

An overview of the international criminal jurisdictions operating in Africa

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Abstract

Whilst the African continent has been beset with many of the modern- day conflicts, and with them violations of international humanitarian law, through the work of the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court, African states have demonstrated their intent to hold accountable the perpetrators of the gravest international crimes. By the end of 2005, the International Criminal Tribunal for Rwanda celebrated its eleventh year, the Special Court for Sierra Leone will have completed its fourth year and the International Criminal Court will be more than three and a half years old. As the present review of their activities shows, the delivery of justice through international jurisdictions is a complex and often time-consuming process.



Whilst the African continent has been beset with many of the modern-day conflicts, and with them violations of international humanitarian law (IHL), including genocide and crimes against humanity, the establishment in 1994 of the International Criminal Tribunal for Rwanda (ICTR) sent out the message that the continent would no longer allow impunity to reign where crimes which shock the conscience of humanity had been committed. This commitment to pursue those responsible for such crimes has been further underscored with the creation, at the request of the government of Sierra Leone, of the Special Court

* The article reflects the views of the author alone and not necessarily those of the ICRC.

for Sierra Leone (SCSL), a “mixed jurisdiction” combining international and national components or characteristics, to create a hybrid system of justice. Ultimately, the renewed efforts to fight impunity for war crimes, crimes against humanity and genocide culminated in the creation of a permanent international criminal jurisdiction. In 1998, with the adoption of the Rome Statute, the permanent International Criminal Court (ICC) was born, opening its doors as of 1 July 2002.

The ICC has so far been looking into crimes allegedly committed in Sudan, the Democratic Republic of the Congo (DRC), Uganda and the Central African Republic. Importantly, the latter three situations have been referred to it by the respective governments of each country. Thus, with most of the current developments in international justice through the work of these three institutions, two based on the continent, emanating from Africa, African states have demonstrated their intent to hold accountable the perpetrators of the gravest international crimes.

This article intends to provide an overview of some of the operations of the ICTR, of the SCSL, as well as of the burgeoning ICC, to review these efforts and to highlight a few possible lessons which have been heeded. It proceeds by recalling the main differences and similarities between the ICTR, the SCSL and the ICC in terms of their respective creations and mandate, the early legal challenges to their jurisdictions and logistical obstacles to their set-up and operations, before concluding on how these institutions are planning to “finish” their work.¹

Three models of international criminal justice

A United Nations subsidiary organ

The grave crimes committed in Africa which caught the world’s attention, and led to the creation of the ICTR, occurred in Rwanda in 1994. The first officially released UN report to conclude that genocide had taken place in Rwanda was presented on 28 June 1994 by the Special Rapporteur of the UN Commission on Human Rights. Not only did this report find that a well-planned and systematic

1 Whilst it is not being reviewed in the present article, mention should also be made of the Eritrea-Ethiopia Claims Commission which was established and operates pursuant to the Peace Agreement signed in Algiers on 12 December 2000 between the governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia. Unlike the SCSL, the ICC and the ICTR, the Commission is not concerned with criminal responsibility for violations of international humanitarian law. Instead, it is mandated under Article 5 of the Agreement to “decide through arbitration all claims for loss, damage or injury by one Government against the other, and by nationals ... of one party against the Government of the other party or entities owned or controlled by the other party that ... result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law”. Awards for successful claims are in the form of material and financial reparation and restitution.

genocide had been committed in Rwanda, it also recommended that those responsible should be brought to trial before an international tribunal.² Barely a week afterwards, on 1 July 1994, the UN Security Council underscored its grave concern that systematic, widespread and flagrant violations of international humanitarian law, including acts of genocide, had been committed in Rwanda.³ Noting that perpetrators of such acts should be held individually accountable, the Security Council directed the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine the atrocities committed in Rwanda.⁴ This Commission considered that, given the seriousness of the offences, an international criminal tribunal should be created to prosecute those responsible for the atrocities. They added that future deterrence could best be ensured through the development of a coherent body of international criminal law, preferably by international jurisdictions rather than domestic courts.⁵ In parallel, on 28 September 1994, the newly installed government of Rwanda requested international assistance in investigating, prosecuting and trying those responsible for genocide.⁶

In November 1994 the Security Council, acting under Chapter VII of the UN Charter, as it had done the year before when establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), decided to set up the ICTR. Like the ICTY, the ICTR is thus a subsidiary organ of the Security Council, and all UN member states have an obligation in conformity with international law to co-operate with it. Under Article 1 of its Statute, the ICTR is mandated to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such

2 Report by on the situation of human rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. No. E/CN.4/1995/7, 28 June 1994. The Special Rapporteur was adamant that the massacres of the Tutsi constituted genocide. He explained that the intention to destroy the Tutsi group was clear from the incitements put out by the media and easy to deduce from the nature and extent of the killings of the Tutsi.

3 UN Doc. No. S/RES/935 (1994), 1 July 1994.

4 *Ibid.* See also UN Doc No. S/1994/1125, 4 October 1994. On 26 July 1994, the Secretary-General set up the Commission of Experts to investigate the situation in Rwanda and to determine whether there had been any specific violations of international humanitarian law and acts of genocide, and how to deal with any identifiable perpetrators. In its preliminary report, the Commission of Experts concluded that between 6 April and 15 July 1994 there had been an internal armed conflict within the territory of Rwanda and that the evidence showed that acts of genocide had been committed against the Tutsi group and that crimes against humanity were perpetrated in a concerted, planned, systematic and methodical way. The experts were of the view that prosecutions for crimes committed under international law during the armed conflict in Rwanda would be better undertaken by an international tribunal rather than by local courts. They explained that “municipal prosecution in these highly emotionally and politically charged cases can sometimes turn into simple retribution without respect for fair trial guarantees” and that “even where such trials are conducted with scrupulous regard for the rights of the accused, there is a great likelihood that a conviction will not be perceived to have been fairly reached”. *Ibid.*, paras. 133–141.

5 *Ibid.*, The Commission initially suggested that Rwandan cases be dealt with by the ICTY, as the creation of a separate ad hoc tribunal for Rwanda would be administratively inefficient and could lead to there being “less consistency in the legal interpretation and application of international criminal law”.

6 Letter of 28 September 1994 addressed by Rwanda’s Permanent Representative to the United Nations President of the Security Council, UN Doc. S/1994/1115, 28 September 1994.

violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994.⁷ Interestingly, the ICTR was mandated to prosecute for serious violations of Common Article 3 to the 1949 Geneva Conventions and of the 1977 Additional Protocol II.⁸

During the discussion and adoption of Resolution 955 in the Security Council on 8 November 1994, the Rwandan ambassador declared: “The Tribunal will help national reconciliation and the construction of a new society based on social justice and respect for the fundamental rights of the human person, all of which will be possible only if those responsible for the Rwandese tragedy are brought to justice.” It was hoped indeed that the ICTR would serve a dual purpose: on the one hand, to promote justice and, on the other, to aid the process of reconciliation in Rwanda.

