

# Developments in international criminal justice in Africa during 2011

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## Summary

*Africa experienced seismic political shifts in 2011 that had a significant effect on the development of international criminal justice on the continent. The year 2011 saw the finalisation of several noteworthy cases before the International Criminal Tribunal for Rwanda and the conclusion of the case against Charles Taylor before the Special Court for Sierra Leone. The International Criminal Court was also in the spotlight, because of new events – the second referral by the Security Council of a head of state before the ICC; the transfer of the former head of state of Côte d'Ivoire to the ICC; as well as existing events – a co-operation request in the ICC situation in Kenya against the background of an upcoming general election; the ongoing proceedings in the situation in the Democratic Republic of Congo and continuing complexities in the situation in Darfur. The article reviews the developments in these courts as well as the international community's response aimed at combating piracy off the coast of Somalia.*

## 1 Introduction

In this review of the developments in international criminal justice in Africa during 2011, we address the implementation of international

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criminal law against a backdrop of dramatic political upheavals, particularly evident in the investigations of the prosecutor of the International Criminal Court (ICC). Although there was no progress in the cases before the ICC concerning the situation in Uganda, there were marked judicial developments in the situations in the Democratic Republic of the Congo (DRC) and Kenya. The article also examines the ongoing complexities surrounding the prosecution of President Omar Hassan Ahmad Al Bashir, as well as the two new situations before the ICC, concerning Libya and Côte d'Ivoire.

After over three years, 2011 also marked the historic conclusion of the trial against Charles Taylor before the Special Court for Sierra Leone (SCSL). The review of the SCSL examines some of the salient elements of the defence's final arguments in the case, as well as issues related to the SCSL's residual mechanism.

The review of the International Criminal Tribunal for Rwanda (ICTR) examines the jurisprudence in significant cases recently completed before the ICTR, as well as the groundbreaking developments in the prosecution's repeated requests for transfer of cases to Rwanda under Rule 11*bis*. This article touches on developments in the international community's continued fight against piracy.

## 2 Rwanda

In Resolution 1966 (2010), the United Nations (UN) Security Council requested that the ICTR make every effort to complete all its cases by the end of 2014.<sup>1</sup> The ICTR made considerable progress in 2011 by delivering six appeal judgments<sup>2</sup> and completing six trials: four lengthy and complex multi-accused cases – the *Government II*, *Military II*, *Karemera and Others*, and *Butare* cases,<sup>3</sup> and two single-accused cases – *Gatete* and *Ndahimana*.<sup>4</sup> In accordance with article 2 of the Transitional Arrangements for the ICTR and the Residual Mechanism, any cases in which the notice of appeal is filed before 1 July 2012 are

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1 Security Council Resolution 1966 (2010) adopted on 22 December 2010.

2 *Théoneste Bagosora & Others v The Prosecutor* Case ICTR-98-41-A; *The Prosecutor v Yussuf Munyakazi* Case ICTR-97-36A-A; *Tharcisse Muvunyi v The Prosecutor* Case ICTR-2000-55A-A; *Dominique Ntawukuliyayo v The Prosecutor* Case ICTR-05-82-A; *Tharcisse Renzaho v The Prosecutor* Case ICTR-97-31-A; *Ephrem Setako v The Prosecutor* Case ICTR-04-81-A.

3 *The Prosecutor v Casimir Bizimungu & Others* Case ICTR-99-50-T (*Government II*); *The Prosecutor v Ndindiliyimana & Others* Case ICTR-00-56-T (*Military II*); *The Prosecutor v Édouard Karemera & Others* Case ICTR-98-44-T (*Karemera*); *The Prosecutor v Pauline Nyiramasuhuko & Others* Case ICTR-98-42-T (*Butare*).

4 *The Prosecutor v Jean-Baptiste Gatete* Case ICTR-2000-61-T; and *The Prosecutor v Gregoire Ndahimana* Case ICTR-2001-68-T.

to be heard by the ICTR, and any appeals filed after that date are to be heard by the Residual Mechanism.<sup>5</sup>

As of 31 December 2011 there were three trials in progress, one case awaiting trial, and seven cases on appeal. The ICTR had thus far completed trials involving 73 accused and appeals involving 41 persons, referred three cases to national jurisdictions, acquitted 10 persons, and released seven persons who had served their sentences.<sup>6</sup> There remain nine fugitives – Bernard Munyagishari having been arrested in the DRC in May 2011. Three of the nine fugitives, who are considered senior-level fugitives, will be tried by the Residual Mechanism.<sup>7</sup> The prosecution seeks to preserve evidence for the trials of these fugitives through Rule 71*bis* proceedings, to ensure that future cases do not fail due to the death of witnesses, memory loss, or the destruction of evidence.<sup>8</sup> The other six fugitives may be tried in a national jurisdiction upon referral by the ICTR or by the Residual Mechanism.<sup>9</sup> By the end of 2011 there were three pending applications for the referral of cases to Rwanda.<sup>10</sup>

Further, in 2011, the ICTR acquitted and ordered the immediate release of Casimir Bizimungu (a former Minister of Health) and Jerome-Clement Bicamumpaka (a former Minister of Foreign Affairs),<sup>11</sup> bringing the total number of acquitted persons to 10.

In December 2011, the General Assembly elected 25 judges to the roster of judges of the Residual Mechanism.<sup>12</sup> Many are former or serving ICTR/ICTY judges, greatly enhancing the maintenance of

5 Art 2 of the Transitional Arrangements, Annex 2 to Security Council Resolution 1966 (2010), (Transitional Arrangements).

6 See ICTR Status of Cases, <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx> (accessed 30 April 2011).

7 Art 1 of the Statute of the International Residual Mechanism for Criminal Tribunals, annex to Security Council Resolution 1966 (2010). The three fugitives are Felicien Kabuga, Protais Mpiranya and Augustin Bizimana.

8 Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, S/2011/731 (16 November 2011) (Completion Strategy Report) paras 19-21. In these closed-session proceedings, both the Prosecutor and lawyers for the fugitives present evidence so that it may be entered into the court record and preserved for use when the fugitives are arrested and tried. This is an innovative approach in international criminal justice.

9 Art 1 Transitional Arrangements.

10 *The Prosecutor v Bernard Munyagishari* Case ICTR-05-89-R11*bis*, Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence, *The Prosecutor v Fulgence Kayishema* Case ICTR-01-67-R11*bis*, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence and *The Prosecutor v Charles Sikubwabo* Case ICTR-95-1D-R11*bis*, Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence.

11 *Government II* (n 3 above).

12 Ten of the judges are from Africa.

jurisprudential and institutional knowledge and continuity.<sup>13</sup> With the ICTR branch of the Residual Mechanism scheduled to commence operations on 1 July 2012, we look forward to seeing how the different challenges identified in the review of the developments in international criminal law in Africa during 2010 will be addressed by the ICTR, the Residual Mechanism and their parent body, the Security Council.<sup>14</sup>

## 2.1 Judicial developments

During 2011, the ICTR issued judgments in four major cases concerning senior members of the Rwandan government, political and military establishments.<sup>15</sup> In each of the cases, the Trial Chambers addressed charges of conspiracy to commit genocide and complicity in the genocide. Interestingly, in all four cases, the prosecution failed to demonstrate that a conspiracy to commit genocide existed prior to April 1994. Specifically, in *Government II*, the Trial Chamber held that the evidence was equivocal as to whether a genocidal plan existed, or was necessarily complete among members of the interim government when it was formed on 9 April 1994.<sup>16</sup> The prosecution struggled to meet the threshold mainly because it relied on circumstantial evidence which was open to inferences that were not consistent with a finding of a conspiracy to commit genocide against the Tutsi before April 1994.<sup>17</sup> Indeed, in *Karemera*, the Trial Chamber considered it reasonable to infer that the large-scale attacks on Tutsis began on 7 April 1994, possibly as a reaction to the assassination of President Habyarimana.<sup>18</sup>

However, the Trial Chambers made different findings as regards events after the assassination of the President, indicating that the

13 Art 7 of the Transitional Arrangements permits the president, judges, prosecutor, registrar and staff of the Residual Mechanism to work simultaneously as president, judge, prosecutor, registrar or staff, respectively, of the ICTR or ICTY.

14 See W Mwangi 'Developments in international criminal justice in Africa during 2010' (2011) 11 *African Human Rights Law Journal* 251-254-258.

15 In *Government II* (n 3 above), four members of the interim government, Casper Bizimungu (Minister of Health), Justin Mugenzi (Minister of Trade and Industry), Jérôme Bicamumpaka (Minister of Foreign Affairs) and Prosper Mugiraneza (Minister of Civil Service); in *Military II* (n 3 above), Augustin Ndindiliyimana (former Chief Staff of the *Gendarmerie nationale*), Augustin Bizimungu (former Chief of Staff of the Rwandan army), Francois-Xavier Nzuwonemeye (Commander of the Reconnaissance battalion (RECCE) of the Rwandan army during the events of 1994), and Innocent Sagahutu (the Commander of Squadron A of RECCE battalion); in *Karemera* (n 3 above), Edouard Karemera (First Vice-President of the MRND (*le Mouvement Révolutionnaire National pour le Développement*), member of the MRND Executive Bureau and Minister of the Interior and Communal Development for the interim government) and Matthieu Ndirumpatse (Chairperson of the MRND National Party and of the MRND Executive Bureau); and in *Butare* (n 3 above), Pauline Nyiramasuhuko (Minister of Women's Development).

16 *Government II* (n 3 above) paras 811-814.

