assembly/AU/Dec.213 (XII), 4 February 2009, para 9 (2009).

⁷² Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc Assembly/AU/13(XIII), 12 July 2009, para 5.

⁷³ n 72 above, para 8.

⁷⁴ 'Implications of the African Court on Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes' opinion submitted by Coalition for an Effective African Court on Human and Peoples' Rights, Darfur Consortium, East African Law Society, International Criminal Law Centre of the Open University of Tanzania, Open Society Justice Initiative, Pan-African Lawyers Union, Southern Africa Litigation Centre, and West African Bar Association. In the absence of what would be a prohibitively costly exercise, the organisations argued that 'an extension of the jurisdiction of the Court would create

attempts to confront current legal and practical obstacles ... [including] the absence of: an instrument creating crimes within the jurisdiction of such a court; enumerating the elements of crimes within the scope of the court and punishment for them; establishing the procedures for proceedings with respect to such crimes; [and] a regional system of enforcement and co-operation in criminal matters.

It is anticipated that the Assembly of the AU will review the draft protocol which, if adopted, would lead to the establishment of a Criminal Chamber within the African Court in the course of 2010.

9 Kenya

In Kenya, the first quarter of 2009 was marked by intense debate around the envisaged creation of a 'Special Tribunal for Kenya', as recommended by the Commission of Inquiry into the Post-Election Violence (CIPEV) and also known as the Waki Commission.⁷⁵ Supported by an apparently strong popular desire for accountability for the crimes committed in late 2007 and early 2008, efforts to establish this court were intended to herald a new era for Kenya.

Three significant attempts were made in 2009 to put in place judicial mechanisms to try those responsible. The first tabling of the 2009 Constitution Amendment Bill (amendment of section 3A of the Kenyan Constitution) that promised to pave the way for the creation of the Special Tribunal for Kenya was defeated on 19 February 2009. In August 2009, the government sought to expand the mandate of the proposed Truth, Justice and Reconciliation Commission, a fact-finding body established to investigate past human rights violations and address historical injustices, to encompass the post-electoral crimes. A joint statement by two Kenyan human rights organisations highlighted the shortcomings of such a proposal, noting the Waki Commission's observations on the 'weaknesses of the Kenyan national legal system, including the potential frustration of prosecutions through litigation and the Attorney-General's powers to take over and terminate criminal proceedings'. They added that a deviation from the recommendation to establish a Special Tribunal constituted an 'unwillingness to prosecute which satisfies the requirement for referral to the [ICC]' and would

a regional African exceptionalism to international criminal law and international justice, ultimately damaging the credibility and effectiveness of Africa's regional human rights system. In the space between African exceptionalism and an ineffectual regional system, an African impunity gap could become institutionalised, rendering international criminal law irrelevant to Africa. This outcome is both undesirable and avoidable'.

⁷⁵ CIPEV investigated the violence that followed the much-contested results of the presidential elections in December 2007.

be tantamount to a 'delay in the dispensation of justice'.⁷⁶ In September 2009, a last attempt was made to table a second Constitution Amendment Bill (2009) to bring the Special Tribunal into effect. It was never debated for lack of quorum.

With the paralysis of all endeavours to establish the Special Tribunal for Kenya, on 9 July 2009 Kofi Annan, Chairperson of the AU Panel of African Eminent Personalities, referred the undisclosed list of suspects and supporting information to the ICC prosecutor. This led the ICC prosecutor to use his *proprio motu* powers under article 15 of the Rome Statute for the first time. On 25 November 2009 he sought authorisation to initiate investigations into the post-election violence in Kenya, attaching a confidential list of 20 suspects who in his view bore the greatest responsibility for the crimes committed. Pursuant to article 15(3) of the ICC Statute, the prosecutor also invited victims of the violence to make representations to the Pre-Trial Chamber on whether there was a reasonable basis to open such an investigation.