A hybrid court

In contrast to the ICTR, the SCSL was not initially contemplated as the means by which to bring peace and reconciliation to a country which had been torn apart by warring internal factions.

On 7 July 1999 the government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF) signed a peace agreement (the Lomé Peace Agreement) in which amnesty and immunity against judicial process was to be granted to combatants for atrocities committed during the conflict from March 1991 to July 1999. In accordance with Article IX (Pardon and Amnesty) of the Lomé Peace Agreement, the government of Sierra Leone was to grant absolute and free pardon and reprieve to all combatants and collaborators and ensure that no official or judicial action would be taken against any former members of the RUF, the Armed Forces Revolutionary Council (AFRC), the Sierra Leone Army (SLA), or the Civil Defence Forces (CDF) “in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement”. In addition, full immunity was to be granted to former combatants, exiles and other persons outside Sierra Leone for reasons related to the armed conflict.⁹ A judicial institution to prosecute perpetrators of violations of IHL and crimes against humanity was not considered.

Nevertheless, on 12 June 2000, on behalf of the government and people of Sierra Leone, the president of Sierra Leone requested the president of the Security

7 UN Doc. S/RES/955(1994), 8 November 1994. The Security Council accepted that certain organizational and institutional links had to be established between the ICTR and ICTY to ensure a unity of legal approach, as well as economy and efficiency of resources. Consequently, it was decided that the Office of the Prosecutor and the Appeals Chamber were to be common to both Tribunals.

8 The inclusion of Common Article 3 to the 1949 Geneva Conventions and their 1977 Additional Protocol II in the jurisdiction of the ICTR was seen as the ICTR’s Statute “greatest innovation”, and a “development with enormous normative importance”. See Theodor Meron, “International Criminalization of Internal Atrocities”, *American Journal of International Law*, Vol. 89, p. 55.

9 In addition, the parties to the Lomé Agreement decided to establish a Commission for the Consolidation of Peace (CPP), which was to be responsible for implementing a post-conflict programme to ensure reconciliation and the welfare of all the parties to the conflict, especially the

Council “to initiate a process whereby the United Nations would resolve on the setting up of a special court for Sierra Leone” to bring to justice “members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages”.¹⁰ It was argued that the RUF leadership had reneged on the Lomé Agreement, notably by resuming their atrocities, mainly against civilians, and by taking 500 UN peacekeepers hostage.

In August 2000 the UN Security Council, by its Resolution 1315, requested the Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent special court.¹¹ In the view of the Council, a credible system of justice and accountability for very serious crimes would end impunity and contribute to national reconciliation, and to the restoration and maintenance of peace. The Security Council recalled that at the time of the signing of the Lomé Agreement, the Special Representative of the Secretary-General appended a statement to the effect that it was understood that crimes of genocide, crimes against humanity, war crimes and other serious violations of IHL should not be covered by these amnesty provisions. Article 10 of the SCSL Statute reflects this position, in that it states that “an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to Articles 2 to 4 of the present Statute shall not be a bar to prosecution”.

The Secretary-General, in his report on the implementation of Resolution 1315 issued in October 2000, explained that unlike the ICTR and ICTY, which were established by resolutions of the Security Council and constituted as subsidiary organs of the UN, the Special Court, being established by an Agreement between the UN and the government of Sierra Leone, is therefore a treaty-based *sui generis* court of mixed jurisdiction and composition, which had to be incorporated at national level. Its material jurisdiction would comprise international and Sierra Leonean law, and it would be staffed by international and Sierra Leonean judges, prosecutors and administrative support staff.¹²

victims of war. Under Article VI (Commission for the Consolidation of Peace) of the Lomé Agreement, structures which were envisaged to further national reconciliation and the consolidation of peace included a Human Rights Commission and a Truth and Reconciliation Commission. A cursory look at the Secretary-General’s third report on the UN mission in Sierra Leone of March 2000 reveals that these two commissions were seen as vital organs if the process of national healing and respect for the rule of law, democratic principles and human rights were to advance. Third Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/2000/186, 7 March 2000.

10 Annex to Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. No. S/2000/786, 10 August 2000.

11 Security Council Resolution 1315, UN Doc. No. S/2000/1315, 14 August 2000. In the words of the Security Council, “persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations”. It added that the international community would exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.

12 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 9.

On 16 January 2002, the UN and the government of Sierra Leone signed the agreement on the establishment of the SCSL.¹³ Pursuant to Article 1 of its Statute, the SCSL was mandated to prosecute persons who bear the greatest responsibility for serious violations of IHL and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.¹⁴

A permanent treaty-based jurisdiction

The ICC, being both a treaty-based institution and also a permanent jurisdiction, is obviously fundamentally different from the SCSL, a hybrid UN–national institution, and the ICTR, an ad hoc UN Security Council subsidiary organ. The constitutive treaty is the Rome Statute of the International Criminal Court of 17 July 1998 (Rome Statute), adopted by 120 states at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Rome Statute entered into force on 1 July 2002, sixty days after sixty states had ratified or acceded to it.¹⁵ Thus, unless there is a Security Council referral, as in the situation of Darfur, only state parties to the treaty will be bound by its provisions and required to co-operate with the ICC.¹⁶ The ICC has often been referred to as “a court of last resort”, as emphasized in the preamble of the Rome Statute. Although the ICTR and the SCSL are also concurrently competent with national or domestic jurisdictions, both of them can claim primacy over national jurisdictions: over Sierra Leonean jurisdictions for the SCSL, and over all national courts for the ICTR. The ICC, however, shall be complementary to national criminal jurisdictions, and can only assume jurisdiction where states are “unwilling or unable” to prosecute or try alleged crimes covered by the ICC Statute.¹⁷

13 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

14 In determining the temporal jurisdiction of the SCSL, the Secretary-General felt that for the Court to have jurisdiction as of 23 March 1991, the date on which the civil war had started in Sierra Leone, would create too heavy a burden for the prosecution and the SCSL. Instead, 30 November 1996, the date of the conclusion of the Abidjan Peace Accord between the government and the RUF, was chosen, as it “would have the benefit of putting the Sierra Leone conflict in perspective [and] ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction”; Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, para. 26, 27.

15 By the end of 2005, there were 100 state parties. In February 2003 the Assembly of States Parties elected the eighteen judges to serve terms of office of three, six or nine years. In April 2003 the Assembly elected Luis Moreno-Ocampo (Argentina) as Chief Prosecutor, and in June 2003, the judges sitting in plenary session elected the ICC Registrar.

