

5. Post-conflict justice: developments in international courts

SHARON WIHARTA

1. Introduction

The nexus between justice and peace has grown stronger in recent years. The 1990s were characterized by several repressive dictatorships giving way to more democratic regimes. In such circumstances, there was a recognition that gross violations of international humanitarian law had to be expediently addressed if the goal of a peaceful transition was to be achieved.¹ The issue of holding accountable those responsible for committing grave crimes during conflicts is also becoming a major component of peace negotiations. A mechanism for redress, be it an ad hoc tribunal, a truth and reconciliation commission or as a component of a complex peacekeeping mission, was advocated in almost all recently concluded or ongoing peace processes. One positive consequence of what has been a lengthy debate is that the delivery of justice as an essential element of post-conflict peace-building has emerged as an internationally accepted norm. Equally important is the understanding that international courts represent just one element in a wide range of conflict prevention instruments. Deterrence effects are also part of the rationale behind the setting up of such courts.

Several significant developments in formal institution building occurred in the sphere of post-conflict justice in 2003. However, the specific means by which these were pursued were often controversial. The International Criminal Court (ICC), established in July 2002, is now fully operational.² The judges and the prosecutorial team have commenced work. The court has received numerous reports of possible crimes. It has also been placed on a sound financial footing. The progress of the ICC has been hampered by continued opposition, particularly from the United States. The Administration of US President George W. Bush maintained its policy of pursuing Bilateral Immunity Agreements (BIAs) with states parties to the Rome Statute and non-states parties.

¹ This occurred in, e.g., Argentina, El Salvador and South Africa. For a discussion of transitional justice see Kritz, N. J. (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 2, *Country Studies* (United States Institute of Peace: Washington, DC, 1995).

² The Rome Statute, the treaty establishing the ICC, was adopted on 17 July 1998 at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome. It entered into force on 1 July 2002. 'Rome Statute: International Criminal Court', *International Legal Materials*, vol. 37 (Sep. 1998), pp. 1002–69; and 'Rome Statute of the ICC, as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999', URL <<http://www.un.org/law/icc/statute/contents.htm>>. For an account of the foundation of the ICC see Wiharta, S., 'The International Criminal Court', *SIPRI Yearbook 2003: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2003), pp. 153–66.

The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have both been requested by the United Nations Security Council to end all activities by 2010. Substantial structural changes have consequently been made in order to facilitate this process—including the appointment of a separate Chief Prosecutor for the ICTR. Another important development in 2003 was the creation of ‘hybrid’ courts (or second-generation courts as they are sometimes called) such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers for Cambodia. The creation of a domestic tribunal in Iraq at the end of 2003 raised important questions about whether the nascent system of international criminal justice has been threatened.

Section II of this chapter provides an update of developments regarding the ICC. Section III examines the contribution made to post-conflict justice thus far by the ICTR and the ICTY. Section IV examines the potential role of the new hybrid courts and considers alternative mechanisms, and section V presents the conclusions.

II. The International Criminal Court one year on

The institutional framework of the ICC was put in place in 2003. Key members of staff—judges, the President, the Registrar, the Prosecutor and the Deputy Prosecutor—were appointed. It is expected that both the Pre-Trial and Appeals Divisions will be fully in place and ready to hear their first cases by April 2004. The Office of the Prosecutor (OTP) will also be ready to investigate its first case at that time.³ The appointment of its most senior officials has allowed the court to widen the scope of its work from mainly administrative and operational tasks to judicial and prosecutorial questions. A large team has been drafting the Rules of Procedure and Evidence—an important task because, without these, the Prosecutor would not be able to proceed with any cases.⁴ These rules ensure that the court operates efficiently and effectively.

The ICC has jurisdiction only over individuals, may not try governments and can claim jurisdiction over crimes against humanity, genocide, war crimes and crimes of aggression only if certain conditions have been met. The act under investigation must have occurred on the territory of a state party to the Rome Statute, or the accused must be a national of a state party; one or more of the parties involved must be a state party, or a non-state party must have accepted the jurisdiction of the ICC. Under the principle of complementarity, the state has the duty to prosecute in the first instance. Only in circumstances where the national court is unable or unwilling to try the case will it proceed to

³ ICC, Address by Philippe Kirsch, President of the ICC, to the Assembly of States Parties to the Rome Statute of the International Criminal Court, second session, New York, 8 Sep. 2003, URL <http://www.icc-cpi.int/library/organs/presidency/080903_reg_kirsch_second_ASP.pdf>.

⁴ Not all of the 18 judges are currently working full-time. Nor are they all based at The Hague. Akua Kuenyehia, First Vice-President of the International Criminal Court, remarks made at the Wilton Park Conference, ‘Post-conflict justice: lessons for the future?’, 15–18 Sep. 2003, URL <<http://www.wiltonpark.org.uk>>.

the ICC. In situations where non-state parties are involved, the case will only fall under ICC jurisdiction if the UN Security Council, acting under Chapter VII of the UN Charter, decides to refer a situation to the Prosecutor. Finally, the ICC has no retroactive power and can only try crimes that have been committed after the statute entered into force on 1 July 2002.