This turn of events raises several important issues. In accordance with the principle of complementarity, the prosecutor will need to satisfy the Pre-Trial Chamber that the Kenyan government is either 'unwilling or unable genuinely to carry out the investigation or prosecution' of suspects. However, it can be argued that the Kenyan government has indicated its willingness to conduct the appropriate domestic investigations and prosecutions. It enacted the 2009 Truth Justice and Reconciliation Act, establishing a Truth, Justice and Reconciliation Commission that is expected to commence hearings in mid-2010; it enacted, in 2009, the International Crimes Act that defines crimes against humanity and other crimes under international law; and made three separate attempts to pass bills relating to the establishment of a Special Tribunal. It has also stated that in the event that the Special Tribunal is not created, the government would have the option to refer the matter to the prosecutor of the ICC for investigation. This, as in the case of Lubanga before the ICC, raises questions about the selective applicability of the principle of complementarity and the distinction between 'unwillingness' and 'inability'.

In the event that the Pre-Trial Chamber finds that there is a reasonable basis to initiate an investigation, the prosecutor will be reliant on the full co-operation of the Kenyan authorities, in particular the police. While the government has publicly underscored its intention to co-operate with the ICC, the Attorney-General's office is the formal point of contact for ICC investigators.

It is possible that international criminal prosecutions may do little to prevent future violence. Given that it is highly unlikely that the ICC will conclude all relevant prosecutions in the next two years, it has been

⁷⁶ Joint Statement on the Prosecution of Post-Election Violence Perpetrators, the Kenyan Section of the International Commission of Jurists (ICJ-Kenya) and the Federation of Women Lawyers (FIDA-Kenya), 9 August 2009.

argued that the impending general and presidential elections in 2012 may trigger further political tensions and foment violent acts between ethnic groups.⁷⁷ The post-electoral violence exhibited in 2007-2008 was a culmination of deep-rooted ethnic tensions in specific parts of the country, not sporadic acts of violence. This would indicate that additional transitional justice mechanisms are also required to deter and appease tensions and deter the commission of further crimes. However, it is not clear how effective these transitional measures, including prosecutions, will be in the absence of a meaningful political transition. The limitations in the International Crimes Act do not apply to crimes committed prior to January 2009, thus ruling out a large portion of the crimes examined in the Waki Report and the related responsibility of the alleged senior level perpetrators listed in the documents handed over to the ICC prosecutor. Furthermore, the International Crimes Act permits the Attorney-General, a political appointment, broad discretion to refuse to co-operate with the ICC, in effect granting him the capacity to limit the ability of the ICC to fully investigate. The 2008 Truth, Justice and Reconciliation Act, which established the Truth, Justice and Reconciliation Commission, is soon expected to commence its hearings. This raises issues of co-operation and whether these two mechanisms could in reality reinforce each other. In view of the many perpetrators who allegedly committed various serious crimes during this period but do not meet the requisite threshold to be tried before the ICC, there remains the fundamental question of whether they will be tried in the domestic sphere, with all the shortcomings contained in the Waki Commission's report, or whether a separate, more independent mechanism will be established.

Last seen labouring up Thika Road in Kenya, the back of a 'matatu' states '*Hague Siendi*', loosely translated as 'I am not going to The Hague'. This one phrase appears to aptly capture the mood on the ground. Only time will tell if it rings true.

10 The crime of piracy

Piracy, one of the oldest international crimes and until recently relegated to cinematic blockbusters courtesy of Hollywood, has raised interesting legal complexities and novel challenges to the practice of international criminal law in the East African region as a result of the increasing pirate attacks in the Gulf of Aden and the Somali Basin. The 1958 Convention on the High Seas and its successor, the 1982 UN Convention on the Law of the Sea (UNCLOS), codified the customary

⁷⁷ T Murithii *The spectre of impunity and the politics of the Special Tribunal in Kenya* (2009).

principle of universal jurisdiction over this crime⁷⁸ and embodied the principle that all states could prosecute suspected pirates.⁷⁹

The legal impact of the piracy epidemic in the region, representing about half of all maritime piracy incidents in 2009,⁸⁰ has been the subject of much debate, both in international and regional circles.

