

Impunity Watch is a Netherlands-based, international non-profit organisation seeking to promote accountability for atrocities in countries emerging from a violent past. IW conducts periodic and sustained research into the root causes of impunity and obstacles to its reduction that includes the voices of affected communities to produce research-based policy advice on processes intended to encourage truth, justice, reparations and the non-recurrence of violence. We work closely with civil society organisations to increase their influence on the creation and implementation of related policies.

Policy Brief: Enhancing the Societal Impact of International Criminal Tribunals

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I. Background

On 26 September 2014, Impunity Watch (IW) convened an Expert Meeting, hosted by the International Criminal Tribunal for the former Yugoslavia (ICTY) bringing together staff from international criminal tribunals in The Hague and expert staff from Civil Society Organisations (CSOs) to discuss ways of enhancing the societal impact of international criminal tribunals. Two key themes were put forward as the basis for this discussion on impact, namely the need for improved outreach and the importance of more integrated approaches between criminal justice tribunals and local transitional justice initiatives. This Policy Brief is the outcome of the Expert Meeting. Quotes taken from the meeting do not necessarily reflect the view of IW, but are meant to give an impression of the discussions.

“The Discussion Document talks a lot about Outreach but for me it has to do with judicial proceedings. How judicial proceedings are undertaken, perceived and how they can contribute, this should be included.”

“Tribunals are judicial institutions, not welfare organisations; therefore the mandate is limited.”

II. Introduction

In the wake of mass atrocities, international criminal trials can help to deter mass violence, enforce the rule of law, and advance respect for human rights. As noted by former UN Secretary General, Kofi Annan, prosecutions can provide a direct form of accountability for perpetrators of human rights violations and help to de-legitimise extremist elements, ensuring their removal from the national political process and contribute to the restoration of civility, peace and deterrence.¹ Although trials also ensure a measure of justice for victims by giving them the chance to see their former tormentors being held to account and, to the extent permitted by their procedures, to reclaim their dignity by giving them the opportunity to present their views and concerns in court,² research shows that the societal impact of international trials is limited in relation to the needs and interests of victims.³ The ICTY and the International Criminal Tribunal for Rwanda (ICTR) for instance did not emphasise victim’s interests nor promote their participation in their proceedings except as witnesses for the prosecution.

The Rome Statute combines both retributive and restorative justice in its remit by providing for both prosecution of perpetrators and the participation of victims at the International Criminal Court (ICC) to present their views and concerns and also enshrines their right to seek reparations through the Trust Fund for Victims. But this has not yet translated to meaningful justice for victims and affected communities on the ground. This is because international criminal justice is imperfect, at best targeting only a handful of perpetrators who are prosecuted for a limited number of crimes far away from where the crimes occurred. On the other hand, the Trust Fund for Victims which is charged with administering reparations is severely limited in terms of mandate and resources.

This Policy Brief seeks to answer the question: how can international criminal prosecutions better serve the needs and interests of victims, in particular through improved outreach and communication to manage expectations or through a more integrated approach with local transitional justice initiatives? But first, it seeks to contextualise this question against a discussion on the limitations of international criminal justice and what it can realistically offer for victims. It ends with a number of policy recommendations on how international criminal justice can be made more meaningful to victims and affected communities through improved outreach.

The focus of this Expert Meeting was restricted to outreach and the link with local transitional justice (TJ) initiatives. These two themes were identified as key to potentially ensuring the wider societal impact of criminal justice in a February 2014 Policy Brief that followed an Expert Meeting held in December 2013.⁴ They also enabled us to limit the scope of the discussions, to be able to develop practical recommendations. These recommendations have been elaborated through an analysis of lessons learned and best practices, though for a full analysis of the functioning of international(ised) criminal tribunals a more comprehensive approach is needed.