The method of participation by victims in trials warrants closer examination because their extensive participation in ICTR and ICTY trials, primarily through witness testimonials, was thought to have prolonged trials unduly.⁵ However, the ICC recognizes the right of victims to be involved in proceedings, as provided for by the Rome Statute. Drawing up a list of defence counsel and a code of conduct for counsel, as well as the financial implications of setting up the Defence Counsel Unit, have also required attention.⁶ During this period, the Presidency of the Court has been vigilant about the ICC's external relations and has made efforts to educate the public about its work. It has also been agreed that states parties should adopt the assessed contributions approach, similar in both method and scale to that used by UN member states to assess and pay their dues, to finance the court. This puts the court on a more stable financial footing. However, there is a danger that, as in the case of UN peacekeeping contributions, delayed payments might cause the court to fall quickly into financial arrears, thereby affecting its ability to function.⁷ The budget in fiscal year (FY) 2004 is €55.09 million (*c.* \$67 million)—comparable to the budgets of the recently established hybrid courts, but significantly less than those of the ICTR (\$240 million) and ICTY (\$327 million).⁸

Election of key staff

The Assembly of States Parties (ASP) began its search for judges in September 2002, soon after the end of the third meeting of the first session. However, nominations for potential judges were slow to come—especially from Asia. The ASP agreed that nominations could be accepted for individuals from states not yet party to the Rome Statute if the state in question had started the process of ratification and was expected to deposit its instrument of ratification before the election period.⁹ This was done in the hope that countries such as China and Russia would begin to ratify the Rome Statute. By the close of the nomination period, 43 candidates had been nominated for the 18 seats.¹⁰

⁵ Cayley, A., Senior Trial Attorney for the ICTY, communication with the author, 27 Oct. 2003.

⁶ ICC, Assembly of States Parties, 'Report of the International Criminal Court', 6 Aug. 2003, document ICC-ASP/2/5, available at <<http://www.icc-cpi.int/basicdocs/asprecords.html>>.

⁷ Only 39 states had paid their contributions in full by Sep. 2003, while 11 had made partial payments. The total amount outstanding was €8 million. ICC, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, second session, New York, 8–12 Sep. 2003, document ICC-ASP/2/10, p. 178.

⁸ €52.21 million will be used to finance the court and €2.88 million for the secretariat of the ASP. ICC (note 7), p. 22; and United Nations, 'Fifth Committee takes up 2004–2005 budgets for Rwanda, Former Yugoslavia tribunals', Press Release GA/AB/3594, 24 Nov. 2003.

⁹ Hedberg, B., Director, International Law and Human Rights Department, Ministry for Foreign Affairs, Sweden, communication with the author, 30 Oct. 2003.

¹⁰ There were initially 45 nominees but 2 were later withdrawn. The Group of 'Western European and other states' put forward the highest number of nominees with 12 candidates, African states put for-

The ASP placed an emphasis on an even geographical distribution of judges at the court to signal that the ICC could become a universal norm-setter and encourage the subsequent universal acceptance of the court.¹¹ There was also a need to strike a delicate balance between candidates who were academics and those who were practitioners, and between those who had criminal law experience and those who possessed other relevant legal backgrounds such as international humanitarian law, human rights law, and expertise on sexual crimes and gender issues. A complex set of voting regulations was drawn up to provide for gender balance and equitable geographical representation and to ensure that the different principal legal traditions would be represented. Furthermore, no two judges could come from the same state.¹² Nominees were placed on two lists: List A comprised names of candidates who had criminal law experience and List B names of candidates with competence in international law.¹³ Observers were concerned that the criteria put in place to make for a fair process might prove counter productive since, in order to satisfy them, a more qualified candidate might be passed over for another who would fill a gap in the quota system. For example, only 10 of the 43 candidates were women.¹⁴ This made it difficult for there to be a meaningful election to fill the six positions reserved for women. The emphasis on representation of women judges was not only for reasons of gender equality but also because the Rome Statute had, for the first time in the history of international law, included sexual violence against women and children as a crime against humanity. The experiences of the ICTR and the ICTY demonstrated that there are inherent advantages in having high-ranking female officers of the court trying such crimes.¹⁵ During proceedings, women judges proved more likely to persuade rape victims to testify while male investigators were less likely to take the initiative in looking for evidence of sexual violence.

Candidates were elected by a secret ballot and a successful candidate required at least two-thirds of all votes cast.¹⁶ The election of the 18 judges required 33 rounds of voting.¹⁷ The President of the ASP had previously

ward 10 nominees, Latin American and Caribbean states 8 nominees, Eastern European states 7 and Asian states 6 nominees. A full list of the nominees can be found on the Internet site of the ICC at URL <http://www.un.org/law/icc/elections/judges/judges_allcriteria.htm>.

¹¹ Hedberg (note 9).

¹² Mundis, D. A., 'The Assembly of States Parties and the institutional framework of the International Criminal Court', *American Journal of International Law*, vol. 97, no. 1 (Jan. 2003), p. 143.

¹³ The rules stipulated that at least 9 candidates were to be elected from List A and at least 5 from List B. Additionally, at least 3 candidates were to be from African states, at least 2 from Asian states, at least 2 from East European states, at least 3 from 'Western Europe and other states', and at least 3 from Latin American and Caribbean states. ICC, Election of the judges for the International Criminal Court: guide for the first election, document ICC-ASP/1/5, 17 Dec. 2002.

¹⁴ Hoyos, C. and Tait, N., 'World's leading human rights job finds no takers', *Financial Times*, 7-8 Dec. 2002, p. 4.

¹⁵ Booth, C., 'Prospects and issues for the International Criminal Court: lessons from Yugoslavia and Rwanda', ed. P. Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press: Cambridge, 2003), pp. 157-92.

¹⁶ ICC (note 13).

¹⁷ ICC, Official records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, first session (first and second resumptions), New York, 3-7 Feb. and 21-23 Apr. 2003,

encouraged members to avoid the usual vote swapping and instead to elect candidates who would genuinely serve the court well.¹⁸ There are signs that this was adhered to. The composition of the Presidency of the Court was later determined by the judges.¹⁹ The President will be responsible for external relations, the First Vice-President for the administrative aspects of the Presidency's work and the Second Vice-President for the judicial aspects.²⁰