17 *Military II* (n 3 above) paras 5 & 241-245.

18 *Karemera* (n 3 above) para 1448.

massacres were planned, organised and co-ordinated. For example, in *Butare*, the Chamber found that Nyiramasuhuko, the only female accused at the ICTR, entered into an agreement with members of the interim government on or after 9 April 1994 to kill Tutsis within Butare *préfecture* with the intent to destroy in whole or in part the Tutsi ethnic group.<sup>19</sup> Mugenzi and Mugiraneza were also found liable in *Government II* for conspiracy to commit genocide and for direct and public incitement to commit genocide based on their participation in a public meeting in Butare, where President Sindikubwabo made an inflammatory speech and incited the killing of Tutsis.<sup>20</sup> In *Karempera*, the Trial Chamber held that a Joint Criminal Enterprise (JCE) materialised on 11 April 1994 and was composed of: political leaders, including Karempera and Ngirumpatse, persons of authority within the military, the *Interahamwe*, and the territorial administration, and influential businessmen, including Felicien Kabuga. The Trial Chamber was convinced that the common purpose was the destruction of the Tutsi population in Rwanda.<sup>21</sup> However, not every member of the interim government was found guilty of participating in the conspiracy. In *Government II*, the Chamber acquitted Bizimungu and Bicomupaka on all counts, not having found any allegations proven against them.<sup>22</sup>

The trial judgments delivered in 2011 have also enriched the ICTR jurisprudence on sexual offences as crimes against humanity. Of particular note is *Karempera*, in which the Trial Chamber found that the rape and sexual assault of Tutsi women and girls by soldiers, *gendarmes* and militiamen, including the *Mouvement républicain national pour la démocratie et le développement* (MNRD) *Interahamwe*, was a natural and foreseeable consequence of a JCE to destroy the Tutsi ethnicity. Karempera and Ngirumpatse incurred liability in the extended form of the JCE for the rapes and sexual assaults committed after 18 April 1994 by the *Interahamwe*, soldiers and others. The fact that the perpetrators of the rapes and sexual assaults were not members of the JCE was irrelevant as it was foreseeable that these non-members would commit the rapes and sexual attacks as part of the destruction of the Tutsi population in Rwanda, which was the common purpose of the JCE. The Trial Chamber found that Karempera and Ngirumpatse were aware that the rapes and sexual assaults were possible consequences of the implementation of the JCE and they willingly took the risk that

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19 *Butare* (n 3 above) paras 5676-5678.

20 *Government II* (n 3 above) paras 1936-1947 & 1976-1987.

21 *Karempera* (n 3 above) paras 1453-1458.

22 *Government II* (n 3 above) paras 1948 & 1963.

they would be committed.<sup>23</sup> In *Butare*, Nyiramasuhuko and her son Ntahobali were found guilty of rape as a crime against humanity.<sup>24</sup> They both bore superior responsibility for rapes committed by the *Interahamwe*. In addition, Ntahobali bore responsibility as a principal perpetrator for raping a Tutsi girl and Tutsi women, for ordering *Interahamwe* to commit rapes, and also for aiding and abetting rapes.<sup>25</sup> Finally, in *Military II*, the Trial Chamber convicted Bizimungu of rape as a crime against humanity and rape as a violation of article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>26</sup>

At the appellate level, in *Bagosora*, the ICTR Appeals Chamber reversed some of Colonel Théoneste Bagosora's convictions and, as a result, reduced his sentence from life imprisonment to 35 years' imprisonment.<sup>27</sup> Being *directeur de cabinet* in the Ministry of Defence, Colonel Bagosora was the most senior official after the Minister in the Rwandan Ministry of Defence. In fact, he was in charge of the Ministry between 6 and 9 April 1994 when Augustin Bizimana, the Minister of Defence, was on an official mission in Cameroon. Colonel Bagosora was generally perceived to have been the mastermind of the genocide, and is reported to have said a few years earlier that he was planning the apocalypse. It is quite ironic that the person considered the chief villain by many will end up serving a shorter sentence than other less infamous and notorious persons convicted by the ICTR.

## 2.2 Referrals

After numerous unsuccessful attempts, the ICTR granted the prosecution its request to refer the case of Jean-Bosco Uwinkindi for trial in Rwanda under Rule 11*bis* of the ICTR Rules of Procedure and Evidence.<sup>28</sup> Only two cases had been transferred to a national

23 *Karemera* (n 3 above) paras 1474-1490. The Trial Chamber reasoned that during a campaign to destroy, in whole or in part, a national, ethnic, racial, or religious group, a natural and foreseeable consequence of that campaign will be that soldiers and militias who participate in the destruction will resort to rapes and sexual assaults unless restricted by their superiors.

24 *Butare* (n 3 above) paras 6093-6094.

25 *Butare* (n 3 above) para 6086. In general, see paras 6074-6094.

26 *Military II* (n 3 above) paras 67 & 2159-2161.

27 Similarly, the Appeals Chamber reversed some of Nsengiyumva's convictions and reduced his sentence from life to 15 years' imprisonment.

28 *The Prosecutor v Jean Bosco Uwinkindi* Case ICTR-2001-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (*Uwinkindi Referral Decision*) and *Uwinkindi v The Prosecutor* Case ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions (*Uwinkindi Referral Appeal Decision*). The cases that the prosecution was unable to transfer to Rwanda under Rule 11*bis* are *The Prosecutor v Yussuf Munyakazi* Case ICTR-97-36-R11*bis* (*Munyakazi Referral*); *The Prosecutor v Jean-Baptiste Gatete* Case ICTR-00-61-R11*bis* (*Gatete Referral*); *The Prosecutor v Idelphonse Hategekimana* Case ICTR-00-55-R11*bis* (*Hategekimana Referral*); *The Prosecutor v Gaspard Kanyarukiga* Case ICTR-02-78-R11*bis* (*Kanyarukiga Referral*); and *The Prosecutor v Clement*

jurisdiction since 2004 and this is the first time that the ICTR has referred a case to Rwanda and to an African country.<sup>29</sup> This referral decision provides helpful guidance as regards the necessary criteria that states must fulfil to receive referral cases from the ICTR.

The *Uwinkindi* Referral Decision sets out the reasons for the ICTR's change of heart, namely, (i) the fact that Rwanda's laws on sentencing are now consistent with the ICTR's rules on sentencing;<sup>30</sup> (ii) Rwandan judges are sufficiently qualified and experienced to handle referred cases and international or non-Rwandan judges will be able to participate in the adjudication of the referred cases;<sup>31</sup> (iii) Rwanda has improved its witness protection programme, including the creation of an additional witness protection unit under the auspices of the judiciary for transferred cases;<sup>32</sup> (iv) testimony may be given via deposition in Rwanda, via video link before a judge at trial or in a foreign jurisdiction, or via a judge sitting in a foreign jurisdiction;<sup>33</sup> and (v) the availability of competent Rwandan lawyers and government-funded legal aid, as well as the possibility of support from international non-governmental organisations (NGOs).<sup>34</sup>

Although the referral decision signifies confidence in Rwanda's ability to conduct fair trials, there are credible concerns, some of which were acknowledged by the ICTR Referral Chamber. For instance, the Referral Chamber accepted that there has been harassment, threats and the arrest of lawyers for accused charged with genocide.<sup>35</sup> It is also implicit in the *Uwinkindi* Referral Decision that there are concerns about the expansive interpretation and application of Rwanda's law on genocidal ideology, which could have a chilling effect on defence lawyers and witnesses, as they may be afraid of being prosecuted for pursuing a line of defence or giving testimony that goes against the accepted narrative of the genocide.<sup>36</sup> Further, the Referral Chamber noted that the new witness protection unit, created specifically for

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*Kayishema* Case ICTR-95-01-R11bis (*Kayishema Referral*).

29 *The Prosecutor v Wenceslas Munyeshyaka* Case ICTR-05-87-R11bis, Decision on Prosecutor's Request for Referral of *Wenceslas Munyeshyaka's* Indictment to France and *The Prosecutor v Laurent Bucyibaruta* Case ICTR-05-81-R11bis, Decision on Prosecutor's Request for Referral of *Laurent Bucyibaruta's* Indictment to France. The referral of the case of *The Prosecutor v Michel Bagaragaza* Case ICTR-05-86-R11bis was revoked at the request of the Prosecutor due to jurisdictional concerns. For a previous discussion on referrals, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 274 287.

30 *Uwinkindi Referral* Decision (n 28 above) paras 49 & 51.

31 Paras 177-196.

32 Paras 128-132.

33 Paras 109-110.

34 Paras 136-146.

35 Paras 159-160.

36 Paras 95-96.



referred cases, had not yet been tested, and so its effectiveness could not be evaluated.<sup>37</sup> The *Uwinkindi* Referral Decision offers Rwanda an opportunity to show that the improvements it has made to its judicial and correctional system will be effective in practice, and that it is able to deal with the above concerns satisfactorily if they should materialise during the proceedings.

Pursuant to Rule 11*bis*, the Referral Chamber decided that the African Commission on Human and Peoples' Rights (African Commission) should monitor the proceedings of the transferred case in Rwanda. In addition to setting out monitoring guidelines for the African Commission, the Referral Chamber requested Rwanda to facilitate effective monitoring of not only the proceedings but also detention conditions.<sup>38</sup> The choice of the African Commission is not entirely surprising in light of previous referral decisions, whereby the ICTR held that the African Commission had the necessary 'qualifications' to monitor trials.<sup>39</sup> The African Commission's involvement demonstrates one of the roles that African regional organisations may play in advancing international criminal justice on the continent.