In the last two years, the current international legal regimes have appeared insufficiently robust to judicially address the growing problem of piracy. One of the means employed by the international community to address this limitation was the establishment of the Contact Group on Piracy off the Coast of Somalia by the Security Council in late 2008. Within this Contact Group, a working group was created to, *inter alia*, examine the legal complexities of prosecuting pirates. The Contact Group was also requested by the Security Council in its Resolution 1897 (2009) to explore possible additional mechanisms to bring pirates to justice. Simultaneously, in 2009 Denmark, the European Union, the United Kingdom and the United States also entered into bilateral agreements with the Republic of Kenya for the prosecution of pirates in Kenyan courts apprehended by their warships.⁸¹ By the end of 2009, Kenya had become the lead prosecutor of suspected pirates apprehended in the Gulf of Aden and the Somali Basin. Using modern legal instruments to prosecute a once-archaic crime presents its own challenges to this state. The zeal with which Kenya has pursued the prosecution of pirates contrasts with the challenges faced in trying to realise a special court for Kenya to try those suspected of committing crimes in the post-election period.

By virtue of the adoption of the Merchant Shipping Act (MSA), signed into law on 29 May 2009 and entering into effect on 1 September 2009, Kenya incorporated both the 1982 UN Convention on the Law

⁷⁸ Art 105 of UNCLOS states that 'On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.'

⁷⁹ Art 101 of UNCLOS defines piracy as '(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).'

⁸⁰ International Maritime Bureau. All reports of the IMB are accessible through the IMB Piracy Reporting Centre <http://www.icc-ccs.org> (accessed 31 March 2010).

⁸¹ In 2009, China and Canada were reported to be considering similar arrangements. See C Wanja 'Kenya-China to sign MOU on anti-piracy' 4 March 2009 <http://www.kbc.co.ke/story.asp?ID=55949> (accessed 31 March 2010); D Lett 'Canada asks Kenya to prosecute pirates: MacKay' 21 May 2009 <http://www2.canada.com/topics/news/story.html?id=1617277> (accessed 31 March 2010).

of the Sea and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) into its domestic law, effectively establishing its universal jurisdiction over piracy. While all challenges facing the prosecution of piracy in Kenya cannot be examined here, the adoption of this Act raises interesting jurisdictional questions. Although complimentary to the offence of piracy *jure gentium* found in section 69(1) as read with section 63(3) of the Kenyan Penal Code, interestingly the MSA attempts to reach beyond Kenya's obligations under UNCLOS and SUA and provides for jurisdiction over non-nationals apprehended by third parties on the high seas for the crime of piracy.⁸² It is interesting that Kenya took a decision to do so even though neither Convention requires states to establish jurisdiction over piracy on the high seas or in an Exclusive Economic Zone (EEZ). In addition, UNCLOS provides a discretionary power for pirates to be prosecuted and punished in the courts of the arresting state.⁸³

While Kenya could argue that under the relevant Security Council resolutions it is playing its part in combating piracy by providing a venue for prosecution, the broad expansion of Kenya's extra-territorial jurisdiction over those suspected of acts of piracy and armed robbery at sea and captured by third states may yet be challenged in Kenyan courts. In view of the extra-territorial nature of the MSA, it is also not clear whether piracy cases can continue to be tried in magistrate's courts which are only conferred with jurisdiction 'throughout Kenya'.⁸⁴ Section 4 of the 2007 Magistrate's Court Act allows magistrate's courts to exercise jurisdiction in criminal proceedings conferred on them by the Criminal Procedure Code or 'any other written law'. It is, however, possible that by virtue of Kenya's Constitution which provides that the High Court has 'unlimited original jurisdiction in civil and criminal matters',⁸⁵ this Court has the jurisdiction to prosecute non-national suspected pirates for extra-territorial acts of piracy committed on the high seas. The case of Hassan Mohamad Hassan in the magistrate's court prior to the enactment of the MSA illustrates the weaknesses in this argument and the reliance of the government on article 101 of UNCLOS as justification for Kenya's jurisdiction for the prosecution of non-Kenyan nationals outside Kenya's territorial jurisdiction.⁸⁶ In this

⁸² Merchant Shipping Act (2009) Part XVI sec 369. In contrast, under art 6(4) of SUA, territorial or at the very least a strong nexus is required for a state party to establish jurisdiction. This is mirrored in the United States Code, para 18.

⁸³ n 78 above.

⁸⁴ Magistrates Court Act, ch 10 (2007) sec 3(2).