The post of Chief Prosecutor is an extremely personality-driven office, being the most public face of the court and therefore carrying particular responsibility for establishing its reputation. In essence, it is the Prosecutor who will define and establish the style of the ICC—much as Chief Prosecutor Carla Del Ponte did at the ICTY.²¹ The Prosecutor is reliant on the cooperation of states parties when conducting investigations and prosecutions. Hence, apart from the obvious requirement that the Prosecutor be proficient in criminal law, the ideal candidate should also be diplomatically astute, while making sure that the process itself stands apart from politics—maintaining the integrity of the office. The experiences of the ICTR reminded all involved that too tenacious a Prosecutor is not desirable, but nor is a timid Prosecutor. The search for a suitable Chief Prosecutor proved more arduous than anticipated. The nomination deadline, originally 30 November 2002, was extended to 8 March 2003 because no names were put forward by states parties. The determination of the ASP to avoid a politicized and divisive process required the Prosecutor to be elected by consensus, which inevitably slowed the process. Although the USA is not a party to the Rome Statute, and technically has no influence over the choice of candidate, the ASP was keen to find a candidate that the USA did not object to. It took the ASP six months to agree a candidate by consensus. A short list from Argentina, Australia, Barbados, Botswana, Canada, Gambia, Romania and the United Kingdom was informally distributed among ASP delegates. The Argentinean Luis Moreno Ocampo received the broadest support and was officially nominated for the position. He was sworn in to office on 16 June 2003 for a nine-year term.²²

There were 120 applications for the position of the Deputy Prosecutor. This was narrowed down to a pool of three candidates, from Belgium, Gambia and Ukraine. The candidate from Belgium, Serge Brammertz, was elected Deputy Prosecutor for a period of six years from 3 November 2003.²³

document ICC-ASP/1/3/Add.1. A full list of the ICC's first 18 judges can be found on the ICC Internet site at URL <<http://www.icc-cpi.int/chambers/judges.html>>.

¹⁸ Mundis (note 12), p. 142.

¹⁹ Judge Philippe Kirsch (Canada) was elected by his peers to serve as President alongside Judge Akua Kuenyuhia (Ghana) as First Vice-President and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President.

²⁰ ICC (note 7), p. 3.

²¹ Simons, M., 'War crimes court struggles to fill Chief Prosecutor's job', *International Herald Tribune*, 17 Mar. 2003, p. 7.

²² Prosecutor Moreno Ocampo has extensive practical and academic experience in criminal law. His past prosecutorial experience includes the trials of the Argentine military regime, the trial of the Chilean secret police for the murder of General Carlos Prats and the extradition of a former Nazi officer to Italy.

²³ Deputy Prosecutor Brammertz served as Federal Prosecutor of Belgium and was a professor at the University of Liège, Belgium. United Nations, 'States parties to the ICC elect Serge Brammertz of Belgium Deputy Prosecutor', Press Release L/3048, 9 Sep. 2003.

Modalities for investigations and prosecutorial strategy

It is anticipated that the Office of the Prosecutor will initially be able to handle up to three investigations concurrently.²⁴ For the most part, and at least in the initial stages of an investigation, the OTP will depend on external resources to carry out its functions.²⁵ The OTP will rely on national structures, the UN, appropriate regional organizations and well-established non-governmental organizations (NGOs) to gather evidence.²⁶ This approach is consistent with the principle of complementarity, which has become one of the fundamental guiding principles of Ocampo's strategy for running the office.²⁷ Although greater NGO involvement, by means of collecting testimonials, offering victim support, and so on, is an innovative step, it will not be universally welcomed. The Prosecutor has also indicated that his prosecutorial strategy will focus only on those perpetrators who bear the greatest responsibility, that is, targeting high-ranking alleged criminals as opposed to the rank and file. Whether such people will be within his reach remains to be seen.

Ocampo took the unprecedented step of seeking feedback from the public. His decision to engage international legal experts, human rights specialists and the general public in an open discussion about the structure and role of his office was widely welcomed. The degree of transparency within his office surprised many observers. This approach was later adopted by the judges during the drafting of the Rules of Procedure and Evidence.

The Prosecutor has moved with great caution when identifying his initial caseload. The selection of these cases is crucial because it will signal the direction that the court will take and is regarded as a test that could make or break the ICC's credibility. Since 1 July 2002, the OTP has received almost 500 communications from 66 countries, of which 15 are not states parties. After an initial evaluation, most of the communications were deemed by the OTP to fall outside of either the court's temporal or subject-matter jurisdiction. Fifty of the communications received pertain to incidents that occurred prior to the establishment of the court and 38 concern allegations of a 'crime of aggression', which is still undefined.²⁸ A further 16 communications relate to the US-led intervention in Iraq, two to the Israeli-Palestinian conflict and several to the internal conflict in Côte d'Ivoire. These cases were dismissed because the reported incidents did not occur on the territories of states parties.

The OTP has announced that the main situation which it will monitor will be the current crisis in the Ituri region of the Democratic Republic of the Congo (DRC).²⁹ The Government of the DRC has indicated that it welcomes

²⁴ Simons, M., 'An Argentine prosecutor turns focus to new war crimes court', *New York Times*, 29 Sep. 2003, p. 13.

²⁵ ICC, 'Paper on some policy issues before the Office of the Prosecutor', document ICC-OTP 2003.

²⁶ E.g., the International Crisis Group is assisting the OTP with the investigation of crimes committed in Ituri, DRC.

²⁷ The principle of complementarity places the onus on states to take responsibility for investigating and prosecuting alleged war crimes. In the event that the state is unable or unwilling to do so, jurisdiction will be deferred to the ICC.

²⁸ ICC (note 7), p. 7; and Wiharta (note 2).

²⁹ For a fuller discussion of the conflict see chapter 3 in this volume.

the ICC's decision to investigate the Ituri situation and would appreciate a commitment from the international community to provide assistance to the national judicial system in prosecuting crimes committed elsewhere in the country prior to 2002.³⁰ It is therefore possible that a multi-tiered prosecutorial approach could be adopted in the DRC.