16 Pursuant to Article 13 of the ICC Statute, the ICC can exercise its jurisdiction if (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a state party in accordance with Article 14; (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

17 According to the ICC Statute, a state might be deemed “unable” if due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary

In just over three and half years after the entering into force of the Rome Statute, four “situations” are now before the ICC. They concern crimes allegedly committed in the DRC,¹⁸ Uganda, the Central African Republic¹⁹ and the Darfur region of Sudan. The Prosecutor appears to be particularly active in relation to Uganda and Sudan. These two situations are very different for a large number of reasons, including the modalities of the exercise of competence of the court. Indeed, it was following a referral from President Museveni of Uganda in December 2003 that the ICC Prosecutor decided on 28 July 2004 to open investigations into crimes allegedly committed in northern Uganda. A bit over a year later, in 2005, indictments were issued by the ICC against five alleged Ugandan leaders of the Lord’s Resistance Army (LRA): Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya.²⁰

As for Darfur, a preliminary investigation was opened following a referral by the UN Security Council on 31 March 2005.²¹ Acting under Chapter VII of the UN Charter, the Security Council determined that the situation in Sudan constitutes a threat to international peace and security. It thus decided “to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC”. The Security Council’s decision was primarily based on the report issued by the International Commission of Inquiry on Darfur, established earlier by the Security Council.²²

evidence and testimony or otherwise unable to carry out its proceedings. A state might be deemed “unwilling” if (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned; (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

18 On 19 April 2004 the Prosecutor of the ICC received a letter signed by the president of the DRC referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since 1 July 2002. The Prosecutor was asked to investigate to determine whether any person should be charged with such crimes. On 21 July 2004 the Prosecutor decided that there was a reasonable basis to open the first investigation of the ICC. According to the Prosecutor an estimated 5,000 to 8,000 unlawful killings had been committed in the DRC since 1 July 2002, and information suggested that rape and other crimes of sexual violence, torture, child conscription and forced displacement continue to take place.

19 In January 2005 the ICC announced that the Prosecutor had received a letter sent on behalf of the government of the Central African Republic, referring the situation of alleged crimes committed on the territory of the Central African Republic since 1 July 2002. It remains for the Prosecutor to determine whether to initiate investigations.

20 See notably *ICC Newsletter* no. 6, available on <www.icc-cpi.int> (last visited 21 March 2006).

21 UN Doc. S/RES/1593 (2005), 31 March 2005.

22 UN Doc. S/RES/1564 (2004), 18 September 2004. The Commission was mandated (i) to investigate reports of violations of IHL and human rights law in Darfur by all parties; (ii) to determine whether acts of genocide had occurred; (iii) to identify the perpetrators, and (iv) to suggest means of ensuring that those responsible for such violations are held accountable. In its report the Commission concluded that there had been serious violations of international human rights and humanitarian law amounting to crimes under international law in Darfur. Although it found that there had not been a policy of genocide, it concluded that some individuals might have committed acts of genocide. The Commission noted that the Sudanese justice system was unable and unwilling to address the situation in Darfur, namely because Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, and recommended that the Security Council refer the situation to the ICC.

The three different methods selected to establish the three above international criminal jurisdictions – a treaty for the ICC, a UN subsidiary organ for the ICTR, and a hybrid *sui generis* court for the SCSL, illustrate the evolving nature of international criminal justice since the early 1990s. Arguably, each successive model was seen as an improvement, taking in the experiences of and the lessons learned by its precursor(s).

Legal challenges to jurisdiction

Despite the different manner in which the ICTR and SCSL have been created, the challenges to their establishment and jurisdiction have been near identical. Defendants at both institutions have moved against the Security Council's role in setting them up and, in particular in the case of the SCSL, there have been preliminary motions against the inclusion of certain crimes within its jurisdiction.

Challenges to the jurisdiction of the International Criminal Tribunal for Rwanda

One of the first legal challenges to be put to the ICTR judges was on whether the Security Council had the power to establish a judicial body such as the ICTR. In *The Prosecutor v. Joseph Kanyabashi*, the defendant argued that the sovereignty of states, notably that of Rwanda, had been violated because the ICTR had not been established by treaty. The defendant also contended that the Security Council was not empowered under Chapter VII of the UN Charter to create an international judicial body. The trial chamber dismissed the arguments, explaining *inter alia* that membership of the UN necessarily entails certain limitations on the sovereignty of a member state, pursuant notably to Article 35 of the UN Charter.²³ The trial chamber noted that, although the Security Council is bound by the provisions of Chapter VII of the UN Charter, it has a wide margin of discretion in determining if there exists a threat to international peace and security, and that such discretion is not justiciable. The chamber added that the question of whether or not the conflict in Rwanda in 1994 posed a threat to international peace and security fell exclusively to the Security Council to decide.²⁴

23 ICTR, *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, 18 June 1997, Decision on the Defence Motion on Jurisdiction (Kanyabashi Decision), para. 13-14.

24 *Ibid.*, paras. 19–22. The chamber also noted that the events in Rwanda had created a massive wave of refugees, many of whom were armed, into the neighbouring countries. In the view of the chamber there was a risk that this flood of refugees might destabilize the region. It felt that because of the distribution of population in certain countries neighbouring Rwanda, there were signs that the Rwanda conflict could eventually also spread to these countries. This conclusion finds support in reports by the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (UN Doc. No. S/ 1994/ 1157) and by the Commission of Experts appointed by the Secretary-General (UN Doc. No. S/ 1994/ 1125), which concluded that the conflict in Rwanda and the movement of refugees had created a highly volatile situation in the region, and thus by extension a threat to international peace and security.

In dealing with the argument that the establishment of an ad hoc tribunal was never a measure contemplated by Article 41 of the UN Charter, the trial chamber reasoned, in line with the earlier ICTY jurisprudence in the ICTY *Tadic* interlocutory appeal, that

While it is true that establishment of judicial bodies is not directly mentioned in Article 41 of the UN Charter as a measure to be considered in the restoration and maintenance of peace, it clearly falls within the ambit of measures to satisfy this goal. The list of actions contained in Article 41 is clearly not exhaustive but indicates some examples of the measures which the Security Council might eventually decide to impose on States in order to remedy a conflict or an imminent threat to international peace and security.²⁵

The trial chamber thus confirmed that there was nothing under the UN Charter which precluded the Security Council from establishing such a body when a threat to peace and security exists.²⁶

Challenges to the jurisdiction of the Special Court for Sierra Leone

Similarly, and unsurprisingly, as with the ICTR, the first challenges by defendants at the SCSL were on jurisdictional grounds, with three points being of particular jurisprudential relevance: (i) the validity of the Lomé Agreement; (ii) the role of the Security Council in establishing the SCSL; and (iii) the recruitment of child soldiers as constitutive of a crime.

Validity of the Lomé Agreement

The SCSL Appeals Chamber was called upon to pronounce on the validity of the amnesty provided by the Lomé Agreement. It was asked to rule that the government of Sierra Leone was bound to observe the amnesty granted under Article IX of the Lomé Agreement, and that the Special Court should not assert jurisdiction over crimes committed prior to July 1999, when the amnesty was granted, and that it would be an abuse of process to allow the prosecution of any of the alleged crimes pre-dating the Lomé Agreement. In its Decision of 13 March 2004, the Appeals Chamber dismissed the Preliminary Motions for lack of merit.²⁷ In its view, the Lomé Agreement was not a treaty or an agreement in the nature of a treaty, and, irrespective

²⁵ *Ibid.*, para. 27.