⁸⁵ Sec 60 Kenya Constitution (2008).

⁸⁶ This was the first case of its kind in the Kenyan courts following the transfer of 10 suspected pirates to the Kenyan authorities for prosecution by the United States. *The Republic of Kenya v Hassan Mohamad Hassan & 9 Others* (2006) Criminal Case 434 of 2006 (Chief Magistrate Ct Kenya). See also *Hassan M Ahmed v Republic of Kenya* (2009) in the High Court of Kenya at Mombasa, Criminal Appeals 198, 199, 201, 203, 204, 205, 206 & 207 of 2006 of CM's Court at Mombasa (Justice F Azangalala) 12 May 2009.

appeal, the High Court held that in the event of the absence of jurisdiction under national legislation, the magistrate's court was 'bound to apply the provisions of [UNCLOS] should there have been deficiencies in the Penal Code and Criminal Procedure Code'.⁸⁷ The High Court went further and held that magistrate's courts were bound to invoke an international treaty to fill a statutory gap where Kenya had signed an international instrument which was yet to be domesticated, on the basis that Kenya is a member of the 'civilised world' and of the UN.⁸⁸ This purist interpretation of universal jurisdiction has thus far not attained much traction in either treaty law or state practice, which require at the very least territorial or nationality links.⁸⁹ It is also worth noting that those arrested and transferred into Kenyan custody prior to May 2009 have to be tried under the Penal Code due to the inapplicability of *ex post facto* laws, effectively creating a two-tier prosecutorial system for captured suspected pirates transferred to Kenya for trial.⁹⁰

As the number of suspected pirates being dropped off at Mombasa harbour increases at the same rate as the attacks in the region, the Kenyan Ministry of Foreign Affairs has repeatedly stated in the context of the Kenya-US Agreement that it will only take on a select number of cases.⁹¹ This is understandable considering the limited capacity of the Kenyan criminal judiciary to expeditiously try and incarcerate those convicted of piracy, a limitation magnified in light of the 'inadequate resources, inadequate remuneration of prosecutors, staff attrition, and placement of the police and the prosecutors under two separate authorities, preventing even the most basic institutional co-operation'.⁹²

In view of the hundreds of suspected pirates that have been apprehended on the high seas and released due to a myriad of legal and political considerations, alternative options proffered to avoid large-

⁸⁷ *Hassan* (n 86 above) 10-11.

⁸⁸ As above.

⁸⁹ See eg KC Randall 'Universal jurisdiction: National courts and the prosecution of serious crimes under international law' (2005) 99 *American Journal of International Law* 293 793 (book review) (arguing that '[p]iracy's mere occurrence on the high seas thus does not alone subject the offence to universal jurisdiction'); BS Brown 'The evolving concept of universal jurisdiction' (2001) 35 *New England Law Review* 383 392-393.

⁹⁰ Sec 77(4) of the Constitution of Kenya (1998) provides: 'No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for such a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.'

⁹¹ See 'Kenyan Foreign Minister shed light on US-Kenya piracy agreement' *Turkish Weekly* 28 January 2009 <http://www.turkishweekly.net/news/63755/kenyan-foreign-minister-shed-light-on-u-s-kenya-piracy-agreement-.html> (accessed 31 March 2010).

⁹² US Ambassador to Kenya 'Speech to the Kenya Chapter of the International Commission of Jurists' 6 December 2006 http://nairobiembassy.gov/speech_20061208.html (accessed 31 March 2010).

scale impunity have included the use of 'ship-riders' (traditionally used to combat drug trafficking and illegal fishing) to circumvent legal impediments to arresting pirates on shared waters. These officials would make use of existing functional criminal justice systems in the region to arrest and try pirates. Such a practical arrangement would, however, only offer short-term relief. In the search for a regional solution, certain states have proposed the establishment of a regional or international mechanism dedicated specifically to the trials of pirates.⁹³ These discussions continue bilaterally and in the Contact Group.

The recently-adopted laws, jurisdictional ambiguity, lack of capacity and difficulties in securing evidence and witnesses in combination present Herculean challenges in an environment where prosecutorial experience and guidance on the elements of the crime of piracy is embryonic. With over 100 piracy cases currently pending before its courts, the political implications considering the large Somali refugee and Muslim population in the country, and the lack of a viable alternative at this stage, Kenya is unlikely to remain comfortable in its newly-found role as the only recipient of suspected pirates.