Continuing US opposition to the International Criminal Court

The Bush Administration persisted with its fierce anti-ICC policy in 2003.³¹ It opposes the ICC because of fears that it could be used as an avenue for politically motivated charges against US citizens. Such opposition is manifested primarily through Bilateral Immunity Agreements and the implementation of the 2002 American Service Members' Protection Act (ASPA).³² States that enter into a BIA with the USA agree not to surrender US citizens to the ICC. By November 2003, 70 countries had concluded BIAs with the USA. Of these, 29 are states parties to the Rome Statute and a further 13 are signatories.³³

Military assistance to 35 countries that refused to sign BIAs, amounting to \$46 million in military aid and \$613 000 in military education, was suspended at the end of US FY 2003.³⁴ This amount almost doubled to \$89.28 million in FY 2004, which began on 1 October 2003.³⁵ While it was not a surprise that these provisions of the ASPA were implemented, it did surprise many that six of the new North Atlantic Treaty Organization members from 29 March 2004—Bulgaria, Estonia, Latvia, Lithuania, Slovakia and Slovenia—were sanctioned because the legislation excludes NATO members.³⁶

For the moment, the ICC has refrained from taking a public position on whether signing a BIA is at odds with states parties' obligations under the Rome Statute. This might be the case—especially where the BIAs are reciprocal. Most BIA signatories are developing countries that depend on US military assistance. The issuing of a restrictive EU guideline³⁷ in September 2002 and stepped-up démarches with aspiring EU member states resulted in all EU

³⁰ Pål Wrange, International Law and Human Rights Department, Ministry for Foreign Affairs, Sweden, communication with the author, 30 Oct. 2003.

³¹ The Administration of President Bill Clinton signed the Rome Statute on 31 Dec. 2000, but the Bush Administration withdrew the USA's signature in May 2002.

³² The BIAs are also referred to as 'non-surrender agreements' and 'Article 98' agreements. For a fuller discussion of BIAs, the ASPA and US opposition to the ICC see Wiharta (note 2).

³³ US Department of State, 'American justice and the International Criminal Court', Remarks made by John R. Bolton, Under Secretary for Arms Control and International Security, at the American Enterprise Institute, Washington, DC, 3 Nov. 2003, URL <<http://www.state.gov/t/us/rm/25818.htm>>. For a list of BIA signatories, see Coalition for the International Criminal Court, URL <<http://www.iccnw.org/documents/usandtheicc.html>>.

³⁴ 'United States, International Criminal Court: 35 countries that have not signed a bilateral agreement with Washington on immunity of US soldiers are penalized, including 7 European countries—this measure does not apply to NATO members', *Atlantic News*, no. 3493 (4 July 2003), p. 3.

³⁵ Coalition for the International Criminal Court, 'The US Government position on the ICC: how sanctions will affect US Allies', URL <<http://www.iccnw.org/documents/usandtheicc.html>>.

³⁶ Although a prospective NATO member and a state party to the Rome Statute, Romania concluded a BIA with the USA and was therefore exempt from the sanctions.

³⁷ European Union, General Affairs and External Relations Council, 'GAC conclusions', EU press Release 12134/02 (Presse 279), 30 Sep. 2002; and Wiharta (note 2), p. 165.

member states and a majority of European countries refusing to conclude BIAs with the USA.³⁸ Countries approached by the USA reportedly welcomed the counter-pressure offered by the EU.³⁹ The decision of the Government of Bosnia and Herzegovina to sign a BIA with the USA caused a considerable outcry in Europe. Many EU diplomats saw it as a double blow to international criminal justice because the agreement could potentially undermine the moral and political pressure on the government there to cooperate with the ICTY on arrests and extradition.⁴⁰ There was obvious incongruity between the USA's pursuit of anti-ICC policies with the Balkan countries and its pressure on the same states to cooperate with the ICTY.

In maintaining its ideological stance against the ICC, the US Government has had to come to terms with the fact that it has been forced to sacrifice a number of other policy objectives and relationships linked to international security. It has made consistent efforts over several years to boost African regional peacekeeping capacities. However, where this policy was inconsistent with its policy towards the ICC, the latter prevailed. South Africa, a leading actor in regional peacekeeping activities, had its US military assistance, which had been used for peacekeeping, cut off.⁴¹

In June 2003 the US Government sought a renewal of UN Security Council Resolution 1422,⁴² which had deferred for a period of 12 months investigations or prosecutions by the ICC of peacekeepers serving in UN-mandated or UN-authorized operations. The renewal was eventually agreed with abstentions from France, Germany and Syria.⁴³ During the debate, several other member states and UN Secretary-General Kofi Annan strongly protested against the US proposal and expressed their hope that this would not become a routine exercise.⁴⁴ A threat by the USA to veto a Mexico-sponsored draft resolution providing better protection for UN aid staff was particularly unpopular. The USA objected to a clause in the resolution that stipulated that attacks on UN personnel would be categorized as war crimes subject to the jurisdiction of the ICC.⁴⁵ The final wording of the resolution omits specific reference to the ICC, referring instead to 'existing international law mechanisms'.⁴⁶ The vigour of the opposition of the most powerful state in the world continues to diminish the stature of the ICC and inhibit its effective operation.

³⁸ This point was recognized by the US Government. US Department of State (note 33).

³⁹ Wrangle (note 30).

⁴⁰ Dinmore, G., 'Washington presses ahead with war crimes deals', *Financial Times*, 8 May 2003, p. 4.

⁴¹ 'US blocks military aid to South Africa', BBC News Online, 2 July 2003, URL <<http://news.bbc.co.uk/1/hi/world/africa/3037678.stm>>.

⁴² UN Security Council Resolution 1422, 12 July 2002.

⁴³ UN Security Council Resolution 1487, 12 June 2003.

⁴⁴ United Nations, 'In statement to Security Council, Secretary-General voices concerns over extending UN peacekeepers' immunity from ICC action', Press Release, UN document SG/SM/8749, 12 June 2003; and Turner, M., 'UN struggles over renewal of prosecution ban', *Financial Times*, 7–8 June 2003, p. 2.

⁴⁵ 'Heading for a new Security Council spat', *Latin American Weekly Report*, WR-03-33, 26 Aug. 2003, p. 8.

⁴⁶ UN Security Council Resolution 1502, 26 Aug. 2003.