The African Commission or the accused may request the revocation of a referral or other remedial measures if they consider that there is a material violation of the rights of the accused. While an application for revocation, if granted, in itself would not stay the proceedings in Rwanda, Rwanda would be obliged to return the case to the ICTR or the Residual Mechanism.<sup>40</sup> Surprisingly, however, without basis in either the Statute of the ICTR or that of the Residual Mechanism, the Referral Chamber stated that it would only consider revocation as a remedy of last resort, because revoking a referral and restarting the proceedings elsewhere would affect the accused's right to an expeditious trial.<sup>41</sup> Although raised on appeal, the Appeals Chamber chose not to address the question.<sup>42</sup> While the right to an expeditious trial is a fundamental

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37 Para 131.

38 Paras 209 & 212-213. The Appeals Chamber strengthened the monitoring system by instructing the African Commission to submit monthly reports (instead of reporting every three months as requested by the Referral Chamber) and clarifying that the accused shall have access to the monitoring reports unless the President of the ICTR or the Residual Mechanism determines that there is good cause to limit such access: *Uwinkindi* Referral Appeal Decision (n 28 above) paras 52 & 85.

39 *Munyakazi Referral*, Decision on the Prosecutor's Appeal Against Decision on Referral under Rule 11*bis*, 8 October 2008, para 30; *Kanyarukiga Referral*, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11*bis*, 30 October 2008, para 38; *Hategekimana Referral*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis* (AC), 4 December 2008, para 29.

40 Rwanda would be under an obligation to comply with a request to defer to the ICTR or the Residual Mechanism, pursuant to art 28 of the ICTR Statute and art 28 of the Statute of the Mechanism, respectively.

41 *Uwinkindi* Referral Decision (n 28 above) para 217.

42 *Uwinkindi* Referral Appeal Decision (n 28 above) para 81.



one, it should not be the only consideration in the determination of whether a case should be revoked. If other equally important fair trial guarantees are not met, it would surely be unreasonable to decline revocation solely on the grounds of protecting the right to an expeditious trial.

Of related interest is the extradition case from Sweden, currently before the European Court of Human Rights.<sup>43</sup> Sylvere Ahorugeze, a former head of the Rwandan Civil Aviation Authority, left Rwanda in 1994 and settled in Denmark. He was arrested in Sweden in 2008 in compliance with an international arrest warrant issued by the Rwandan government, according to which he was charged with genocide, complicity in genocide, conspiracy to commit genocide, murder, extermination, and formation, membership, leadership and participation in an association of a criminal gang, whose purpose and existence were to do harm to people or their property. The Swedish government decided to extradite him following a Supreme Court decision that there were no impediments to the extradition under Swedish law. Ahorugeze appealed to the European Court on 15 July 2009, claiming that his extradition to Rwanda would violate article 3 (torture and inhumane treatment) and article 6 (fair trial guarantees) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). On 27 October 2011, the European Court held that there were no substantive grounds for believing that Ahorugeze faced a real risk of torture or inhuman or degrading treatment and punishment. It also found that he would not face a real risk of a flagrant denial of justice, that is, of a trial that is manifestly contrary to the fair trial guarantees in article 6 of the European Convention. In its decision, the European Court considered ICTR referral cases and specifically stated that the referral decision had to be given considerable weight.<sup>44</sup> The matter is now pending before the Grand Chamber of the European Court. The *Ahorugeze* judgment clearly illustrates that the *Uwinkindi* Referral Decision has already begun to soften previous reluctance to extradite suspects to Rwanda.

### 2.3 Acquitted persons

Five of the ICTR acquitted persons remain under the protection of the ICTR in Tanzania. They are unable to return to Rwanda because of personal security reasons, and the states in which their families reside are reluctant to grant them entry. There are no mechanisms or procedures under the ICTR Statute that would enable the Tribunal to compel any state to accept acquitted persons, or persons who have completed serving their sentences – even in cases of family reunification. Moreover, acquitted persons and persons who have

<sup>43</sup> *Ahorugeze v Sweden* 37075/09 ECHR (27 October 2011) (*Ahorugeze* judgment).

<sup>44</sup> *Ahorugeze* judgment (n 43 above) para 127.

completed serving their sentences currently are not considered refugees under the Convention Relating to the Status of Refugees of 1951 (1951 Refugee Convention). Article 1F of the 1951 Refugee Convention excludes from the Convention's protection any person in respect of whom there are serious concerns for considering that he or she committed a crime against the peace, a war crime, or a crime against humanity. A literal interpretation suggests that a person who has been acquitted still has to meet the other requirements for refugee status under the Convention, and may be excluded under article 1F in relation to crimes that were not covered by the indictment and subsequent acquittal. This is a real possibility for persons acquitted by the ICTR because they could be subject to other charges in Rwanda.

The problem will become increasingly acute when the ICTR closes because the Residual Mechanism will have neither the capacity nor the political weight to advocate effectively for the relocation of such persons. In 2011, the ICTR President raised this matter before the General Assembly and the Security Council<sup>45</sup> and called upon the Security Council to find a sustainable solution.<sup>46</sup> As the clock ticks, one possible solution could be the UN High Commission for Refugees revisiting its guidelines on the interpretation and application of the exclusion clauses under article 1F of the 1951 Refugee Convention, which currently appear not to address persons acquitted by international criminal tribunals. By failing to find a solution to this issue, the international community has relegated those acquitted and those who have completed their sentences to *de facto* imprisonment, in violation of those individuals' rights to family, privacy and freedom of movement.<sup>47</sup>

### 3 Sierra Leone

#### 3.1 Charles Taylor case

In 2011, the lack of a Hollywood drama (that was exhibited in 2010) was compensated for when the SCSL achieved one of its most significant milestones: the conclusion on 11 March 2011 of the case against Charles Taylor after three and a half years, 115 witnesses, and

45 Annual Report of the International Criminal Tribunal for Rwanda, A/66/209-S/2011/472 (29 July 2011) para 54.

46 Completion Strategy Report, para 67.

47 W Mwangi 'The International Criminal Tribunal for Rwanda: Reconciling the acquitted' in CL Srivam & S Pillay (eds) *Peace vs justice: The dilemmas of transitional justice in Africa* (2010).

approximately 1 110 exhibits. This marked the end of the first-ever trial of a former African head of state by an international court.<sup>48</sup>

One of the theories that the defence espoused from the very beginning of the case was that Taylor's prosecution was politically motivated. In its opening statement, the defence stated that Taylor had been indicted and arrested only because of the interests of, and pressure by, the US government.<sup>49</sup> Two months before closing arguments, the defence successfully persuaded the Court to admit into evidence two confidential and classified US cables leaked by Wikileaks,<sup>50</sup> which it claimed supported the theory that the prosecution of Taylor was politically motivated and deliberately designed to keep him out of West Africa.<sup>51</sup> Inevitably, the defence reiterated this theory in their closing arguments, asserting that the prosecution had turned the case into a twenty-first century form of neo-colonialism and that the trial was an abuse of legal process to achieve a predetermined end, namely, the conviction of Taylor and his lengthy imprisonment.<sup>52</sup> The defence further submitted that<sup>53</sup>

tribunals which are but an instrument of diplomacy in the hands of powerful states are, in fact, not administering law at all but, instead, providing spurious cover for their paymasters, thereby prostituting the legal process.

Not surprisingly, the presiding judge and the prosecution challenged the defence's submissions, and the Trial Chamber's views on these pronouncements may well feature in the final written judgment.<sup>54</sup>

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<sup>48</sup> *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T (*Taylor*). The trial judgment was delivered on 26 April 2012. Taylor was found guilty of planning, aiding and abetting the commission of war crimes and crimes against humanity, <http://www.sc-sl.org/LinkClick.aspx?fileticket=86r0nQUtK08%3d&tabid=53> (accessed 30 April 2012). At the time of writing, the full written judgment had not yet been issued. The judgment will be reviewed in the next update. Apart from the Taylor trial, the only other judicial proceedings at the Special Court concerned contempt of court charges against five people accused of interfering with prosecution witnesses. The contempt of court proceedings will take place in 2012.

<sup>49</sup> *Taylor* Defence Opening Statement 24290-24294 & 24318-24319.

<sup>50</sup> *Taylor*, Decision on the Urgent and Public with Annexes A-C Defence Motion to re-open its case in order to seek admission of documents relating to the relationship between the United States government and the Prosecution of Charles Taylor, 27 January 2011. The cables, dated 10 March 2009 and 15 April 2009, were published respectively at <http://www.guardian.co.uk/world/us-embassy-cables-documents/196077> and <http://www.guardian.co.uk/world/us-embassy-cables-documents/202468>.

<sup>51</sup> *Taylor*, Defence Motion to re-open its case in order to seek admission of documents relating to the relationship between the United States government and the prosecution of Charles Taylor, 10 January 2011, 3. The defence argued that the indictment and trial of Mr Taylor was an extension of the US foreign policy interests in West Africa.

<sup>52</sup> *Taylor*, Trial Transcript, 9 March 2011 490389-490390.

<sup>53</sup> *Taylor* (n 52 above) 490396.

<sup>54</sup> *Taylor*, Trial Transcript, 11 March 2011 49572-49573.

Attempts to question the impartiality of the Special Court have been dismissed in previous cases, and rightly so.<sup>55</sup> International criminal courts certainly have political elements. This is because they emanate from political decisions by states (expressed through either treaties or Security Council resolutions), they are funded by states (either by voluntary contributions or through the UN-assessed contributions), and their management is subject to the oversight of states (through the Management Committee in the case of the Special Court, the General Assembly and the Security Council in the case of the ICTY and ICTR, and the Assembly of States Parties in the case of the ICC). However, despite these political aspects, international criminal tribunals remain independent and impartial in the exercise of their judicial functions.