²⁶ It should be noted that the ICTR and national jurisdictions exercise concurrent jurisdiction over the offences committed in Rwanda. The ICTR nevertheless has primacy in cases of a jurisdictional conflict arising with a national court (Article 8(2) of the Statute). The ICTR is competent to try individuals, rather than states or criminal organizations (Article 5 of the Statute). Although any individual can be prosecuted by the ICTR for crimes committed in Rwanda in 1994, the Tribunal can try only Rwandan citizens for crimes committed in the territory of neighbouring states during this period (Article 7 of the Statute). *Kanyabashi* Decision, para. 35.

²⁷ SCSL, *Prosecutor Against Morris Kallon and Brima Bazzy Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Lomé Decision)*, Case No. SCSL-2004-15-AR72(E) and Case No. SCSL-2004-16-AR72(E), 13 March 2004.

of whether it was binding on the government of Sierra Leone, it did not affect the liability of individuals to be prosecuted before an international tribunal for international crimes, as included in Articles 2 to 4 of the SCSL Statute. It explained that the contracting parties to the Lomé Agreement were the government of Sierra Leone and the RUF, while the UN, the Organisation of African Unity, the Economic Community of West African States (ECOWAS), the government of the Togolese Republic and the Commonwealth were mere moral guarantors who assumed no legal obligation.²⁸ Moreover, the SCSL appeals judges were of the opinion that the Lomé Agreement did not remove the universal jurisdiction that other states have to prosecute persons accused of crimes incorporated under Articles 2 to 4 of the Statute (crimes against humanity, violations of Common Article 3 to the Geneva Convention and of Additional Protocol II, and other serious violations of international humanitarian law) and likewise did not remove SCSL jurisdiction to do so.²⁹ Citing case law and academic treatise, the Appeals Chamber stated,

[I]t stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.³⁰

Delegation of power by the UN Security Council

A second jurisdictional challenge against the SCSL contended that there had been an illegal delegation of power by the UN Security Council when it created the Special Court.³¹ The arguments raised by the defendant concerned the power of the Security Council to delegate its powers to the Secretary-General to conclude an agreement between the UN and the government of Sierra Leone, and the power of the Secretary-General to conclude such an agreement on his own.³² The Appeals Chamber gave short shrift to these grounds of appeal. In its view, no delegation of power is required for the Secretary-General in fulfilling and executing the orders of the Security Council. Thus, in concluding the agreement between the UN and the government of

28 Ibid., para. 41.

29 It should be noted that in determining the subject-matter jurisdiction of the SCSL in the light of the principle of *nullum crimen sine lege*, the UN Secretary-General declared that the international crimes included in the Statute were deemed to have the character of customary international law at the time of the alleged commission of the crimes. See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 12.

30 *Lomé Decision*, para. 71. However, the Appeals Chamber noted that crimes falling under Sierra Leonean law, as included in Article 5 of the Statute, did not benefit from universal jurisdiction and are not mentioned in Article 10 of the Statute. Thus whilst the judges found the Lomé Agreement, in particular its Article IX, to be of no relevance in cases before the SCSL, the ruling is limited to crimes covered by Articles 2 to 4 of the Statute. In the light of the Appeals Chamber's focused approach, SCSL jurisdiction for crimes falling under Sierra Leonean law, as listed in Article 5 of the Statute, could seemingly be questionable.

31 SCSL, *Prosecutor Against Moinina Fofana, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations (Delegation Decision)*, Case No. SCSL-2004-14-AR72(E), 25 May 2004.

32 Ibid., para. 12.

Sierra Leone, the Secretary-General was not acting on his own, but rather at the request of the Security Council in his capacity as its executive organ.³³ The judges also ruled, in dismissing the defendant's next argument, that the UN Charter, specifically Articles 1(1) and 42 thereof, granted the Security Council the power to create an international court. In a reasoning similar to the above ICTR *Kanyabashi* decision, the Appeals Chamber opined that the establishment of an international tribunal was akin to "an effective and collective measure for the prevention of and removal of threats to the peace" as contemplated under Article 1(1) of the UN Charter.³⁴ Finally, the Appeals Chamber was not convinced by the defendant's last contention that the Security Council had acted *ultra vires* in creating a *sui generis* organ such as the SCSL, over which it lacks effective authority and control.³⁵

Recruitment of child soldiers

Defendant Sam Hinga Norman moved in a preliminary motion that the SCSL lacked jurisdiction to try individuals for having recruited children under the age of 15 into armed forces or groups or using them to participate actively in hostilities.³⁶ Whilst the defendant conceded that child recruitment had acquired the status of a crime under international law, he argued that the Court had to identify the point at which it had become a crime entailing individual criminal responsibility so as to not violate the principle of *nullum crimen sine lege*.

In its Decision, the Appeals Chamber, referring to a plethora of sources, including the 1949 Geneva Conventions and their 1977 Protocols, the 1998 ICC Rome Statute, ICTR and ICTY jurisprudence, the 1989 Convention on the Rights of the Child and its 2000 Optional Protocol on the involvement of children in armed conflict, as well as national legislation, concluded that child recruitment was criminalized by November 1996.³⁷ In the view of the Appeals Chamber, Article 4 of the SCSL Statute, as it relates to child recruitment, therefore does not contravene the principles of legality and specificity.³⁸

33 *Ibid.*, paras. 14–17.

34 *Ibid.*, paras. 18–20.

35 *Delegation Decision*, paras. 22–29. The appeal judges reasoned that, while the Security Council could not exercise judicial control over the SCSL, the SCSL could be controlled in administrative matters, including advice and policy direction. They noted that the Secretary-General represents the Security Council on the Court's Management Committee and at any time when there existed a threat to international peace and security, the Security Council would act in accordance with the UN Charter, even to override the Agreement establishing the SLSC.

36 SCSL, *Prosecutor Against Sam Hinga Norman, Decision Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-2004-14-AR72(E), 31 May 2004. Counsel for Moinina Fofana, as intervener, contended that child recruitment was not crime under customary international law, and that there was no sufficient state practice indicating an intention to criminalize it, para. 5.

37 *Ibid.*, paras. 30–51. The Appeals Chamber also considered *amici curiae* opinions filed by the University of Toronto, the International Human Rights Clinic and UNICEF.

38 *Ibid.*, para. 53. In reaching this conclusion, the Appeals Chamber noted that the norm prohibiting child recruitment as included in the Geneva Conventions and their Additional Protocols, as well as the near universal ratification of the 1996 Convention on the Rights of Child provided compelling evidence that this conventional norm had acquired customary status well before 1996. The Chamber also noted that the overwhelming majority of states did not practise the recruitment of children under 15 and had criminalized such behaviour prior to 1996.