III. The experience of international criminal tribunals

The work of the ICTY and the ICTR⁴⁷ has greatly contributed to the field of post-conflict justice—not only in furthering international criminal jurisprudence on matters such as individual responsibility (particularly for those in positions of power), the ability to exercise jurisdiction over crimes committed in internal conflicts and, significantly, the inclusion of sexual crimes as crimes against humanity, but also in terms of procedural refinements. The ICC and the SCSL have drawn on the strategies, procedures and experiences of the tribunals when designing their own institutional strategies. Officials were able to avoid repeating costly mistakes in crucial areas such as the make-up of trial chambers, the role of victims, the importance of a public defendant, and the relationship between an internationally led process and a locally led process. However, both tribunals have been in existence for nearly a decade and the number of outstanding trials is still high. The slow pace of justice and the prohibitive cost of maintaining the tribunals have compelled the Security Council to ask the tribunals to draw their operations to a close. They are to finalize all investigations by 2004, complete all trials by 2008 and conclude all appeals by 2010.⁴⁸ Subsequent to this decision, large-scale internal structural reforms were undertaken at both tribunals. Aware that the completion strategies were unlikely to be achieved with the available resources, the Security Council approved additional *ad litem* judges to boost the tribunals' capacity to hold hearings.⁴⁹ The new judges increased the throughput of trials—four to six were conducted simultaneously on any given day. The tribunals' prosecutorial strategies have also been adjusted to allow more plea bargains and to accelerate the transfer of certain cases to domestic courts.⁵⁰

The International Criminal Tribunal for Rwanda

One of the biggest structural reforms of the ICTR was the appointment of its own Prosecutor. In August, pursuant to UN Security Council Resolution 1503, former Chief Prosecutor Carla del Ponte was removed from her post.⁵¹ This was perhaps a belated acknowledgement by the Security Council that it is not possible for one person to hold the position of Chief Prosecutor for two inter-

⁴⁷ UN Security Council Resolution 955, 8 Nov. 1994, established the ICTR to address the crimes of genocide, crimes against humanity and war crimes committed in Rwanda between 1 Jan. and 31 Dec. 1994. The applicable law of the tribunal, which is based in Arusha, Rwanda, is the Statute of the International Criminal Tribunal for Rwanda. UN Security Council Resolution 808, 22 Feb 1993, set up the tribunal and UN Security Council Resolution 827, 25 May 1993, set out the details of its operation.

⁴⁸ UN Security Council Resolution 1503, 28 Aug. 2003.

⁴⁹ The ICTR received 4 *ad litem* judges in 2002 and an additional 5 in 2003. The ICTY received 12 *ad litem* judges in 2002. In the case of the ICTR, it is worth noting that the original request was transmitted to the UN Security Council in 2001 but was only agreed 1 year later. UN Security Council Resolution 1431, 14 Aug. 2002; and UN Security Council Resolution 1512, 27 Oct. 2003.

⁵⁰ United Nations, 'Officials of tribunals for Rwanda, Former Yugoslavia brief Security Council: describe strategies for concluding trials by 2008 deadline', Press Release, UN document SC/7889, 9 Oct. 2003; and Simons, M., 'Serb at Hague pleads guilty to brutalities', *New York Times* (Internet edn), 4 Sep. 2003, URL <<http://www.nytimes.com/2003/09/05/international/europe/05HAGU.html>>.

⁵¹ UN Security Council Resolution 1503 (note 48).

national criminal tribunals. The separation of the Prosecutor's offices, although a welcome move, has caused concern that investigations into the Rwandan Patriotic Army would be dropped.⁵² The new Prosecutor, Hassan Jallow, was appointed in September 2003. It is expected that the Prosecutor's office will now focus its attention on the backlog of cases. It has indicated that all indictments will be completed by July 2005. The ICTR also decided to increase its referrals of 'lower ranking' cases to the national judiciary.⁵³ A community-level process of gachacha has been running in parallel with the national process and the ICTR.⁵⁴

As a result of the reforms, the tribunal will have delivered nine judgements involving 14 defendants during 2002–2003, making it the most fruitful period of the tribunal's lifespan to date. Potentially explosive trials involving the military, members of the former Rwandan Cabinet and the media commenced at the end of 2003.⁵⁵ A practical yet important change in the procedures of the ICTR was the introduction of simultaneous interpreting from Kinyarwanda to English and French. The ambitious overhaul of the ICTR suggests that it is highly likely that it will be able to fully implement its completion strategy.

The International Criminal Tribunal for the Former Yugoslavia

The ICTY, established by the UN Security Council in 1993 to deal with crimes of genocide, crimes against humanity and war crimes committed since 1991, is currently undertaking proceedings against about 90 people—most of whom were in leadership positions or were responsible for large-scale crimes.⁵⁶ Its completion strategy has called for the delegation of current and future cases to the authorities in Bosnia and Herzegovina. While the ICTY has made every effort to be more efficient and expedite matters more quickly, certain factors could prevent the tribunal from meeting its 2008 deadline. One of the biggest challenges is the reluctant cooperation from states in the region and, in particular, their refusal to turn suspects over to the tribunal.

One of the durable legacies of the ICTY will be the strengthened criminal justice system in Bosnia and Herzegovina. In 2002 a proposal to establish a

⁵² International Crisis Group (ICG), 'The International Criminal Tribunal for Rwanda: time for pragmatism', *Africa Report*, no. 69 (ICG: Nairobi/Brussels, 26 Sep. 2003).

⁵³ United Nations, 'Report of the International Criminal Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 Jan. and 31 Dec. 1994', 11 July 2003, UN document A/58/140-S/2003/707.

⁵⁴ Gachacha is based on the traditional form of justice that works on the principle of reconciling the parties and promoting social harmony rather than penalizing the guilty party.

⁵⁵ As of Apr. 2004, 21 cases are in progress; 24 accused are in custody and awaiting trial; and 9 accused remain at large. United Nations (note 53); and the ICTR Internet site at URL <<http://www.ictr.org>>.