### 3.2 Residual mechanism

Upon conclusion of the Taylor trial, the SCSL will be replaced by a small Residual Special Court for Sierra Leone (RSCSL) established by an agreement between the UN and the government of Sierra Leone, which was ratified by the Sierra Leone Parliament in December 2011.<sup>56</sup> The RSCSL will have the same jurisdiction as the SCSL, and will continue the functions, rights and obligations of the SCSL.<sup>57</sup> Thus, the RSCSL will have the power to prosecute the only remaining fugitive, Johnny Paul Koroma, or to refer his case to a competent national jurisdiction. Even though Koroma is believed to be deceased, it was essential to make provision for a possible trial or referral of his case in order to avoid any impunity should he turn up alive after the closure of the SCSL.<sup>58</sup>

The RSCSL will initially be based in The Hague, with a small sub-office in Freetown, mainly for witness protection.<sup>59</sup> This will enable co-location with the archives of the SCSL, which are currently housed in the Dutch National Archives together with the archives of the International Military Tribunal at Nuremburg. Copies of all the public records will be accessible to the public, in print form and electronically, at the Peace Museum which is being established on part of the SCSL site. It is expected that the original archives will be returned to Sierra

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55 *Prosecutor v Norman* SCSL-04-14-AR72(E)-34, Decision on Preliminary Motion based on Lack of Jurisdiction 13 March 2004, and *Prosecutor v Sesay & Others* SCSL-04-15-T-363, Decision on Sesay – Motion Seeking Disclosure of the Relationship Between Government Agencies of the United States of America and the Office of the Prosecutor 2 May 2005.

56 Art 1(1) of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone (RSCSL Agreement). The Statute of the Residual Special Court for Sierra Leone is annexed to and forms part of the Agreement.

57 Art 1(2) RSCSL Agreement.

58 Arts 1 & 7 RSCSL Statute.

59 Art 6 RSCSL Agreement.

Leone when there is a suitable facility for the long-term preservation and security of the archives.<sup>60</sup>

## 4 International Criminal Court

### 4.1 General comments

As of December 2011, the ICC was conducting investigations and prosecutions in seven situations: three situations referred to the ICC by the states themselves – Uganda, the DRC and the Central African Republic; the situations in Libya and in Darfur, Sudan, referred to the ICC by the UN Security Council; and the situations in Kenya and Côte d'Ivoire, where the prosecutor *proprio motu* sought and was granted authorisation to initiate investigations concerning crimes against humanity. In addition, the ICC was conducting preliminary examinations in, amongst others, Guinea and Nigeria.<sup>61</sup> In the above situations, the prosecutor has brought charges against 23 individuals. There remain outstanding arrest warrants in the situations in Uganda, DRC, Sudan and Libya. By the end of 2011, there was no judicial activity in the situation in Uganda<sup>62</sup> and the prosecution continued to present its case in the case against Jean-Pierre Bemba Gombo in the situation in Central African Republic.<sup>63</sup>

### 4.2 Democratic Republic of the Congo

In 2011 in respect of the situation in the DRC, there were three active cases. The presentation of evidence in the case against Thomas Lubanga Dyilo was concluded,<sup>64</sup> the defence in the case against Germain Katanga and Mathieu Ngudjolo Chui commenced<sup>65</sup> and Callixte Mburashimana was transferred to The Hague where proceedings commenced against him. Bosco Ntanganda remains a fugitive.<sup>66</sup>

The case against Mburashimana never promised to be a conventional one, and this is starkly demonstrated in the Confirmation of

<sup>60</sup> Art 7(3) RSCSL Agreement.

<sup>61</sup> See, in general, UN General Assembly, 66th session Report of the International Criminal Court to the United Nations for 2009/10 19 August 2011 (A/66/309).

<sup>62</sup> ICC-02/04.

<sup>63</sup> ICC-01/05.

<sup>64</sup> The judgment in the *Lubanga* case was issued on 14 March 2012. A chronological analysis of the case and the judgment will therefore be examined in 2013.

<sup>65</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07).

<sup>66</sup> *The Prosecutor v Bosco Ntanganda* (ICC-01/04-02/06).

Charges Decision analysed below.<sup>67</sup> On 4 January 2011, pursuant to article 627-10 of the French Code of Criminal Procedure, the French Court of Cassation authorised the surrender of Mburushimana to the ICC.<sup>68</sup> Mburushimana was charged under article 25(3)(d) of the Rome Statute as criminally responsible for five counts of crimes against humanity (rape, murder, torture, inhumane acts and persecution) and eight counts of war crimes (attacks against the civilian population, murder, mutilation, torture, rape, inhuman treatment, destruction of property and pillaging). In accordance with the Document Containing the Charges (DCC), the prosecution alleged that Mbarushimana was associated with the *Forces Démocratiques de Libération du Rwanda* (FDLR) in the DRC, a rebel group believed to be seeking to oppose the Rwandan government. Mbarushimana was considered the highest-ranking member of the FDLR as of 2010 and therefore responsible in part for the implementation of the strategy of bringing attention to the FDLR's claims by attacking civilian populations in the Kivu region in the DRC.<sup>69</sup> Mbarushimana was transferred to the ICC from France on 25 January 2011 and made his initial appearance before the ICC Pre-Trial Chamber on 28 January 2011.

In the lead-up to the Mburushimana Confirmation of Charges Decision, the Pre-Trial Chamber also examined the question of the identification of 72 'potentially privileged' documents seized at Mbarushimana's premises in France, within the meaning of rule 73(1) of the ICC Rules of Procedure and Evidence (Rules), Mbarushimana's repeated requests for interim release and his challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute.<sup>70</sup> The Pre-Trial Chamber

67 See Mwangi (n 14 above) 265; 'ICTR/Mbarushimana – File of former UN official suspected of genocide transferred to Rwanda' *Hirondelle* 9 March 2005 <http://www.hirondellenews.com/content/view/2119/1182/> (accessed 31 March 2011); and Radio Netherlands Worldwide International Justice Tribune Archive: Proceedings in Kosovo of 1 June 2001 [http://www.rnw.nl/international-justice/article/proceedings-kosovo?quicktabs\\_1=0](http://www.rnw.nl/international-justice/article/proceedings-kosovo?quicktabs_1=0) (accessed 2 March 2012). See also United Nations Administrative Tribunal Judgment 1192 (*Mbarushimana*) of 30 September 2004.

68 Information from the French authorities in relation to the surrender of Callixte Mbarushimana, *Mbarushimana* (ICC-01/04-01/10-34) 14 January 2011.

69 Decision on the Confirmation of Charges, *Mbarushimana* (ICC-01/04-01/10-465-Red), Pre-Trial Chamber I, 16 December 2011 (*Mbarushimana Confirmation of Charges Decision*) paras 2-5.

70 See Decision on the Defence Challenge to the Jurisdiction of the Court, *Mbarushimana* (ICC-01/04-01/10-451), Pre-Trial Chamber I, 26 October 2011 (*Mbarushimana Jurisdictional Challenge Decision*) 39, 42-45 & 50; Decision on the 'Defence Request for Interim Release' *Mbarushimana* (ICC-01/04-01/10-163), Pre-Trial Chamber I, 19 May 2011; Decision on the 'Second Defence Request for Interim Release' *Mbarushimana* (ICC-01/04-01/10-319), Pre-Trial Chamber I, 28 July 2011; and Review of Detention and Decision on the 'Third Defence Request for Interim Release' *Mbarushimana* (ICC-01/04-01/10-428), Pre-Trial Chamber I, 16 August 2011.

rejected the latter two and, specifically in relation to Mbarushimana's jurisdictional claim, held that the crimes contained in Mbarushimana's arrest warrant were 'sufficiently linked to the situation of crisis existing in the DRC at the time of and underlying the Referral', irrespective of the fact that the object of the prosecution's investigations was not 'active throughout the duration of the relevant time-frame'. Thus, the jurisdiction of the Court was triggered and the matter fell within the scope of the Court's jurisdiction.<sup>71</sup> On 11 August 2011 the Pre-Trial Chamber authorised the participation of 130 victim applicants in the proceedings.<sup>72</sup>

The confirmation of charges hearings were held from 16 to 21 September 2011.<sup>73</sup> On 16 December 2011, the Pre-Trial Chamber, with presiding judge Monageng dissenting, decided not to confirm the charges against Mbarushimana, ordering his release from custody upon completion of the necessary arrangements.<sup>74</sup> This review includes a brief summary of Judge Monageng's dissenting opinion, which essentially turned on the interpretation of the standard of 'substantial grounds to believe' as provided for in article 61(7) of the ICC Rome Statute in light of the jurisprudence of the Court.

First, the Pre-Trial Chamber raised its concerns regarding the prosecution's attempt in the Document Containing the Charges to:

keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute.

Accordingly, the Pre-Trial Chamber found that 'the location and dates of alleged crimes are material facts which, pursuant to regulation 52(b) of the Regulations, must be pleaded in the DCC'. The words 'include but are not limited to' were therefore considered 'meaningless' and the Pre-Trial Chamber decided to only assess charges related to locations specified under each count.<sup>75</sup>

Second, the majority noted that the charges and associated facts in relation to the eight counts of war crimes were 'articulated in such vague terms that the chamber had serious difficulty in determining or could not determine at all, the factual ambit of a number of charges'.<sup>76</sup>

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71 *Mbarushimana* Jurisdictional Challenge Decision (n 70 above) paras 39, 42-45 & 50.