11 Senegal – Hissène Habré

As previously noted, Senegal enacted several constitutional amendments in 2008 that removed all legal obstacles to prosecute Habré.⁹⁴ Now formally charged with crimes against humanity, war crimes and crimes of torture in Senegal, will former Chadian President Hissène Habré ever face justice in that country or in another?⁹⁵ While the vic-

⁹³ This position has been supported by the Dutch, Russia and Germany. See 'Verhagen: International problem of piracy demands international action' <http://www.netherlandsmission.org/article.asp?articleref=AR00000707EN> (accessed 31 March 2010).

⁹⁴ Senegal amended its Constitution (art 9) and Code of Criminal Procedure to allow retrospective prosecution of Habré. Para 3 in art 9 of the Constitution of Senegal now allows courts in Senegal to prosecute crimes committed in the past and in foreign states, mentioning genocide, war crimes and crimes against humanity. See Aptel & Mwangi (n 14 above).

⁹⁵ 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 AU to recommend 'the competent jurisdiction' for his trial. On 2 July 2006, the AU 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.

tims of his alleged crimes in Chad continue to seek justice,⁹⁶ Belgium is seeking his extradition to face criminal charges under its 'universal jurisdiction' law. In late 2008, Hissène Habré seized the Economic Community of West African States (ECOWAS) Court of Justice with a claim against Senegal for a violation of his fundamental rights; and he is also the common denominator in the cases against Senegal decided by the Committee Against Torture and currently before the International Court of Justice.⁹⁷

On 15 December 2009, Hissène Habré was again the centre of attention in the first-ever decision of the African Court on Human and Peoples' Rights.⁹⁸ This individual application was filed by Michelot Yogogombaye against the Republic of Senegal and requested that the Court prevent the government of Senegal from trying Hissène Habré for 'crimes against humanity, war crimes and acts of torture in the exercise of his duties as head of state'. The applicant argued that the proceedings would violate both the principle against non-retroactivity of laws and the principle of universal jurisdiction. In dismissing the case, the Court held that it lacked jurisdiction as Senegal had not made the requisite declaration under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights (African Court Protocol) granting individuals the opportunity to institute cases directly before the Court.

As stated by many legal scholars, the African Court appears to have squandered its first opportunity to commence its judicial career on an auspicious note.⁹⁹ It took almost 12 months to issue a 13-page decision on a relatively simple jurisdictional question, two-thirds of which was dedicated to facts and procedural matters. None of the interim orders referred to in the decision are available to provide scholars and

⁹⁶ In Chad, victims have filed criminal complaints against him for crimes of torture, murder, and 'disappearance' against former agents of his Directorate of Documentation and Security (DDS).

⁹⁷ Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), Request for the Indication of Provisional Measures, Order of 28 May 2009, ICJ General List 144.; UN Committee against Torture, 36th session 'Decision of the Committee against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' Communication 181/2001 Senegal (CAT/C/36/D/181/2001 (Jurisprudence)) 19 May 2006. See also Human Rights Watch 'Chronology of the Habré case' <http://www.hrw.org/fr/news/2009/02/12/chronology-habr-case> (accessed 31 March 2010).

⁹⁸ In the matter of *Michelot Yogogombaye v The Republic of Senegal* Application 001/2008, African Court on Human and Peoples' Rights, Judgment 15 December 2009.

⁹⁹ The case is instructive in its jurisdictional limitations over complaints brought by individuals or NGOs. For a case to be heard, the respondent state must give its consent. With only Malawi and Burkina Faso having filed the necessary declarations to this effect, it may be a while before the Court is provided with another opportunity to test its judicial muscle.

practitioners with an understanding of the case or the procedure, calling into question the transparency of the process.¹⁰⁰

It is also understandable why critics would hypothesise that the ‘aim of the application [was] certainly to put an end to the saga against Habré and to free Habré after years of house arrest’.¹⁰¹ Senegal has again stated in late 2009 that it will not commence the trial of Hissène Habré without the financial assistance of the international community.¹⁰²

12 Concluding remarks

This survey of some of the important developments that have taken place in 2009 highlights the growing relevance of international criminal jurisdictions and of the use of the principle of universal jurisdiction in Africa and for Africa, further to the release on April 2009 of the African Union–European Union Expert Report on the Principle of Universal Jurisdiction.¹⁰³

Africa continues to be at the forefront of the fight to end impunity against international crimes. The *ad hoc* tribunals established on the continent — ICTR and SCSL — are still recording significant successes and charting important jurisprudential developments, even as they face important challenges in their preparations to close down.