This early case law on the establishment and jurisdiction of the ICTR and the SCSL ultimately reinforced the legitimacy of these jurisdictions, and clarified some important legal questions, in the furtherance of international criminal justice. Besides these legal challenges, the ICTR and SCSL have been confronted by many of the same difficulties as they have sought to become fully operational.

Logistical challenges in the establishment of the international criminal jurisdictions

Although the ICTR was in principle established in November 1994, its judges were only elected in May 1995.³⁹ As there were no actual physical structures to house the ICTR at the time, the judges of the ICTR held their inaugural plenary session in June 1995 at the seat of the ICTY in The Hague.⁴⁰ The first indictment was submitted by the Prosecutor on 22 November 1995, and confirmed on 28 November 1995.⁴¹ Further indictments against five individuals were confirmed in June 1996.⁴² The first appearances of accused persons before the ICTR occurred on 30 and 31 May 1996 in a makeshift courtroom in the building hosting the ICTR in Arusha.⁴³ The ICTR considered these appearances to be particularly important as they represented the first sitting in Africa by an international criminal tribunal. Three trials began in early 1997, those of Jean Paul Akayesu, on 9 January 1997, Georges Rutaganda, on 18 March 1997, and just under a month later, on 9 April 1997, that of Clément Kayishema and Obed Ruzindana.

39 In its Resolution 989 (1995) of 24 April 1995, transmitted to the president of the General Assembly by a letter dated 24 April 1995, the Security Council proposed a list of candidates for judgeships. A month later, on 24 and 25 May 1995, the General Assembly, by decision 49/324, elected the first six judges for a four-year term of office. These were Judges Lennart Aspegren, Laity Kama, Tafazzal Hussain Khan, Yakov A. Ostrovsky, Navanethem Pillay and William Hussein Sekule. Pursuant to Article 15 of the ICTR Statute, Judge Richard Goldstone, as the then Prosecutor of the ICTY, was also to serve as the Prosecutor of the ICTR. On 20 March 1995 the Deputy Prosecutor was designated to act on behalf of the Prosecutor in Arusha and Kigali. The first Registrar of the ICTR, responsible for the administration of the Tribunal, was only appointed on 8 September 1995 by the UN Secretary-General. See generally, ICTR First Annual Report, UN Doc. No. A/51/399 – S/1996/778, 28 September 1996.

40 It was only for their second plenary session, in January 1996, that the judges met in Arusha. During this session they adopted the rules of detention and the directive for the assignment of defence counsel. In March 1996, in accordance with Rule 23 of the Rules of Procedure and Evidence, the judges decided to enter into an agreement with the International Committee of the Red Cross, which will thus become the independent authority responsible for inspecting detention conditions. See the ICTR First Annual Report.

41 The Indictment concerned massacres committed in the prefecture of Kibuye in Rwanda between April and June 1994. The accused were Clément Kayishema, Charles Sikubwabo, Aloys Ndimbati, Ignace Bagilishema, Vincent Rutaganira, Muhimana Mika, Obed Ruzindana and Ryandikayo.

42 A first indictment concerned Elie Ndayambaje, for mass killings in the Kabuje and Gisagara districts, Kibuye prefecture, and the second was against Elizaphan Ntakirutimana, Gérard Ntakirutimana, Obed Ruzindana and Charles Sikubwabo, for massacres committed in Kibuye prefecture. ICTR First Annual Report, para. 46.

43 The accused were Jean-Paul Akayesu, former mayor of the commune of Taba in Gitarama prefecture, and Georges Rutaganda, second vice-president of the Interahamwe za MRND, respectively. ICTR First Annual Report, para. 39.

Being only the second international criminal jurisdiction of its kind, and the very first in Africa, the ICTR was confronted by an array of teething troubles. The realities of international justice soon dawned on the international community, and many early headaches, administrative as well as judicial, were to afflict the ICTR.

On an administrative level, the UN Office of Internal Oversight Services found in 1997 that there existed severe mismanagement in many areas at the ICTR.⁴⁴ In one of its strongest findings it stated that “not a single administrative area of the Registry functioned effectively”. As a result, both the Registrar and the Deputy Prosecutor were replaced, and structural changes as well as new senior staff were put in place.⁴⁵ Moreover, whilst the first trials had started promptly, their progress was hampered, notably by the lack of courtrooms. Indeed, the two trial chambers were forced to share a single courtroom, which meant having to suspend one trial to allow another to continue. A second courtroom was finally built in August 1997, thereby allowing the trial chambers to speed up the trials by operating simultaneously.⁴⁶ Following a request from the President of the ICTR, the Security Council established a third trial chamber in 1998, increasing the number of judges from six to nine.⁴⁷

When, a few years later, the international community came to establish the SCSL, there was a large consensus that a hybrid jurisdiction would be a preferable alternative to a fully fledged international tribunal. In the light of the experience of the ICTR in its initial years, the SLSC was to be a more limited and streamlined operation.⁴⁸

Although the SCSL started its functions in July 2002, only seven months after the signing of the Agreement between the UN and the government of Sierra Leone on the establishment of the Court, like the ICTR it had to build detention facilities, a courthouse and office premises. The court premises were officially

44 Audit and Investigation of the International Criminal Tribunal for Rwanda, UN Doc. No. A/51/798, 6 February 1997.

45 ICTR Second Annual Report, UN Doc. No. A/52/582-S/1997/868, 13 November 1997, paras. 53–61.

46 ICTR Third Annual Report, UN Doc. A/53/429-S/1998/857, 23 September 1998, para. 77.

47 The Security Council was convinced that it was essential to add to the number of judges and trial chambers, in order to enable the ICTR to try without delay the large number of accused awaiting trial. See UN Doc. S/RES/1165 (1998), 30 April 1998. The first week of September 1998 was very much a turning point in the fortunes of the ICTR, with the guilty plea of Jean Kambanda, the prime minister of the interim government between April and July 1994. The case of Jean Kambanda represented the first ever conviction of a former head of government for genocide, and the issuance of the Judgement in the Akayesu case provided the first judicial interpretation of the crime of genocide. Since then, the ICTR has increased its output substantially and, to date, the trials of more than twenty-six accused have been completed and cases against twenty-six accused are under way. Five of the ongoing trials are joint cases implicating between three and six accused, most of whom are the alleged leading perpetrators of the massacres. The other trials involve single defendants. The ICTR has set many groundbreaking precedents, and found accountable the majority of the leaders of the massacres in Rwanda 1994. The ICTR has also developed an important corpus of jurisprudence, in particular on genocide and serious violations of Common Article 3 of the 1949 Geneva Conventions and their 1977 Additional Protocols. See also Erik Mose, “Main Achievements of the ICTR”, *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 920–943.

48 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000.

opened on 10 March 2004. As none of the buildings which had been identified by the government of Sierra Leone to house the SCSL was found to be suitable due to security and renovation concerns, to save time and costs prefabricated structures were erected to host the office facilities. Nearly 340 expert international as well as national staff had to be recruited.