72 Decision on the 138 applications for victims' participation in the proceedings *Mbarushimana* (ICC-01/04-01/10-351), Pre-Trial Chamber I, 11 August 2011.

73 *Mbarushimana* Confirmation of Charges Decision (n 69 above) para 32.

74 *Mbarushimana* Confirmation of Charges Decision (n 69 above).

75 *Mbarushimana* Confirmation of Charges Decision (n 69 above) paras 79-85.

76 Paras 108-110.



It added that the 'evidence was so scant that the Chamber cannot properly assess, let alone satisfy itself to the required threshold, whether any of the war crimes charged by the prosecution were committed by the FDLR' in the identified villages.<sup>77</sup> The majority, upon examination of the charges and the relevant evidence, found that there was sufficient evidence establishing grounds to believe that acts amounting to war crimes were committed in five out of the 25 occasions alleged by the prosecution.<sup>78</sup>

Third, the Pre-Trial Chamber examined the five counts of crimes against humanity allegedly committed.<sup>79</sup> Referring to the ICC Elements of Crimes,<sup>80</sup> the Pre-Trial Chamber first analysed whether the contextual elements of crimes against humanity were satisfied. In its findings, the majority was not satisfied that on the basis of the evidence, the threshold of substantial grounds to believe that the FDLR had pursued a policy of attacking the civilian population within the meaning of article 7 was met, and concluded that the attacks could not be considered part of a larger organised campaign specifically designed to be directed at a civilian population.<sup>81</sup> In this regard, the majority further noted that the four attacks against the civilian population that the Pre-Trial Chamber found to have been committed were retaliatory attacks against the FARDC/Mai Mai for attacks on the FDLR and/or Rwandese civilians, all launched with the aim of targeting FARDC military objectives, not civilian populations. Having found that the 'essential requirement that the crimes were committed pursuant to or in furtherance of an organisational policy to commit an attack directed against the civilian population, as set out in articles 7(1) and (2)(a) of the Statute', was absent, the majority found it 'unnecessary to analyse the remaining elements of the crimes against humanity charged by the prosecution'.<sup>82</sup> It is of note that although dissenting, Judge Monageng also declined to confirm torture and persecution as crimes against humanity.<sup>83</sup>

Judge Monageng, however, found that the majority 'attached too much weight to [evidential] inconsistencies' in their conclusions. He

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77 Para 113.

78 Paras 108-239. For ease of reference, see n 69 above fn 638.

79 *Mbarushimana* Confirmation of Charges Decision (n 69 above) para 242.

80 The ICC Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales E.03.V.2 and *corrigendum*), part II.B. The Elements of Crimes as adopted at the 2010 Review Conference may also be found in the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010 (International Criminal Court publication, RC/11).

81 *Mbarushimana* Confirmation of Charges Decision (n 69 above) paras 244-267.

82 Paras 264-266.

83 *Mbarushimana* Confirmation of Charges Decision (n 69 above) Dissenting Opinion paras 29-30 & 33-38.

opined that 'relevant witness statements' as well as other indirect evidence, such as reports of Human Rights Watch, consistently referred to, or confirmed, FDLR orders to target civilian populations as a way to pressure the Rwandan government to discuss their political demands.<sup>84</sup> In his view, the majority incorrectly relied on evidence that the attacks were launched in retaliation, opining that there are substantial grounds to believe that there was an organisational policy to commit attacks against civilians<sup>85</sup> and that the crimes established in the case were part of a widespread and systematic attack on civilians.<sup>86</sup> With reference to the ICC Elements of Crimes, Judge Monageng held that there was sufficient evidence to establish substantial grounds to believe that murder, rape and other inhumane acts as crimes against humanity within the meaning of article 7 of the Rome Statute occurred.<sup>87</sup>

Fourth, the Pre-Trial Chamber examined Mbarushimana's individual criminal responsibility for the alleged crimes further to article 25(3) (d) of the Rome Statute.<sup>88</sup> In its deliberations, the Pre-Trial Chamber clarified the difference between joint criminal enterprise and liability under article 23(3)(d) and held that 'in order to be criminally responsible under article 25(3)(d) of the Statute, a person must make a significant contribution to the crimes committed or attempted', but could also be liable by 'contributing to a crime's commission after it has occurred, so long as this contribution had been agreed upon by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime'.<sup>89</sup> In relation to Mbarushimana, the majority took the view that there were no substantial grounds to believe that the FDLR leadership constituted 'a group of persons acting with a common purpose' within the meaning of article 25(3) (d) of the Statute, in particular in light of the requirement that the common purpose pursued by the group must have 'at least an element of criminality'.<sup>90</sup>

Notwithstanding, the majority nevertheless examined each of Mbarushimana's alleged contributions in view of his functions in the FDLR and concluded that Mbarushimana 'did not provide any contribution to the commission of such crimes, even less a "significant" one'.<sup>91</sup> The majority found that in accordance with article 25(3)(d), there was no evidence that Mbarushimana (i) had any power over the FDLR forces on the ground or that his role as leader of the FDLR

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84 *Mbarushimana* Confirmation of Charges Decision (n 69 above) paras 2-8.

85 Paras 9-20.

86 Paras 21-26.

87 Paras 27-38.

88 Paras 268-290.

89 Paras 282, 285 & 287.

90 Para 291.

91 Paras 292-340.

significantly contributed to the commission of crimes by the FDLR;<sup>92</sup> (ii) denied crimes committed by the FDLR with knowledge of them in furtherance of a policy of the organisation;<sup>93</sup> (iii) in his role as the point of contact for external actors, contributed to the commission of crimes by the FDLR;<sup>94</sup> and (iv) encouraged FDLR 'troop' morale through his press releases and radio messages, thus contributing to the commission of crimes.<sup>95</sup>

Judge Monageng disagreed with the 'very foundation of the majority's conclusion with respect to a group acting with a common purpose'. He was of the opinion that there were substantial grounds to believe that (i) the FDLR had a common plan to direct attacks against the civilian population of the Eastern DRC to pressurise the governments of Rwanda and DRC; and to simultaneously conduct an international media campaign to conceal FDLR's responsibility for the attacks;<sup>96</sup> and (ii) there existed an identified 'group of persons' within the meaning of article 25(3)(d) of the Rome Statute, including Mbarushimana, who had the authority to exercise control over the FDLR forces on the ground and were aware of the crimes the FDLR committed.<sup>97</sup> Judge Monageng concluded that this group of persons, through the FDLR soldiers under their command, committed the crimes detailed by the prosecution within the meaning of article 25(3)(d).<sup>98</sup> Judge Monageng believed that the majority failed to discuss critical pieces of evidence, stating that there were substantial grounds to believe that (i) Mbarushimana used an international media campaign to conceal the criminal activities of the FDLR;<sup>99</sup> (ii) the media campaign was used to encourage FDLR forces to continue the military effort and remain faithful to the FDLR's goals;<sup>100</sup> (iii) Mbarushimana's conduct constitutes an intentional and significant contribution to the crimes committed to a degree that warrants individual responsibility;<sup>101</sup> and (iv) Mbarushimana acted with the aim of 'furthering criminal activity and criminal purpose of the FDLR leadership ... [and] ... in the knowledge of the intention of the FDLR leadership to commit the crimes within the scope of the common purpose'.<sup>102</sup>

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92 Paras 293-303.

93 Paras 304-315.

94 Paras 316-320.

95 Paras 321-339.

96 *Mbarushimana* Confirmation of Charges Decision (n 69 above) Dissenting Opinion, paras 40-47.

97 Paras 48-63.

98 Para 49.

99 Paras 66-79.

100 Paras 80-101.

101 Paras 102-114.

102 Paras 116-133.

The Pre-Trial Chamber, by majority, declined to confirm the charges against Mbarushimana and ordered his release. The prosecution appealed the Mbarushimana Confirmation of Charges Decision and the Pre-Trial Chamber's rejection of its 'Request for stay of order to release Callixte Mbarushimana'.<sup>103</sup> On 20 December 2012, the Appeals Chamber dismissed the prosecution's appeal on all grounds.<sup>104</sup> In its reasons, the Appeals Chamber reaffirmed its jurisprudence that neither the Decision on the Confirmation of Charges nor the Decision on the Request for Stay of Release were 'decision[s] granting or denying release' and therefore could not be appealed under article 82(1)(b) of the Rome Statute.<sup>105</sup> Mbarushimana was released from ICC custody on 23 December 2011.<sup>106</sup> This decision by the Pre-Trial and Appeals Chambers appears to be a serious indictment of the manner in which the prosecution prepared the case against Mbarushimana.<sup>107</sup> On 26 December 2011 the Rwandan government indicated that it would file charges of genocide against Mbarushimana.<sup>108</sup>

Of interest will be the effect, if any, that this denial of confirmation of charges will have on two cases pending before the German national courts featuring the President of the FDLR, Ignace Murwanashyaka, and the Vice-President, Straton Musoni. Murwanashyaka and Musoni were arrested in Germany in November 2009 and the case against them commenced in Stuttgart, Germany, on 4 May 2011. Pursuant to the German Code of Crimes against International Law (CCAIL), perpetrators of grave human rights violations, such as crimes against

103 Prosecution's Appeal against 'Decision on the Confirmation of Charges' and Request for Suspensive Effect in the alternative, Prosecution's Appeal against 'Decision on the Prosecution's request for stay of order to release Callixte Mbarushimana', *Mbarushimana* (ICC-01/04-01/10-470), Pre-Trial Chamber I, 19 December 2011.