III. The limitations of international criminal justice

A. Absence of clarity on goals

The founding of the ICTY and the ICTR gave rise to significant hopes for what international criminal justice could achieve in the wake of mass atrocity. The fact that these tribunals could hold trials that were perceived as fair, if expensive, rekindled a dream of a global court. This dream found expression in the establishment of the ICC in 2002. Now, a dozen years later, scholars and policymakers are increasingly turning their minds to the question of whether the institution is living up to its goals.⁵

The first complication is that the goals of the ICC, and international criminal tribunals in general, are not as clear as one would expect. For instance, in relation to the ICTY, in 2004 a prominent policymaker wrote that “the hope was that the establishment of the ICTY would promote reconciliation in the former Yugoslavia. There is little evidence that this is the case. Clearly, the Tribunal itself is not sufficient to promote reconciliation. Additional mechanisms, such as functioning national courts and truth commissions, are needed.”⁶

Traditional criminal justice goals include retribution, deterrence, or rehabilitation. While some would argue that the ICC is about retribution, its relatively small number of cases and comparatively light sentences would indicate otherwise. The deterrent effect of the Court likewise can be disputed, since violence continues, even in many of the situations in which it is investigating. To name but a few examples, the Lord’s Resistance Army committed widespread

“The model is mainly based on a common law system. OTP has the obligation to build its own case and only releases information if it finds something exculpatory; in contrast to civil law countries where it is the judges’ duty to find out what actually happened. The purpose of criminal proceedings is not to uncover the truth; the model of adjudication is not really geared towards that goal.”

“The current system is not necessarily the best for victims, but it is imposed. The first obligation of the Rome Statute is to establish the truth, which is difficult with a common law system.”

atrocities in the Democratic Republic of Congo (DRC) known as the “Christmas massacres” in December 2008 and January 2009, five years after arrest warrants were issued against their leaders. Darfur (Sudan) continues to experience massive displacement, killings, abductions and air raids, as well as attacks on UNAMID, despite an outstanding arrest warrant for President Omar al Bashir.

Some would argue that international criminal justice has an “expressive” value. Argentine scholar Carlos Nino wrote that “trials are great occasions for social deliberation and for collective examination of the moral values underlying public institutions. They can help to break a power structure and invent a new democratic society.”⁷ But the ability of external mechanisms such as the ICC or other international tribunals to contribute to transforming societies is debatable.

The Statute states that the goal of the ICC is to “contribute to ending impunity by conducting fair investigations and trials for the worst crimes, thereby contributing to their prevention.” This may be the only goal of the ICC’s that is clearly identified in the Statute, but it still raises significant questions as to how it can best be achieved. This is particularly the case considering the limited resources at the Court’s disposal. At its current capacity, the ICC has a budget and staff roughly comparable to that of the ICTY at its height of operations. At the same time, the Court is investigating eight situations and conducting preliminary examination in roughly ten more.

B. Narrow prosecutorial strategy

In the first decade of its existence, limitations on its resources have meant that the ICC was able to investigate and prosecute far fewer cases in any given country than the ICTY did in the former Yugoslavia. In order to apportion its limited resources, over the last twelve years the ICC implemented a prosecutorial strategy that put a focus on “those bearing the greatest responsibility”. This notion was given such a restrictive interpretation that it effectively resulted in issuing between three and seven arrest warrants in any given situation. The Court’s emphasis on “focused investigations”, with small teams spending only limited time on the ground trying to investigate in very complex conflicts, resulted in a poor track record for the Court in terms of confirmation of charges and successful prosecutions.

Partly in recognition of these challenges, the Office of the Prosecutor (OTP) recently adopted a new prosecutorial strategy. Moving away from focused investigations, it will now conduct more in-depth open investigations not just focusing on the most responsible alleged perpetrators, but gradually building from mid-level perpetrators upwards. It has also learned lessons from the accusations of one-sided justice and has endeavoured to be more even-handed in recently opened situation countries, as well as endeavouring to better communicate about the neutral role of the OTP. The OTP has requested more resources in the proposed budget with a view to continuously improving the quality of its investigations and recruiting more experienced staff locally as well as maintaining a permanent field presence.

It is too early to tell the impact that the new prosecutorial strategy will have. What is clear is that, due to its highly selective nature, both in terms of cases and situations under the previous prosecutorial strategy, the Court has faced and continues to face a crisis of perceptions both on a global and on a local level.