In the same vein as the ICTR, logistical constraints, in particular financing, have been a major concern for the SCSL. Unlike the ICTR, financed from the UN budget, the budget of the SCSL is dependent on voluntary contributions of states. Thus without state support the SCSL's activities can be severely constrained. Financial problems have lurked from day one of the SCSL's life. Possibly as a result of high costs at the UN ad hoc tribunals, and with the establishment of the ICC, states were reluctant to accept the Secretary-General's initial estimate of the SCSL's costs of operations for its first three years, namely, US\$30.2 million for the first year and \$84.4 million for the next two years. Faced with opposition from states, the budget for the first three years was lowered to \$19.219 million for July 2002–June 2003, \$32.534 million for July 2003–June 2004 and \$29.9 million for July 2004–June 2005.⁴⁹

Moreover, the SCSL has struggled to receive all the pledged financing, with a shortfall of \$82 million for its first three-year budget. This prompted the UN Secretary-General to seek urgent subventions from the General Assembly, which though granted, failed to materialise as quickly as the SCSL had hoped.⁵⁰

More fundamentally, as both the ICTR and the SCSL quickly realised and recognised, the complexity and nature of international justice meant that they must depend heavily on the co-operation of states, and on national judicial procedures, in a number of crucial areas. For instance, all the accused before the ICTR had to be arrested in third states and transferred to the ICTR detention facilities in Arusha. Before trial, sufficient time had to be accorded to the defence to prepare its case, which would entail having to identify potential witnesses, who, in the case of the ICTR, had to be tracked down in numerous countries other than Rwanda, often far from the seat of the Tribunal. As many of the witnesses were afforded protection by the ICTR and SCSL, arrangements for their resettlement and safe transfer to and from the Tribunal required much assistance from states and various organisations.⁵¹

This dependency on state support and on political stability and security in those states was highlighted in March 1997, when the defence in the *Rutaganda* trial seized an ICTR trial chamber of an extremely urgent motion for the taking of statements of sixteen witnesses who were living on the Tingi-Tingi refugee camp in the DRC (then Zaire). By the time that motion was heard, the refugee camp had been overrun and destroyed. The witnesses had disappeared. The trial chamber, fully cognisant of the need to ensure the full respect of the rights of the defendant,

49 Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, forwarding the SCSL Completion Strategy (18 May 2005)(Completion Strategy), UN Doc. A/59/816-S/2005/350, 27 May 2005, paras. 55–56.

50 *Ibid.*, para. 57.

51 *Ibid.*, paras. 33–38.

sought the co-operation of states, the UN, including the UN High Commissioner for Refugees, and any other organization that could be of help in locating those witnesses.⁵² Following this decision, the security conditions for Rwandan refugees in the DRC deteriorated substantially, which did not facilitate the task of finding the missing witnesses.⁵³

In the case of the SCSL, of the eleven accused still indicted, only one has yet to be brought before the Court, namely Johnny Paul Koroma who is still at large.⁵⁴ Unlike the ICTR, which, as a subsidiary organ of the UN Security Council, can report to the latter instances of non-co-operation by states, the SCSL does not benefit from such powers. The SCSL is very much in the hands of states and has to rely on their goodwill to obtain not only the arrest and transfer of all accused, but also help with the witness movement and relocation. The case of Charles Taylor highlighted this reliance on state cooperation. Having been indicted by the Special Court Charles Taylor, the former president of Liberia, was granted asylum by Nigeria in August 2003. It was not until March 2006, with the ending of his asylum by the Nigerian authorities, that Charles Taylor was finally transferred to the Special Court. This came a few months after the Security Council granted the UN Mission in Liberia a Chapter VII mandate to arrest Charles Taylor if he returns to his country.⁵⁵ Whilst the arrest and transfer of Charles Taylor was welcomed by the international community, it showed that much depends on the assistance states choose to provide, if the Special Court is to fulfill its mandate.

The ICC is most probably going to face similar issues in its relationship with states as those affecting the ICTR and SCSL, particularly as regards access to the crime sites, the protection of witnesses, preservation of evidence, and arrests of accused. Many of the cases with which the ICC will deal are likely to stem from post-conflict countries, the infrastructures of which have been severely weakened

52 ICTR, *Prosecutor v. Georges Rutaganda* (Case No. ICTR-96-3-T), Decision on the Extremely Urgent Request made by the Defence for the taking of a Teleconference Deposition, 6 March 1997.

53 ICTR Second Annual Report, paras. 21–24.

54 Of the remaining persons initially indicted, two of the accused, namely Foday Saybana Sankoh and Sam Bockarie, subsequently died. Ten accused are presently in the custody of the SCSL in Freetown; they are Charles Ghankay Taylor, Alex Tamba Brima, Moinina Fofana, Augustine Gbao, Morris Kallon, Brima Bazzy Kamara, Santigie Borbor Kanu, Allieu Kondewa, Samuel Hinga Norman and Issa Hassan Sesay. In January 2004 the trial chamber ordered the regrouping into three trials of these nine detainees, on the basis of their belonging to one of the parties to the conflict on Sierra Leone. As such, Issa Hassan Sesay, Morris Kallon and Augustine Gbao were joined in the case regarding the Revolutionary United Front (RUF Trial), Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu are to be tried together in the Armed Forces Revolutionary Council trial (AFRC Trial), and Samuel Hinga Norman, Allieu Kondewa and Moinina Fofana are to be jointly tried in the Civil Defence Forces trial (CDF Trial), see SCSL, *Prosecutor against Issa Hassan Sesay* (Case No. SCSL-03-05), *Alex Tamba Brima* (Case No. SCSL-03-06), *Morris Kallon* (Case No. SCSL-03-07), *Augustine Gbao* (Case No. SCSL-03-09), *Brima Bazzy Kamara* (Case No. SCSL-03-10) and *Santigie Borbor Kanu* (Case No. 03-13), *Decision and Order on Prosecution Motions for Joinder*, 27 January 2004; *Prosecutor against Samuel Hinga Norman* (Case No. SCSL-03-08), *Moinina Fofana* (Case No. SCSL-03-11) and *Allieu Kondewa* (Case No. SCSL-03-12), *Decision and Order on Prosecution Motions for Joinder*, 27 January 2004. All the trials have begun, the RUF trial on 5 July 2004, the AFRC trial on 7 March 2005 and the CDF trial on 3 June 2004. The Prosecution has closed its case in the CDF and AFRC trials on 14 July 2005 and 21 November 2005 respectively. See <www.sc-sl.org> (last visited 21 March 2006).

55 UN Doc. S/2005/1638, 11 November 2005.

by hostilities, and national resources depleted. Moreover, the location of the seat will be an important factor. Being based in The Hague, at a distance from the setting of the crimes, the Court's work will not be facilitated. For the sake of practicality and so as to not put the witnesses in too alien an environment by having to travel to The Hague to testify, the ICC may need to consider sitting elsewhere, for instance in Arusha, when hearing testimonies of witnesses coming from the DRC or Uganda. Thus state support and structures could be essential to enable the ICC to operate effectively. In one of the first situations initiated by the ICC some of these considerations have already come to the fore.