104 Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation, *Mbarushimana* (ICC-01/04-01/10-476), Appeals Chamber, 20 December 2011.

105 Reasons for 'Decision on the appeal of the Prosecutor' of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation of 20 December 2011, *Mbarushimana* (ICC-01/04-01/10-483) Appeals Chamber, 24 January 2012.

106 Callixte Mbarushimana is released from the ICC custody, ICC press release, 23 December 2011 <http://www.icc-cpi.int/NR/exeres/4D4FA434-3060-4EF7-8E5C-AD5C53540E64.htm> (accessed 2 March 2012).

107 Decision on the Confirmation of Charges, *Abu Garda* (ICC-02/-5-02/09-243-Red) Pre-Trial Chamber I, 8 February 2010. As a result of insufficient evidence, on 8 February 2010, the Pre-Trial Chamber, without prejudice for the prosecution, declined to confirm the charges against Bahar Idriss Abu Garda in the Situation in Darfur. However, the accused in that case was not physically present before the Court.

108 'Rwanda: State to file genocide charges against Mbarushimana' *The New Times* 27 December 2011 <http://allafrica.com/stories/printable/201112270738.html> (accessed 3 March 2012).

humanity and war crimes, can be prosecuted in Germany under the principle of universal jurisdiction, even in the absence of a connection to the state where the crimes occurred. In the first case to be tried under the CCAIL, both Murwanashyaka and Musoni face 26 counts of crimes against humanity and 39 counts of war crimes allegedly committed by FDLR forces in Eastern DRC over a 22-month period between January 2008 and November 2009. They are also charged with being members of a terrorist group.<sup>109</sup>

### 4.3 Darfur, Sudan

The ICC arrest warrant issued against President Bashir of Sudan continues to pose legal, political and diplomatic problems for African states. On the one hand, state parties to the Rome Statute have a general obligation under article 86 to co-operate fully with the ICC in its investigation and prosecution of crimes falling within its jurisdiction. In addition, article 89 of the Rome Statute provides that state parties shall comply with the Court's request for the arrest and surrender of a person found in their territory.<sup>110</sup> On the other hand, heads of state are entitled under customary international law to immunity, including immunity from arrest by other states.<sup>111</sup> To complicate matters further, members of the African Union (AU) are obliged to comply

<sup>109</sup> See *Mbarushimana* Confirmation of Charges Decision (n 69 above) para 5; 'Rwanda: Ignace Murwanashyaka and Straton Musoni tried' *BBC* 4 May 2011 <http://www.bbc.co.uk/news/world-africa-13275795> (accessed 3 March 2011); Amnesty International 'Germany: Briefing to the Committee Against Torture' <http://www.amnesty.org/en/library/asset/EUR23/002/2011/en/e27f73a1-dc3c-44ac-af5d-9cd1d58635f0/eur230022011en.pdf> (accessed 3 March 2012); Human Rights Watch 'Germany: Groundbreaking Trial for Congo War Crimes' 2 May 2011 <http://www.hrw.org/news/2011/05/02/germany-groundbreaking-trial-congo-war-crimes> (accessed 3 March 2012).

<sup>110</sup> Where the charges include genocide, as in the *Bashir* case, African countries that are parties to the Convention on the Prevention and Punishment of the Crime of Genocide have an additional obligation, under art 1 of the Convention, to punish genocide. See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ (26 February 2007) ICJ Reports 43.

<sup>111</sup> See Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*), ICJ judgment of 14 February 2002, paras 51-58. In this case, the ICJ, *in obiter dicta*, observed that a foreign minister who enjoys immunity before national courts may be subject to criminal proceedings before certain international courts, including the ICC, but stopped short of stating that the foreign minister could be arrested by other states (para 61). In the *Taylor* trial, the SCSL Appeals Chamber went further, holding that Charles Taylor did not enjoy immunity from prosecution before the SCSL and that any processes issued in the course of, or for the purposes of, the proceedings against him could not be vitiated by claims of immunity (see *Taylor*, Decision on Immunity from Jurisdiction' 31 May 2004). However, it is arguable that this SCSL decision, the prosecution of Slobodan Milosevic by the International

with decisions of the AU.<sup>112</sup> One such decision, adopted by the AU Assembly, is that AU member states shall not co-operate for the arrest and surrender of Bashir to the ICC.<sup>113</sup>

Against this legal background, in 2011 Bashir attended the inauguration ceremony of the President of Chad and a meeting of the Common Market for Eastern and Southern Africa (COMESA) in Malawi. Since both countries are state parties to the Rome Statute, the ICC Registrar reminded them of their obligations under the Rome Statute and asked for their co-operation for the arrest and surrender of Bashir. The Registrar also invited the two countries to consult with the Court if they were facing any difficulties in executing the co-operation request, as required by article 97 of the Rome Statute.<sup>114</sup> Chad and Malawi did not consult the Court and did not arrest Bashir. In observations submitted to the ICC, Chad stated that in view of the AU position on the arrest warrant against Bashir and Chad's membership of the AU, it could not implement the request to arrest and surrender Bashir and the provisions of article 87(7) of the Rome Statute could not be pursued.<sup>115</sup> Malawi justified its decision not to arrest Bashir on two grounds, namely, (a) that, as a sitting head of a state not party to the Rome Statute, Bashir enjoyed, under established principles of public international and under national law, immunity from arrest and prosecution; and (b) that as a member of the AU, Malawi fully aligned itself to the AU's position on the indictment of sitting heads

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Tribunal for the Former Yugoslavia, and the ICC indictment of Muammar Gaddafi and Laurent Gbagbo do not constitute sufficient practice to support a definitive conclusion that immunity is waived automatically, nor that under customary international law, a head of state does not enjoy immunity from arrest by another state in the event that an international criminal tribunal such as the ICC issues a warrant for their arrest.

112 Pursuant to art 23(2) of the Constitutive Act of the African Union, any member state that fails to comply with the decisions and policies of the AU may be subject to sanctions.

113 Decision on the Report of the Commission on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec 245(XIII) adopted by the 13th ordinary session of the Assembly of Heads of State and Government.

114 *Note Verbale*, Annex 4 to ICC document ICC-02/05-01/09-136-Conf and *Note Verbale*, Annex 2 to ICC document ICC-02/05-01/09-131 Conf. Art 97 states in part that '[w]here a state party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that state shall consult with the Court without delay to resolve the matter'.

115 '*Les Observations de la Republique du Tchad*,' annex 1 to '*Rapport du Greffe relative aux observations de la Republique du Tchad*,' ICC document ICC-02/05-01/09-135. Art 87.7 provides that '[w]here a state party fails to comply with a request to co-operate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.

of state and government of countries that are not party to the Rome Statute.<sup>116</sup>

In two separate decisions,<sup>117</sup> the Pre-Trial Chamber rejected these explanations and held that Malawi and Chad had failed to (i) comply with their obligations to consult with the Chamber by not bringing the question of immunity to the Chamber for its determination; and (ii) co-operate with the ICC by failing to arrest and surrender Bashir. The Pre-Trial Chamber held that, in accordance with article 119(1) of the Rome Statute, it had the sole authority to decide whether immunities are applicable in a particular case.<sup>118</sup> The Pre-Trial Chamber concluded that<sup>119</sup>

customary international law creates an exception to head of state immunity when international courts seek a head of state's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore article 98(1) of the Statute does not apply.

In explaining the consequences of its findings for state parties, the Pre-Trial Chamber took the view that 'the unavailability of immunities with respect to prosecutions by international courts applies to any act of co-operation by states which forms an integral part of those prosecutions'.<sup>120</sup> In both cases, the Pre-Trial Chamber decided to refer the matter to the Security Council and the Assembly of State Parties. It remains to be seen whether or not these bodies will take any action against the two countries.

Perhaps the only positive aspect of the ICC decisions on Chad and Malawi is a reinforcement of the principle that state parties must consult the ICC when they face difficulties in implementing a co-operation request. Otherwise, the decisions are far from satisfactory, for a number of reasons. First, it appears that the Pre-Trial Chamber conflated the

116 'Observations from the Republic of Malawi', confidential annex 2 to the Registry's 'Transmission of the observations from the Republic of Malawi', ICC document ICC-02/05-01/09-138. The relevant part of the observations is reproduced in Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Bashir* (ICC-02/05-01/09) Pre-Trial Chamber I, 12 December 2011 (*Malawi Decision*).

117 *Malawi Decision* (n 116 above) and *Le Procureur c. Omar Hassan Ahmad Al Bashir*, Decision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, *Bashir*, (ICC-02/05-01/09) La Chambre Préliminaire I, 13 December 2011, (*Chad Decision*). The discussion in this paper is based on the *Malawi Decision* because it contains more detailed reasoning and was applied in the *Chad Decision*.

118 *Malawi Decision* (n 116 above) para 11. Art 119.1 provides that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

119 *Malawi Decision* (n 116 above) para 43.