On a global level, the Court’s choices in situation selection has created a perception that the Court is exclusively Africa-focused, and unwilling to open investigations in countries where the interests of global powers are at stake, such as Iraq, Afghanistan and Palestine. In other instances, the OTP has taken an inordinately long time to conclude a preliminary examination and determine whether to institute prosecutions or not. The most extreme example of this is Colombia where the preliminary examination has been ongoing for eleven years. This state of affairs is complicated by a lack of clarity as to which organ between the OTP and Outreach should have access in situations under preliminary examination. From the perspective of the OTP, Preliminary Examination is an activity that almost solely involves the OTP, a process in which the OTP continually analyses, monitors and gathers information on the situation. However, as the mandate of the OTP is to prosecute and not to ‘coax’ a state into fulfilling its obligations, the preliminary examination should serve the purpose of determining whether to open an investigation or not, and should therefore be limited in time and scope and not open-ended as has been the case in Colombia.

The second crisis of perceptions is on a local level. Although in some situation countries such as the DRC and Sudan the Court has sought to prosecute alleged perpetrators from both sides of the

“About the criticism that the ICC is only targeting African countries: You can say that it is propaganda and that it is tiring, but it does create perceptions. We have to facilitate internal debate on how to tackle criticism and how to include it in our message.”

conflict, in many of the situations where the Court operates, it is perceived to have targeted one side of the conflict only. For instance, in Uganda the Court is perceived to have targeted only the LRA, but not the Government of Uganda; in Libya, the Court targeted Qadhafi-era officials but no one from the side of the revolution; and in Cote d'Ivoire the Court targeted former President Laurent Gbagbo and his associates but nobody from President Alassane Ouattara's associates. In Kenya, the recent withdrawal of the case against President Uhuru Kenyatta may also give rise to a perception that prosecutions will be one-sided in practice. In some situations this has created scepticism about the Court, or has negatively influenced the perception of the local population in terms of its relevance.

C. Implications for perceptions

This crisis of perceptions highlights the unclear relationship between perceptions and outreach. While outreach can be used to educate the public about the functioning of the ICC, it is not clear whether outreach can succeed at fundamentally changing the views of those who feel that the Court does not represent their “narrative” of the conflict.⁸ Impact studies from the historical tribunals demonstrate this fact.

For instance, long-term studies of the Tokyo Tribunal demonstrate that the views of Japanese remained rather negative towards the trial over decades.⁹ Many considered that the trials were imposed on them as a consequence of their military defeat. Likewise, the views of Serbs towards the ICTY have remained rather negative in spite of many years of outreach.¹⁰ While international tribunals can contribute to shaping the narrative of the conflict among both “perpetrator” and “victim” communities over time, thus potentially contributing to reconciliation, this is a long-term and complex process that requires more reflection on the nature that outreach should take. The experiences of the ICTY, as an institution 20 years into its lifespan, may be particularly instructive in this regard.

What the above two contexts (Japan and Serbia) also demonstrate is that perceptions of criminal courts cannot be separated from the politics of establishing such tribunals. Countering the negative influence of (geo)political interests – real or perceived – is a factor to be considered in the work of outreach.

IV. Outreach

A. The importance of outreach

International criminal tribunals have a mandate that reaches beyond merely prosecuting and punishing perpetrators of mass violence. They are also expected to contribute to ending impunity and at least indirectly to contribute to the objective of promoting reconciliation among the divided communities for whom they are created to serve. In order to meet such broad objectives, how these bodies are perceived by victims and affected communities is key. They must be seen as legitimate in order for them to have the necessary societal impact. Outreach is a critical function in this regard.

Outreach as a policy question began its life as an afterthought. Both the ICTY and the ICTR initially interpreted their mandate narrowly as simply focusing on prosecution of international crimes that had been committed in the former Yugoslavia and Rwanda respectively. They did not commence outreach activities until after several years of operation and even then, outreach was not targeted at victims. As David Tolbert, former deputy prosecutor of the ICTY, points out, “...it was much more about... trying to combat the bad image the [Tribunal] had in parts of that region. The court was being politicised and attacked in the media, and was not well understood in the countries where it was supposed to have an impact.”¹¹ More recently, however, consensus has emerged that a robust outreach programme is crucial in bridging the gap between an international criminal tribunal and victims and affected communities and ensuring that proceedings in these courts translate to real societal impact among the communities that they are established to serve.