In the Darfur case, questions pertaining to state co-operation have arisen, and the insecurity prevailing in Darfur appears to have hampered the investigations. The reports prepared for the UN Security Council by the ICC Prosecutor on the actions he has taken to implement Resolution 1593 provide insights into the challenges he and his team face in investigating in Darfur. In his first report to the Security Council, dated 29 June 2005, the Prosecutor provided an overview of the preliminary investigations: a mammoth task of evidence gathering and analysis, including 2,500 items obtained from the International Commission of Inquiry and more than 3,000 documents from over one hundred groups and individuals. According to the ICC Prosecutor there is credible evidence that crimes falling under the jurisdiction of the ICC have been committed, with thousands of civilians killed, and more than 1.9 million displaced.⁵⁶

One area of concern voiced by the Prosecutor in his most recent report to the Security Council, dated 13 December 2005, relates to the protection of witnesses and victims which could not be assured due to continuing insecurities in Darfur.⁵⁷ The Prosecutor saw this as a serious impediment not only to the investigations conducted by the ICC, but also to the work of the domestic judicial bodies set up by the Sudanese authorities. The Prosecutor nonetheless indicated that his office would soon initiate its second-stage investigations, focusing on specific incidents and on individuals bearing the greatest responsibility for these crimes. He emphasised, however, that no decision had yet been taken as to whom to prosecute.⁵⁸

Another point stressed by the ICC Prosecutor in his reports to the Security Council on Darfur concerns the issue of complementarity. Since the UN Security Council referred the situation to the ICC for its investigation, the Sudanese authorities have seemingly taken steps to initiate prosecutions at the national level, and have established a special panel composed of national judges to investigate the crimes allegedly committed in Darfur.⁵⁹ The ICC Prosecutor reported that, while determining the admissibility of the Darfur situation, he had

56 Report of the prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005), p 4, available on <www.icc-cpi.int> (last visited 21 March 2006).

57 Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005), available on <www.icc-cpi.int> (last visited 21 March 2006).

58 *Ibid.*, p. 3.

59 Report of the Prosecutor to the Security Council Pursuant to UNSC 1593, p. 4.

received information from the Sudanese authorities on, notably, the Sudanese judicial system, the administration of justice in Darfur and traditional systems for alternative dispute resolution. The ICC also looked into the special courts and specialized courts which had been set up in 2004 by the Sudanese authorities, the committees against rape established by ministerial order in 2004, as well as the national commission of inquiry, and other ad hoc and non-judicial bodies.⁶⁰ The Prosecutor explained that while the Darfur case was admissible before the ICC, “this decision did not represent a determination on the Sudanese legal system as such, but is essentially a result of the absence of criminal proceedings relating to the cases on which the ORP is likely to focus”.⁶¹

This limited review of some of the logistical challenges encountered by the international criminal jurisdictions in their work so far shows that many of the same issues have come up before each of them. In particular, reliance and even dependence on the co-operation and goodwill of states to enable the fulfilment of their mandates is an ever recurring theme. The international courts have consistently had to turn to states for their finances, for the arrest and transfer of accused and to secure the appearance and protection of witnesses. The early signs are that the ICC is likewise going to have to define its relationship with states and assess with each of them a workable *modus vivendi*.

Finishing the work

Because of their ad hoc nature, the ICTR and the SCSL knew from their inception that as temporary institutions with limited jurisdictions they would have to determine clearly how to proceed in order to fulfil their mandates effectively within a given timeframe. Accordingly, the ICTR Prosecutor determined early on that the investigations and prosecutions should concentrate on those most responsible for the crimes committed in Rwanda in 1994, so as to limit the number of cases to be tried in Arusha.

By 2003 the Security Council had confirmed that the time had arrived for the ICTR, as well as the ICTY, to start winding down and to bring to an end their activities. The Security Council endorsed the plans put forward by the ad hoc tribunals in which they suggested completing all investigations by 2004, trials by 2008, and appeal procedures by 2010.⁶² This so-called “completion strategy” might have appeared to be a tall order, given the then prevailing speed of trials. The Tribunals seem, however, to have been granted the means needed to meet the challenge. At the ICTR, the creation of a pool of eighteen *ad litem* judges in August 2002, elected in 2003,⁶³ and the construction of a fourth courtroom increased the judicial capacity. The

60 Ibid.

61 Ibid., and Second Report of the Prosecutor to the Security Council Pursuant to UNSC 1593, pp. 5–6.

62 UN Docs. Nos. S/2003/1503, 28 August 2003 and S/1534/2004, 26 March 2004. The ICTR has yet to confirm its capacity to comply with the 2010 deadline as the date for completion of the appeals procedures. If this date is maintained, the ICTR will be closing its doors nearly sixteen years after the events in Rwanda in 1994, having completed cases against sixty-five to seventy persons.

63 UN Doc. No. S/2002/1431, 8 August 2002.

arrival of the *ad litem* judges, and careful judicial planning, made it possible to increase substantially the number of new trials, nearly doubling the ICTR's judicial output.⁶⁴

Nonetheless, from examining the ICTR's completion strategy, which is updated and submitted to the Security Council in May and November each year, it appears that the ICTR will have to keep to a very tight schedule to meet its 2008 deadline and complete all trials. The completion strategy entails a web of meticulous planning and interrelated considerations taking into account sufficiency of resources, the length of trials (including estimates as to required trial days for each case) and the number of cases that can be transferred to national jurisdictions. Nevertheless, in his 2005 updates to the Security Council, the president of the ICTR remained confident that the ICTR would keep to the timeline.⁶⁵

One of the more contentious aspects of the completion strategy is that cases investigated by international prosecutors may have to be transferred to national jurisdictions. The ICTR Prosecutor has targeted forty-one cases for transfer, comprising cases warranting further investigations and other cases fully investigated and where indictments have already been issued, the accused sometimes arrested and awaiting trial. The decision to transfer cases where indictments have already been confirmed rests with the ICTR judges, pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence. The Prosecution has declared that it is negotiating with a number of states, including Rwanda, to take over certain of the cases.⁶⁶ Whether the national legislation of states permits prosecution of individuals for crimes falling under the ICTR Statute, the actual ability of the national courts to handle such cases and the existence of the death penalty are but some of the considerations which must be taken into account by the ICTR in transferring the cases.⁶⁷ Moreover, failure successfully to transfer cases to national authorities risks jeopardizing the completion strategy.