120 *Malawi Decision* (n 116 above) para 44.



issues of criminal responsibility and immunities and there is no sufficient legal basis for concluding that customary international law creates an exception to head of state immunity when an international court seeks the arrest of the head of state for international crimes. Second, there was no discussion of the effect, if any, of the Security Council referral on Bashir's immunity and the obligations of state parties to arrest and surrender him.<sup>121</sup> In particular, the Pre-Trial Chamber should have examined whether Security Council Resolution 1593 (2005), adopted under chapter VII of the UN Charter, implicitly waives Bashir's immunity – the resolution does not expressly address immunity. The Pre-Trial Chamber should also have considered whether, by urging all states to co-operate fully with the ICC in relation to the referral, Resolution 1593 (2005) imposes an obligation on states to arrest Bashir.<sup>122</sup> Such an obligation would prevail over any obligations under the Constitutive Act of the AU and the COMESA treaty by virtue of article 103 of the UN Charter, but would not affect head of state immunity accorded under customary international law.<sup>123</sup> Third, the Pre-Trial Chamber did not consider that the logical result of its conclusions rendered article 98(1) of the Rome Statute ineffective. And finally, while accepting the Pre-Trial Chamber's discretion in whether to schedule oral hearings to assist its deliberations, it is remarkable that these decisions were taken based solely on the written observations, without the benefit of hearing from the parties or relevant *amici curiae*.<sup>124</sup>

The Malawi and Chad decisions failed to resolve the legal conundrum faced by AU member states, namely, one of conflicting

121 For a discussion of the effect of the referral, see D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 333-352 and, on Bashir's immunity generally, see P Gaeta 'Does President Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315.

122 Operative para 2 of Resolution 1593 (2005) reads: '*Decides that the government of Sudan and all other parties to the conflict in Darfur, shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organisations to co-operate fully.*'

123 Art 103 provides that '[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. But this would not have an effect on obligations under customary international law.

124 See D Akande 'ICC issues detailed decision on Bashir's immunity ... at long last ... but gets the law wrong' 15 December 2011 <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%e2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/> (accessed 7 May 2012), D Jacobs 'A sad homage to Antonio Cassese: The ICC's confused pronouncements on state compliance and head of state immunity' 15 December 2011 <http://dovjacobs.blogspot.com/2011/12/sad-homage-to-antonio-cassese-iccs.html> (accessed 7 May 2012) and W Schabas 'Obama, Medvedev and Hu Jintao may be prosecuted by International Criminal Court, Pre-Trial Chamber concludes' 15 December 2011 <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%e2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>

legal obligations which cannot be simultaneously complied with.<sup>125</sup> There is no hierarchy in international law between the obligations under the Rome Statute and the obligations under the AU Constitutive Act. Moreover, the conventional obligation to comply with an ICC request to arrest and surrender a person does not trump the customary international law rules granting a sitting head of state immunity from personal arrest. Article 27(1) of the Rome Statute regulates the vertical relationship between the ICC and an accused who is a national of a state party. As a general rule, it is not applicable to, and therefore not binding on, non-state parties, like Sudan and their nationals.<sup>126</sup> That is why, according to article 98(1) of the Rome Statute, in the case of a national of a non-state party who enjoys immunity, the ICC must first obtain the non-state party's co-operation and waiver of immunity before proceeding to request the surrender of its national by another state.<sup>127</sup> As it is not self-evident that the Security Council referral waives Bashir's immunity, or negates the requirement to seek Sudan's co-operation for a waiver under article 98(1), or imposes an obligation on states to co-operate in the arrest of Bashir, the question is whether the ICC acted consistently with article 98(1) when, without first obtaining Sudan's co-operation for the waiver of the immunity of Bashir, it requested Chad and Malawi to arrest and surrender him.

#### 4.4 Case against Abdallah Banda Nourain and Saleh Mohammed Jerbo Jamus

Of note in the case of Nourain and Jamus in 2011 was the Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons on 16 May 2011, stating that the accused will only contest certain specified issues at trial, relating to the attack on the African Union Mission in the Sudan

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[humanrightsdoctorate.blogspot.com/2011/12/obama-medvedev-and-hu-jintao-may-be.html](http://humanrightsdoctorate.blogspot.com/2011/12/obama-medvedev-and-hu-jintao-may-be.html) (accessed 7 May 2012). The African Union issued a press release noting with grave concern the ICC's decisions on Chad and Malawi, and asserting that they were *per incuriam* because they grossly ignored the two countries' obligations to comply with decisions and policies of the African Union: Press Release 002/2012.

125 This is a continuing problem as Bashir might visit Malawi again for the AU Summit in June 2012.

126 A treaty does not create either obligations or rights for a third state without its consent: art 34 of the Vienna Convention on the Law of Treaties, 1969.

127 Art 98(1) of the Rome Statute reads: 'The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity.'

(AMIS) peacekeepers on 29 September 2007.<sup>128</sup> The case appears to turn on whether AMIS was a peacekeeping operation in accordance with the Charter of the United Nations at the time of the attacks. In the joint submission, the accused indicate that should the Chamber determine that AMIS was a peacekeeping mission established in accordance with the Charter of the UN, the attack itself was unlawful and that the accused persons were aware of the factual circumstances that established the unlawful nature of the attack, the accused persons will plead guilty to the charges against them without prejudice to their right to appeal the Chamber's decision on other issues specifically agreed.<sup>129</sup>

#### 4.5 Domestic prosecutions in Darfur

In July 2011, the government of Sudan and the Liberation and Justice Movement signed a protocol agreement committing themselves to the Doha Document for Peace in Darfur (DDPD), a framework for the comprehensive peace process in Darfur.<sup>130</sup> In chapter V, on Justice and Reconciliation, the DDPD provides for the possibility of the Sudanese judiciary to establish a Special Court for Darfur (Special Court) with jurisdiction over gross violations of human rights and serious violations of international humanitarian law committed in Darfur since February 2003.<sup>131</sup> Under the DDPD, the Sudanese government is obliged to appoint a prosecutor of the Special Court, to create conducive conditions to enable the Special Court to undertake its functions in conducting investigations and trials, and to provide the Court with the necessary resources.<sup>132</sup> A team of specialised experts from the UN and the AU, selected in consultation with the government, shall observe the court proceedings to ensure that they meet the relevant international standards.<sup>133</sup> The Special Court will apply the Sudanese criminal law, international criminal law and international humanitarian and human rights laws.<sup>134</sup> Further, the DDPD provides that immunities enjoyed by persons by virtue of their official status or functions shall

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128 Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, *Nourain & Jamus* (ICC- 02/05-03/09-148) 16 May 2011, paras 3-4.

129 Joint Submission by the Office of the Prosecutor and the Defence (n 128 above) para 4.

130 The DDPD is the culmination of two and half years of negotiations, dialogue and consultations with the major parties to the Darfur conflict, all relevant stakeholders and international partners. It is supported by the African Union and the Arab League. The DDPD can be accessed at <http://unamid.unmissions.org/Portals/UNAMID/DDPD%20English.pdf>.

131 DDPD (n 130 above) art 59.

132 As above.

133 As above.

134 As above.

not obstruct the speedy dispensation of justice, nor shall they prevent the combating of impunity.<sup>135</sup>

This development should be seen against the background of previous attempts at domestic prosecutions, which have been ineffective. In 2009, the AU High-Level Panel on Darfur called for the establishment of a hybrid criminal court within the Sudanese justice system, which Sudan rejected, opting instead for the appointment of a Special Prosecutor.<sup>136</sup> However, no charges have been made, no trials involving serious international crimes have taken place, and the second Special Prosecutor resigned in 2011, citing personal reasons. The relationship between the existing Special Criminal Court on Events in Darfur and Special Prosecutor for Darfur and the new proposals under the DDPD remains to be clarified. Moreover, the creation of new institutions and offices will be meaningless if the Sudanese government has no real political will to prosecute the crimes.

#### 4.6 Libya

The dramatic and revolutionary wave of the Arab Spring in 2011 resulted in the referral of the situation in Libya to the ICC. In accordance with article 13(1) of the Rome Statute, on 26 February 2011 the UN Security Council, acting under chapter VII of the Charter of the United Nations, unanimously adopted Resolution 1970, entitled Peace and Security in Africa, and referred the situation in Libya to the ICC.<sup>137</sup>

Six days later, the prosecution opened an investigation into the situation in Libya and after two months, on 16 May 2011, filed an application requesting the issuance of warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. In the application, the prosecution alleged that the suspects were criminally responsible, through the Libyan state apparatus and security forces, for the commission of murder and persecution as crimes against humanity in violation of article 7 of the Rome Statute in Libya from 15 January 2011. It was alleged that the accused were also responsible as principals to those crimes in accordance with article 25(3)(a) of the Rome Statute.<sup>138</sup>

The Pre-Trial Chamber on 27 June 2011 issued its Decision on the Prosecutor's Application and issued arrest warrants for the three

135 DDPD (n 130 above) art 56.

136 'Darfur: The quest for peace, justice and reconciliation' Report of the African Union High-Level Panel on Darfur, (AUDP) as presented to the African Union Peace and Security Council on 29 October 2009, PSC/AHG/2(CCVII). See also C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2009' (2010) 10 *African Human Rights Law Journal* 280.

137 UN Security Council 'Resolution 1970 (2011)' (referral of the situation in Libya to the ICC) 26 February 2011 (S/RES/1970 (2011)).