⁵⁶ As of Apr. 2004, the tribunal has completed 35 cases, including successfully convicting Radislav Krstic for genocide; 62 accused are in custody, awaiting trial; and 20 accused remain at large, including Radovan Karadzic and Ratko Mladic. Amnesty International, 'Bosnia-Herzegovina: shelving justice—war crimes prosecutions in paralysis', EUR 63/018/2003, Nov. 2003; and ICTY, 'Key figures of ICTY cases', URL <<http://www.un.org/icty/cases/factsheets/procfact-e.htm>>.

special War Crimes Chamber in the State Court was taken up for discussion for several reasons. First, it was becoming evident that, unless drastic measures were taken, the ICTY was unlikely to be able to complete its work by 2008. Second, the manner in which domestic prosecutions were being handled was substandard—due process was sometimes denied to the accused, while no action was taken against others.⁵⁷ Third, the establishment of a War Crimes Chamber was part of a wider ongoing judicial reform in Bosnia and Herzegovina carried out under the framework of the 1995 Dayton Peace Agreement.⁵⁸ It was proposed that mid- and lower-level cases be transferred to the jurisdiction of the War Crimes Chamber in Sarajevo. Approximately 15 indictees and 50 prosecutorial files are to be transferred to the chamber, beginning in 2005.⁵⁹ The proposal was approved by the Security Council in 2002 and by the Peace Implementation Council in 2003.⁶⁰ It is estimated that the budget for the chamber will be approximately €30 million (about \$36 million) over a period of five years.⁶¹ The cost of establishing the chamber will, at least initially, be borne by the international community.

IV. Burden sharing in the delivery of justice?

Hybrid courts

Because the ICC has a forward temporal jurisdiction, and is therefore unable to address crimes that occurred prior to 1 July 2002, alternative mechanisms to hold accountable those who committed grave war crimes have had to be found. The Special Court for Sierra Leone assumed its functions on 1 July 2002. In March 2003, the UN and the Cambodian Government came to an agreement on the terms of the creation of the Extraordinary Chambers to address war crimes committed under the Khmer Rouge regime.

The SCSL and the Extraordinary Chambers for Cambodia represent a new model for international criminal justice institutions in that they are treaty-based organizations and fall outside of Security Council authority. The term hybrid is derived from the fact that the courts are part international and part national—the courts are composed of both international and local judges and prosecutors. They are located in their respective capitals—Freetown and Phnom Penh. It is hoped that having the courts' seats in Sierra Leone and

⁵⁷ Amnesty International (note 56).

⁵⁸ The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton Peace Agreement, 14 Dec. 1995, URL <http://www.ohr.int/dpa/default.asp?content_id=379>.

⁵⁹ United Nations, 'Security Council briefed on establishment of war crimes chamber within state court of Bosnia and Herzegovina', press release, UN document SC/7888, 8 Oct. 2003.

⁶⁰ The Peace Implementation Council was established following the conclusion of the Dayton Agreement. It comprises 55 countries (including 8 with observer status) and international agencies that support the peace process in Bosnia and Herzegovina by assisting it financially, providing troops for the Stabilization Force, or directly running operations on the ground. Further information is available on the Internet site of the Office of the High Representative for Bosnia and Herzegovina, at URL <<http://www.ohr.int/pic>>.

⁶¹ To date, the USA is the largest donor, contributing approximately one-third of this amount. United Nations (note 53).

Cambodia will enable the countries to gain ownership of the justice process and demonstrate to their people that justice is being served in their interest—something which the ICTY and the ICTR have neglected.

The hybrid model underscores the fact that, more often than not, there is a lack of a functioning judicial system in post-conflict states. The model is an attempt to address this gap with the infusion of international expertise that will help strengthen domestic capacity in the judicial sector of the country in question. Moreover, the international presence gives the court greater legitimacy and objectivity for both the accused and the victims. The international nature of the court can also serve to attract more funding. The hybrid model highlights the international community's acknowledgement that a partnership with domestic actors from the outset is essential for a sustainable peace-building process. It is too early to say whether the hybrid model is the ideal one, but for now it is seen as the most efficient prospect for post-conflict justice.

The Special Court for Sierra Leone

The Special Court for Sierra Leone was established in January 2002 to bring to justice persons 'who bear the greatest responsibility for war crimes and crimes against humanity' in Sierra Leone's long-standing internal conflict. The SCSL has jurisdiction over war crimes, crimes against humanity, other grave breaches of international humanitarian law (including attacks against peacekeeping personnel and the conscription of children) as well as specific crimes under Sierra Leonean law such as the abuse of girls under 14 years of age and the large-scale destruction of property committed since 30 November 1996.⁶² In addition to the standard organs of a court, SCSL officials have concluded that a Public Defendant's Office is a necessary component both to provide equality before the law and to curb unnecessary defence costs.⁶³ The Prosecutor's office is of mixed composition, with the UN appointing David Crane as the court's Chief Prosecutor and the Sierra Leone Government appointing Desmond de Silva as his Deputy Prosecutor. It has not been easy to find appropriately skilled judicial officers to staff the court and the vetting process has been very difficult.

Unlike its predecessors, the SCSL does not have an open-ended mandate. Instead, the court must accomplish its tasks within a three-year period. To achieve this it has limited its caseload to approximately 30 cases and will only target top-ranking officials. The SCSL has already made some headway in discharging its mandate: several arrests have been made, 12 indictments have been issued, the trial chamber is in residence and the first trials are likely to commence in early 2004.⁶⁴ The biggest challenge for the SCSL will be

⁶² It should be noted that the crime of genocide is not part of the SCSL's competence because genocide was not committed in Sierra Leone. United Nations, Letter dated 22 Dec. 2000 from the President of the Security Council addressed to the Secretary-General, UN document S/2000/1234, 22 Dec. 2000.

⁶³ The Trial Chamber is made up of 2 international judges and 1 Sierra Leonean judge. The Appeals Chamber consists of 4 international judges and 1 Sierra Leonean judge. United Nations (note 62).