The drafters of the Statute of the SCSL drew upon the experience of the *ad hoc* tribunals and specified that its mandate is to try only those bearing the greatest responsibility for the crimes falling within its mandate.⁶⁸ Its efforts and attention were thus to concentrate on a few key leaders and it was expected that the SCSL would try a limited number of cases. It was implied that that the SCSL would complete its activities within about three years.⁶⁹ In April 2004 the UN General Assembly requested the Secretary-General to invite the SCSL to adopt a completion strategy.⁷⁰ Although this request was made only a couple of years

64 Mose, above note 47.

65 Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2005/336, 24 May 2005, and ICTR President Addresses UN Security Council, ICTR/Info-9-2-460, Arusha, 16 December 2005, available on <www.ict.rg> (last visited 21 March 2006).

66 *Ibid.* As of November 2005, case files in respect of thirty suspects had been handed over to the Rwandan authorities, and one to Belgium.

67 *Ibid.*

68 Article 1 (Establishment of the Special Court) of the SCSL Statute.

69 Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, forwarding the SCSL Completion Strategy (18 May 2005)(Completion Strategy), UN Doc. A/59/816-S/2005/350, 27 May 2005, para. 37.

70 UN Doc. A/58/284, 8 April 2004.

after the SCSL had started its operations, it did not come as a surprise in the light of similar requests to the ICTR and ICTY in 2003, read in conjunction with the implied three-year lifespan of the SCSL.

In the resulting completion strategy prepared by the SCSL, the latter foresaw that the CDF and AFRC trials could be completed by the end of 2005 or early 2006, and the appeals in these cases heard by mid-2006. The SCSL also hoped that the RUF trial, including appeals, would be finished by early to mid-2007.⁷¹ It remains, however, questionable whether the SCSL will be in a position to keep to the above timeframe.⁷²

Yet, whilst suggesting 2007 as an estimate date for completing its work, the SCSL Registrar noted that as Charles Taylor and Johnny Koroma had yet to be arrested, this completion date might be affected.⁷³ He explained that, unless their indictments are withdrawn, or until such time as they are brought before the SCSL, it will not be possible to determine when all the trials, and thus the SCSL, will be closed.⁷⁴ It will be interesting to see whether the recent arrest of Charles Taylor and his impending trial will bring the Registrar to revise this date.

Although there remain doubts as to the exact date of closure of the ICTR and the SCSL, it is now clear that their days are numbered and that they will close within a few years. By then, the ICTR and the SCSL will have tried only a handful of individuals, the majority of the remaining perpetrators being left to be tried by national courts. This is of course coherent with their limited mandates, which are ad hoc in nature, and with the principle of concurrence of jurisdictions asserted in the statutes of the ICTR and SCSL. As they are concerned only with prosecuting those most responsible for the atrocities committed in Rwanda and Sierra Leone, their work must be furthered by national initiatives, such as national courts and community-based justice in the form of the gacaca in Rwanda, and other initiatives, such as the Truth and Reconciliation Commission in Sierra Leone.

Even if the ICC is a permanent institution, it will similarly not be spared efforts by state parties to streamline its operations and activities. For each situation it will in all likelihood be required to delimit clearly the parameters of its work, deciding how many suspects to investigate, prosecute and try, and how to define who are the “most responsible”. Also, it will have to ensure that – by being

71 Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, forwarding the SCSL Completion Strategy (18 May 2005)(Completion Strategy), UN Doc. A/59/816-S/72005/350, 27 May 2005.

72 The defence case in the CDF trial restarted in January 2006 and the RUF trial on 28 February 2006; no date has yet been set for the start of the defence in the AFRC trial, as any motions for acquittal will not be heard until mid-January. See <www.sc-sl.org> (last visited 21 March 2006). Thus if the SCSL succeeds in meeting the target dates in its Completion Strategy, it will have taken SCSL nearly five years for the SCSL to finish the cases against the accused already in detention, somewhat longer than the three years initially predicted by the international community.

73 Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, forwarding the SCSL Completion Strategy (18 May 2005)(Completion Strategy), UN Doc. A/59/816-S/72005/350, 27 May 2005.

74 *Ibid.*, para. 36. A similar position has been adopted by the ICTY in its completion strategy as concerns the arrests of Mladić and Karadžić. See press release of President Pocar’s Address to Security Council, 15 December 2005, CVO/MO/1037e, available on <www.un.org/icty> (last visited 21 March 2006).

constrained to trying those bearing the highest responsibility – the fight against impunity continues to be fostered through the work of national jurisdictions. In this regard, the ICC may again be able to draw invaluable lessons from the ICTR and the SCSL.

Concluding remarks

The above review of some of the operations of the ICTR and the SCSL shows that the delivery of justice through international jurisdictions is a complex process, often time-consuming. Indeed, at the end of 2005 the ICTR celebrated its eleventh year, the SCSL completed its fourth year, and the ICC was more than three and a half years old.

While the SCSL was established with the intent to remedy some of what were perceived to be the weaknesses of the ad hoc tribunals, with still so many unknowns in its lifespan it is difficult to assess whether this hybrid jurisdiction is a more reliable model for bringing justice to a country decimated by violations of international humanitarian law and other crimes. It may be closer to the victims and provide Sierra Leone and possibly its people with a sense of ownership. Nonetheless, it has already been beset by many of the same issues and constraints which have befallen the ICTR, all of which may well be inherent in trying to dispense international justice. It would appear, therefore, that the successful execution of the mandates of international criminal institutions has ultimately less to do with the manner in which they were created than with the support they receive from states. Indeed, through their activities and jurisprudence, the ICTR and the SCSL reminded us that international criminal tribunals do not operate in some vacuum but depend extensively on state co-operation.

The hopes and expectations of the victims, concerned states and the international community of the ICC are very high. It is far too early to assess how well this court, which has only just started operating, is faring. Only time will tell whether the lessons learnt from the ICTR and the SCSL will in any way prove beneficial to the ICC's operations, especially in Africa, as it works its way through its caseload. The first progress reports of the ICC suggests that it may well already be confronted with many of the same difficulties that the ICTR and the SCSL faced as they strove to bring to justice alleged perpetrators of serious violations of international humanitarian law, genocide and crimes against humanity.

However, with the support extended to all international criminal jurisdictions by most states, in particular African states, there is room for optimism that international criminal justice, through the ICTR, the SCSL and the ICC, will prevail over impunity in Africa. Indeed, it was an African state, Senegal, which was the first country to ratify the ICC Statute, and a majority of African states have followed suit. Nearly a third of the state signatories to the Rome Statute are African. Moreover, the African Union, in Article 4 (Principles) of its Constitutive Act, reserved to itself the right to intervene in a member state in respect of grave circumstances, such as war crimes, genocide and crimes against

humanity, and underscored its commitment to rejecting impunity. The African continent is therefore not merely the object of most international criminal justice efforts, but is clearly becoming one of its proponents, as African states become more actively involved in promoting it.

It is probably unavoidable that there will be certain tensions between national authorities and international criminal jurisdictions in delivering justice to the victims of some of the most heinous crimes known to mankind. Nonetheless, the experiences of the ICTR and the SCSL, and the fledgling ICC, have shown that despite being the continent where most of these crimes have been committed in the past couple of decades, Africa is also a continent clearly devoted to furthering accountability for such atrocities.