138 Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (ICC-10/11-01/11-4-Red), 16 May 2011 (*Gaddafi et al* Prosecutor's Application).

accused.<sup>139</sup> The Pre-Trial Chamber confirmed that the case fell within its jurisdiction, despite the fact that the case involved nationals of a state not party to the Rome Statute, one of whom was the *de facto* head of state. In this regard, referring to its jurisprudence in the *Bashir* case, the Pre-Trial Chamber held that ‘the official position of an individual [irrespective of whether they are a national of a state party] has no effect on the Court’s jurisdiction’.<sup>140</sup>

In determining whether the crimes alleged were within the jurisdiction of the Court, the Pre-Trial Chamber first found that, although Muammar Gaddafi did not hold an official title, there were reasonable grounds to believe that he was the *de facto* head of the Libyan state, organising and controlling the state apparatus in the regime that monitored and punished any expression of dissent against his regime.<sup>141</sup> The Pre-Trial Chamber found reasonable grounds to believe that, further to a state policy aimed at quelling the February 2011 demonstrations against the Gaddafi regime, a widespread and systematic ‘attack’ carried out by the Libyan security forces within the meaning of article 7(1) of the Statute occurred, targeted at members of the civilian population, and concluded that the contextual elements of the alleged crimes were satisfied.<sup>142</sup>

Upon examination of the materials provided by the prosecution, the Pre-Trial Chamber determined that there were reasonable grounds to believe murders constituting crimes against humanity were committed in various parts of Libya from 15 February 2011 by the Libyan security forces as part of an attack against the civilian demonstrators or alleged dissidents to the Libyan regime. The Pre-Trial Chamber also found that there was a campaign to cover up these events.<sup>143</sup>

The Pre-Trial Chamber further concluded that there were reasonable grounds to believe that acts of persecution constituting crimes against humanity were committed in Libya from February 2011. It noted that civilians were targeted and attacked by the Libyan security forces and subjected to inhumane acts that severely deprived them of their fundamental rights based on their political opposition to the Gaddafi regime.<sup>144</sup>

In this case, the Pre-Trial Chamber chose not to be bound by the prosecutor’s legal characterisation of the conduct of the accused in its consideration of their culpability under article 25(3)(a) of the

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139 Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’ *Gaddafi et al* 27 June 2011 (*Gaddafi et al* Decision on the Prosecution’s Application) (ICC-01/11-12).

140 *Gaddafi et al* Decision on the Prosecution’s Application (n 139 above) paras 6-10.

141 Paras 17-24.

142 Paras 25-35.

143 Paras 36-41.

144 Paras 42-65.

Statute. Referring to its consistent jurisprudence on the criterion of distinguishing between principal and accessorial liability,<sup>145</sup> the Pre-Trial Chamber found reasonable grounds to believe that (i) Muammar and Saif Gaddafi were mutually responsible as principals to the crimes committed in Libya pursuant to article 25(3)(a) of the Statute, as 'indirect co-perpetrators' of the alleged crimes due to their absolute control over the Libyan state apparatus and their contribution to the implementation of the plan to deter and quell, by all means, the civilian demonstrations against the regime which began in Libya in February 2011;<sup>146</sup> and (ii) Al-Senussi was responsible as principal to the crimes committed in Benghazi, Libya, as an 'indirect perpetrator' of the alleged crimes. The Pre-Trial Chamber added that the 'existence of a chain of command' and the fact that Al-Senissi was following orders did not prevent the 'attribution of principal responsibility' due to his position in the Libyan hierarchy.<sup>147</sup>

In conclusion, the Pre-Trial Chamber determined that the issuance of arrest warrants was necessary pursuant to article 58(1)(b) of the Statute. It concluded that, based on the positions held by each of the accused, it was unlikely that any of them would willingly appear before the Court unless arrested, and may continue to resort to their respective powers to direct further commission and destruction of evidence.<sup>148</sup> The warrants of arrest were issued the same day.<sup>149</sup>

However, on 20 October 2011, the Libyan people were deprived of the opportunity to make the once infamous dictator accountable for his alleged role in the commission of the alleged crimes. Muammar Gaddafi was confirmed dead, allegedly murdered by angry Libyan fighters in Sirte.<sup>150</sup> This naturally raises questions concerning Libya's transition from chaos to the rule of law and the treatment of Saif Al-Islam Gaddafi, who was reportedly captured and detained by anti-Gaddafi forces on 19 November 2011 in Southern Libya.<sup>151</sup> The Libyan National Transitional Council has indicated its intention to prosecute Saif Gaddafi domestically, triggering the debate on the

145 *Gaddafi* (n 139 above) fn 134 for ease of reference.

146 *Gaddafi* (n 139 above) paras 66-83.

147 Paras 66-71 & 84-90.

148 Paras 90-100.

149 Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi *Gaddafi et al* 27 June 2011 (ICC-01/11-13); Warrant of Arrest for Saif Al-Islam Gaddafi *Gaddafi et al* 27 June 2011 (ICC-01/11-14); Warrant of Arrest AbduHah Al-Senussi *Gaddafi et al* 27 June 2011 (ICC-01/11-15).

150 'Gaddafi killed in hometown, Libya eyes future' *Reuters* 20 October 2011 <http://www.reuters.com/article/2011/10/20/us-libya-idUSTRE79F1FK20111020> (accessed 21 March 2012); 'Muammar Gaddafi killed as Sirte falls' *Al-Jazeera* 20 October 2011 <http://www.aljazeera.com/news/africa/2011/10/20111020111520869621.html> (accessed 21 March 2012).

151 'Gaddafi's son Saif al-Islam captured in Libya' *BBC* 19 November 2011 <http://www.bbc.co.uk/news/world-middle-east-15804299> (accessed 21 March 2012).

principle of complementarity.<sup>152</sup> At this stage, it is important that Libya co-operates with the ICC and effects the transfer of Saif Gaddafi to the ICC. The transfer would not preclude the new Libyan government from prosecuting him for crimes allegedly committed before or after 15 February 2011. However, should Libya seek to prosecute Saif Gaddafi domestically for the alleged crimes committed since 15 February 2011, 'demonstrating an ability to fairly prosecute [him] would likely require swift and substantial reform of the [Libyan] judicial system'.<sup>153</sup> Moreover, it is 'indispensable that this discussion takes place before the Chambers of the ICC, and that it takes place not in the language of diplomacy, but in the language of law'.<sup>154</sup>

The doctrine of 'responsibility to protect' has been ubiquitously used to justify the use of force in 2011 in Libya, resulting in a debate on the selective use of the doctrine and its potential use for political as opposed to humanitarian grounds.<sup>155</sup> Observers warn that the biggest questions surrounding the mission in Libya are about its objectives, its

152 United Nations 'Statement by Ms Patricia O'Brien Under-Secretary-General for Legal Affairs The Legal Counsel at the 29th Annual Seminar for Diplomats on International Humanitarian Law' 14 March 2012, 10. (*OLA IHL statement*) [http://untreaty.un.org/ola/media/info\\_from\\_lc/POB%20Statement%2029th%20NYU-ICRC%20seminar.pdf](http://untreaty.un.org/ola/media/info_from_lc/POB%20Statement%2029th%20NYU-ICRC%20seminar.pdf) (accessed 2 April 2012).

153 Human Rights Watch 'Libya: Surrender Saif Al-Islam Gaddafi to ICC' 19 November 2011 <http://www.hrw.org/news/2011/11/19/libya-surrender-saif-al-islam-gaddafi-icc> (accessed 21 March 2012).

154 OLA IHL statement (n 152 above) 10.

155 UN Security Council 'Resolution 1970' 26 February 2011 (S/RES/1970 (2011)) and 'Resolution 1973' 17 March 2011 (S/RES/1973 (2011)). See also, United Nations 'Current legal issues facing the United Nations' Statement by Ms Patricia O'Brien, Under-Secretary-General for Legal Affairs The Legal Counsel 7 March 2012, 9-10 [http://untreaty.un.org/ola/media/info\\_from\\_lc/POB%20Columbia%20Law%20School%20030712.pdf](http://untreaty.un.org/ola/media/info_from_lc/POB%20Columbia%20Law%20School%20030712.pdf) (accessed 2 April 2012) and P O'Brien 'The United Nations and the responsibility to protect': Remarks made at the 'Military Intervention and the Law of Peace' panel at the 106th annual meeting of the American Society of International Law' 5 April 2012 <http://www.intlawgrls.com/2012/04/united-nations-responsibility-to.html> (accessed 5 April 2012). Other discussions about the Libyan intervention by the Legal Counsel can also be found here 'Information and Speeches from the Legal Counsel of the United Nations' [http://untreaty.un.org/ola/legal\\_counsel1.aspx](http://untreaty.un.org/ola/legal_counsel1.aspx) (accessed 2 April 2012). For discussions on Libya and the use of the doctrine of responsibility to protect, selectively see: Council on Foreign Relations 'Libya and the Responsibility to Protect' 24 March 2011 <http://www.cfr.org/libya/libya-responsibility-protect/p24480> <http://www.cfr.org/libya/libya-responsibility-protect/p24480> (accessed 31 March 2012); International Coalition for the Responsibility to Protect 'Impact of action in Libya on the responsibility to protect' May 2011 <http://www.responsibilitytoprotect.org/RtoP%20in%20Light%20of%20Libya%20FINAL.pdf> (accessed 31 March 2012); United States Institute for Peace 'Libya and the responsibility to protect' 1 March 2011 <http://www.usip.org/publications/libya-and-the-responsibility-protect> (accessed 31 March 2012); Austrian Institute for International Affairs 'The responsibility to protect (R2P) and Libya' July 2011 [http://www.oii.ac.at/fileadmin/Unterlagen/Dateien/Kurzanalysen/Responsibility\\_to\\_Protect\\_and\\_Libya.pdf](http://www.oii.ac.at/fileadmin/Unterlagen/Dateien/Kurzanalysen/Responsibility_to_Protect_and_Libya.pdf) (accessed 31 March 2012); Economist 'The lessons of Libya' 19 May 2011 <http://www.economist.com/node/18709571> <http://www.economist.com/node/18709571> (accessed 31 March 2012).