⁶⁴ Vincent, R., Remarks at the conference 'Post-conflict justice: what lessons for the future?', Wilton Park Conference (note 4).

whether it is successful in its attempt to prosecute one of its indictees, former Liberian President Charles Taylor.⁶⁵ On 4 June 2003, Chief Prosecutor Crane indicted Taylor and issued the arrest warrant in Ghana, where Taylor was attending peace negotiations with Liberian rebels under the auspices of the Economic Community of West African States (ECOWAS).⁶⁶ President John Kufor of Ghana, Chair of ECOWAS, viewed the indictment as endangering the sensitive peace talks and this caused an acrimonious relationship to develop between the governments of Ghana, Nigeria and Sierra Leone.⁶⁷ Taylor was offered asylum in Nigeria on 11 August 2003 in a bid by the international community to move the peace process forward in Liberia. This has been criticized by many human rights activists as an affront to justice.⁶⁸

The decision to focus on only a small number of people raises the question of whether the exercise is more symbolic than the product of a genuine desire to administer justice. Another pressing problem for the court is its financial viability. The SCSL is not a UN organ and therefore receives its funding from voluntary contributors. The SCSL is viewed by some as a US-installed counterweight to the ICC and has consequently met resistance from potential donors. The organization's budget amounts to \$57 million for its entire mandate period but funding for its second year of operation is still outstanding.

If the SCSL achieves all that it has set out to do it could serve as a model for administering justice, as well as setting the grounds for the development of a functioning criminal justice system, in Sierra Leone.

The Extraordinary Chambers for Cambodia

After several years of drawn-out negotiations and failed settlements an agreement was reached in March 2003 between the UN and the Cambodian Government on the establishment of a special war crimes court to try perpetrators of war crimes and crimes against humanity during the Khmer Rouge regime.⁶⁹ The court will try, under Cambodian law, crimes committed between 1975 and 1979. Although a hybrid body, the make-up of the Extraordinary Chambers is slightly different from the SCSL and poses certain practical challenges. For instance, the court will have co-prosecutors and co-investigating judges and,

⁶⁵ Taylor was instrumental in sustaining the conflict in Sierra Leone by supporting the Revolutionary United Front.

⁶⁶ 'Sierra Leone tribunal indicts Taylor: talks open in Ghana', UN Wire, 4 June 2003, URL <http://www.unwire.org/UNWire/20030604/34080_story.asp>. In Dec. 2003, INTERPOL issued a 'red notice' for Taylor's arrest. See the glossary in this volume for a list of ECOWAS members.

⁶⁷ 'Ghanaian President wants lift of Taylor indictment', *Afrol News* (Internet edn), 1 July 2003, URL <<http://www.afrol.com/articles/10443.htm>>.

⁶⁸ Human Rights Watch, 'West Africa: Taylor must face justice, Nigeria must not allow impunity to reign', 11 Aug. 2003; and Amnesty International, 'Nigeria: impunity—legal concern. Charles Ghankay Taylor, former President of Liberia', document no. AFR 44/025/2003, 12 Aug. 2003. The US Government issued a \$2 million reward for Taylor in Nov. 2003.

⁶⁹ United Nations, 'Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea', URL <<http://www.cambodia.gov.kh/krt/english/image%20doc.htm>>. The agreement was signed by both parties on 6 June 2003. Cambodia's prior declarations that its national courts would be in a position to administer justice did not persuade the international community that this would be a fair process.

in the event that a disagreement arises between the prosecutors or the judges, the investigation or the prosecution will not go ahead unless the co-prosecutor requests in writing that the matter be referred to the pre-trial chamber.⁷⁰ The necessity to plead cases in writing is inefficient and is likely to slow the trial process considerably. Given the undeveloped nature of the Cambodian judicial system and the lack of a clear line of authority or independence for the Prosecutor, it seems unlikely that a credible, impartial court willing to take on politically sensitive cases can be achieved.

The issue of previously granted amnesty is not adequately addressed.⁷¹ Unlike similar agreements, it does not state that previously granted amnesties will be repealed.⁷² The case of Cambodia presents an added dilemma for the international community over how best to administer justice when remnants of the regime that committed the atrocities remain in power after the conflict.

A considerable amount of time has passed since the atrocities occurred and it will be a huge challenge to find witnesses, victims, physical evidence, and so on. Few steps have been taken to implement the agreement and it is not clear when the court will assume its functions. This is in part due to the fact that the court does not have the necessary financial resources to do so. As agreed by both parties, the UN will bear the cost of all international staff and most of the operational costs, including those of defence counsel.⁷³ In common with the SCSL, it will be financed through voluntary contributions. The initial budget, projected at \$19 million, is still to be raised.⁷⁴

The Iraqi Special Tribunal

The Iraqi Special Tribunal was established by the Iraqi Governing Council on 10 December 2003. It is a striking deviation from recent practice in post-conflict justice in that it is an entirely domestic tribunal. International involvement, where it occurs, is through the use of advisers, observers and specially appointed judges. Many in the human rights community are sceptical that the tribunal will be able to hold fair trials.⁷⁵

The Iraqi Special Tribunal has sweeping temporal and extensive geographical jurisdiction. It will be able to try Iraqi nationals or residents accused of the crime of genocide, crimes against humanity, war crimes and violations of cer-

⁷⁰ The pre-trial chamber consists of 5 judges—3 Cambodian and 2 internationally appointed. Any decision taken by it requires the agreement of 4 judges. There are no provisions for resolution should the chamber be unable to reach such a super-majority decision. Taylor, R. S., 'Better late than never: Cambodia's joint tribunal', *Accountability for Atrocities: National and International Responses*, ed. J. E. Stromseth (Transnational Publishers: Ardsley, N.Y., 2003), pp. 237–70.

⁷¹ One Khmer Rouge official, a former Minister of Foreign Affairs, has been granted amnesty.

⁷² E.g., the UN does not recognize any amnesty granted by the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone.

⁷³ United Nations, General Assembly Resolution A/RES/57/228 B, 22 May 2003.