For the ICC, the year 2009 has been one of extremes. The Court has taken several steps forward, including the start of its first two trials, and the issuance of an arrest warrant against the serving head of state of the Sudan, President Omar Al-Bashir. Yet, the ICC has also been the subject of increased criticism and attempts to circumvent or even undermine it, in particular on the African continent. In concluding last year’s review, these authors, while lauding the efforts of the ICC to further accountability in Africa, expressed the hope that it would begin to cast its net further afield to other parts of the world. While the

¹⁰⁰ As above. See also CB Murungu ‘Judgment in the first case before the African Court on Human and Peoples’ Rights: A missed opportunity or mockery of international law in Africa?’ SSRN 21 December 2009 <http://ssrn.com/abstract=1526539> (accessed 31 March 2010).

¹⁰¹ R Adjovi ‘Questionable precedent: The first ruling by the African Court on Human and Peoples’ Rights’ *Jurist Commentary* 21 December 2009 <http://jurist.law.pitt.edu/forumy/2009/12/questionable-precedent-first-ruling-by.php> (accessed 31 March 2010).

¹⁰² J Terzief ‘African Rights Court’s disappointing first decision’ *World Politics Review* 21 December 2009 <http://www.worldpoliticsreview.com/blog/show/4848> (accessed 31 March 2010). In relation to constitutional amendments in Senegal that address immunity of former heads of state and retrospective prosecution of Habré, see also Aptel & Mwangi (n 14 above).

¹⁰³ The African Union–European Union Report on the Principle of Universal Jurisdiction, Council of European Union, 8671/1/09/Rev 1, Brussels, 16 April 2009. Joint meetings of the AU and the European Union were held in 2008, and a joint advisory technical group was established to advise the two regional organisations.

mandate of the ICC has a broad geographical scope, and considering that international crimes are being committed in many areas of the world, all the formal investigations and cases conducted thus far relate exclusively to crimes committed in Africa by Africans. To maintain its credibility it is imperative that the ICC begins to geographically expand its investigations.

The decision to explore whether to confer criminal jurisdiction to the African Court appears to be in direct contrast to the decision taken by the AU in 2008 when it rejected a similar recommendation when adopting the Statute of the African Court.¹⁰⁴ Even though this move would be coherent with articles 4(h) and 4(o) of the Constitutive Act of the AU, which reject impunity in respect of international crimes of genocide, war crimes and crimes against humanity, it is unclear whether the work of any regional courts would qualify under the complementarity regime established by the Rome Statute. It is clear that no role was anticipated in the Rome Statute for a supranational, regional court within the complementarity framework, which lays the responsibility for prosecuting these crimes squarely with criminal domestic systems.

The architecture of international criminal justice remains fragile, sparse and selective in its application. Therefore, it remains as important as ever that the fight against impunity and for accountability in Africa and beyond, be multi-faceted, and that it takes place at different levels, internationally and nationally. Justice should be done as close as possible to the victims, whenever possible. But if the mechanisms to further accountability at the local or national level fail or present risks for failure, it is critical that there exist viable international mechanisms to replace them. The frequent involvement of state structures in the commission of international crimes makes it unrealistic to accept that national criminal justice will always and fully sanction these crimes. This involvement also often directly explains the reluctance of states to fully support international criminal jurisdictions.

Credible sanctions against those violating the most basic and fundamental human norms and rights — whoever they are and whatever positions they hold — remain undeniably necessary for the advancement of these rights.

¹⁰⁴ See African Union *Summary Report of the Working Group on the Draft Single Instrument Relating to the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, UA/EXP/Fusion.Cours/Rpt.1.