⁷⁴ United Nations, 'Third committee approves draft resolution on Khmer Rouge trials: Extraordinary Chambers would be established and operated within Cambodian national courts', Press Release GA/SHC/3734, 2 May 2003.

⁷⁵ Roth, K., 'Now try him in an international court', *International Herald Tribune*, 15 Dec. 2003, p. 10.

tain Iraqi laws in the territories of Iran, Iraq and Kuwait between 17 July 1968 and 1 May 2003.⁷⁶ The Baghdad-based tribunal will consist of one or more trial chambers, an appeals chamber, tribunal investigative judges, a prosecutions department and an administrative department. There will be a maximum of 20 prosecutors and investigative judges in each of the departments, which will be headed by the Chief Prosecutor and Chief Tribunal Investigative Judge, respectively. The make-up of the Special Tribunal suggests that the framers of the statute opted for a more ambitious and all-encompassing approach to retributive justice and expect the tribunal to try a large number of cases. The fact that the Special Tribunal was set up just days before the arrest of former President Saddam Hussein, and its jurisdiction, suggest that the tribunal would be the most likely forum to try him.

The organization of the Iraqi Special Tribunal raises many questions.⁷⁷ The internationally appointed advisers have little authority within the tribunal's framework and it is not clear to whom advisers would report if it became evident that the tribunal was not following international standards. There is also the question of the availability of judicial resources—the enormity of the task of finding and vetting independent and highly skilled prosecutors and judges cannot be overlooked. Human rights activists, many European politicians and the UN's Office of the High Commissioner for Human Rights are concerned that the tribunal will have the power to impose capital punishment.⁷⁸ It is also unclear how it will be funded.⁷⁹

V. Conclusions

To judge from the various formal legal mechanisms now in place, it appears that there is an emerging consensus among policy makers and academics that the delivery of justice is important for a sustainable peace-building process. However, there is still a debate about how, and in what form, justice should be administered. The situation in Iraq is a clear illustration of this disagreement. Immediately after the US-led intervention in 2003, members of the international community acknowledged that the atrocities committed during Saddam Hussein's regime should be dealt with, but could not agree on a suitable mechanism for legal redress. Various models were considered, ranging from a military tribunal to a hybrid court. In the end, a domestic tribunal with little international participation was chosen—largely because the main occupying power has an aversion to international courts. The establishment of the Iraqi

⁷⁶ The Statute of the Iraqi Special Tribunal is available on the Internet site of the Iraq Coalition Provisional Authority at URL <http://www.cpa-iraq.org/human_rights/Statute.htm>. Apart from the Iraqi laws, the definitions of these crimes correspond to those of the International Criminal Court. The Iraqi laws that fall under the Tribunal's jurisdiction are laws against manipulating the judiciary; wasting national resources and squandering public assets and funds; and abuse of position and pursuit of policies that lead to the threat of war.

⁷⁷ The commission, which was predominantly made up of US representatives but also included other international and Iraqi legal experts, was set up to look into judicial reform in Iraq.

⁷⁸ Turner, M., 'UN concern over Iraqi war crimes tribunal plan', *Financial Times*, 6 Dec. 2003, p. 4.

⁷⁹ The USA has pledged \$75 million to support the tribunal. 'Bringing the old regime to trial', *The Economist*, 13–19 Dec. 2003, p. 39–40.

Special Tribunal could arguably be seen as a reversion to a system based on victors' justice, which the international community has previously been anxious to move away from.⁸⁰

The Rome Statute can be seen to have established a system of international criminal law rather than simply a court. Several states have already begun to incorporate crimes within the ICC's jurisdiction into domestic law. This will further embed the concept of non-impunity. At the same time, a question remains about the extent to which justice is pursued. It could be argued that total and maximum punishment is not always necessary, or even appropriate, for successful peace-building. The limited mandate of the SCSL and the decision by the ICC to target only those bearing the greatest responsibility is a reflection of the limitations of the international community's commitment to justice. However, it is open to question whether, in its haste to complete as many trials as possible and to fulfil the mandates of the international courts, the international community is doing itself a disservice. Plea bargains may make victims feel that justice is not being served. The severity of the crimes committed may not be recognized by the relatively light sentences passed. Furthermore, if only the top leaders are prosecuted, ordinary citizens do not always feel that their grievances have been adequately addressed. There is therefore an obvious need for other processes to complement and supplement the internationally led process. This can be done through mechanisms such as truth and reconciliation commissions, which function as tools of reparative justice, and local judicial processes. The concept of justice must also be expanded beyond institution building to include social and economic aspects.⁸¹ More importantly, the concept of an interwoven patchwork of global (the ICC), international (e.g., the SCSL), national (e.g., the Rwandan courts) and grassroots judicial instruments, rather than a single monolithic approach, to more effectively reduce the so-called 'impunity gap' is now more widely accepted internationally.

The financial viability of post-conflict justice must also be addressed. The international community, particularly a select group of states, has spent over \$1 billion on international courts. With so many international courts now in place the question of the financial sustainability of maintaining them arises. Nor is further devolution to the local level a solution because, as in the case of Bosnia and Herzegovina, the costs still fall to the international community. The debate about striking the delicate balance between resource constraints and symbolic justice that ensures optimum and appropriate levels of punishment will continue for some time.

⁸⁰ The debate on Iraq parallels the situation in Afghanistan, where captured individuals are being detained at Guantanamo Bay, Cuba, under unclear legal conditions. Captured detainees are not accorded 'prisoner of war' status and await trial by a US Military Commission. For further discussion on the nexus between terrorism and international law see Roberts, A., 'Counter-terrorism, armed force and the laws of war', *Survival*, vol. 44, no. 1 (spring 2002), pp. 7–32; and Wedgwood, R., 'Al Qaeda, military commissions, and American self-defense', *Political Science Quarterly*, vol. 117, no. 3 (fall 2002), pp. 357–72.

⁸¹ For an elaboration of the 3 dimensions of justice—legal, rectificatory and distributive—see Mani, R., *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press: Cambridge, 2002).