Outreach has generally been defined as referring to a set of tools that a transitional justice measure puts in place to build direct channels of communication with affected communities, in order to raise awareness of the justice process and promote understanding of the measure.¹² However, to be truly effective in bridging the gap between an international criminal tribunal and victims and affected communities, outreach must go beyond creating awareness among passive audiences. Hence the ICC defines outreach as a process of establishing sustainable, two-way communication

“Two-way communication: how do we start and when do we start? The identification of affected communities: how is this mapping done, how to reach everyone? This is a question of resources. NGOs are present in the communities; they can play a role but need guidelines from the Court. The rules should be clear, e.g. on victim participation, in a way that NGOs can explain it.”

“We planned to cover the entire country because we based our model on the experience of the SCSL, but we very quickly realised it would be impossible, that there should be a limited scope to affected communities.”

“The judgement on Charles Taylor was 1200 pages...But the Appeals Chamber decided to write a 50 pages summary, which got positive feedback from people in Sierra Leone, that they were better able to understand the judgement. There is the ability to write better judgements.”

between the Court and communities affected by the situations that are subject to investigations. It aims to provide information, promote understanding and support for the Court’s work and to provide access to judicial proceedings.¹³

Yet the importance of information outreach for participation in a criminal justice process should not be underestimated. For the meaningful participation of the majority of victims who will never set foot in the courtroom it is crucial that criminal courts promote information about their procedures, which can mitigate against avoidable misunderstandings. Furthermore, indirect, even passive forms of participation still enable victims to be engaged in criminal processes, and so should not be dismissed as lacking the basic tenets needed for ‘participation’.¹⁴

B. Limitations of outreach

While effective outreach is crucial, it is not the only variable when it comes to building legitimacy for a judicial institution. Even the best designed and executed outreach is subject to limitations from above, from below, and from the middle.

From above, outreach may be limited by the fact that ultimately, the credibility of a court or tribunal depends on the quality of the justice it delivers.¹⁵ Outreach cannot fix low quality justice. This includes how proceedings are conducted, the nature, quality and readability of judgments, etc. Outreach is not a packaging process trying to sell the unsellable. For outreach to achieve its objectives therefore, the judges must deliver quality justice. From below, as stated before, outreach may be limited by the dominant narrative of the conflict. The perception of a judicial institution may remain negative despite extensive outreach being conducted because a community’s perception of a process may not be shaped so much by its information about the process, but by their own self-perception as victims in the conflict.¹⁶ Outreach may also be limited from the middle. While outreach and communication are often regarded as what the court says, in reality, outreach is a much deeper and broader concept incorporating everything that a court does. As Refik Hodzic points out with regard to the ICTY:

“... everything a court with such a mandate does is in fact outreach, whether active or passive. Decisions on indictments, convictions, acquittals, witness support and protection, the behaviour of investigators and field staff, public statements and their absence, stunts that judges let defendants, lawyers and prosecutors get away with in the courtroom, the length of trials, the way all tribunal staff, from judges to security guards, conduct themselves at work and outside it, and even administrative edicts – everything plays a role in how Tribunal’s work is perceived.”¹⁷

Court staff at all levels therefore need to be constantly aware that their decisions and behaviour, whether consciously or not, contribute to how the court is perceived and therefore its effectiveness in delivering upon its mandate among victims and affected communities.

C. Successes of outreach¹⁸

According to some field staff, outreach is instrumental in clearing miscommunication, bridging the gap between the Court in The Hague and the victims. For victims it is felt that through outreach they have a forum to engage with the judicial process, a way of giving feedback to the Court and being kept abreast of developments in proceedings.

Some of the successful outreach projects cited include interactive radio programmes, radio listening clubs, town hall meetings, trainings of legal professionals, screenings of trials, documentary screenings, seminars and workshops, academic programmes and moot courts, and ‘Accountability Now’ clubs.

In some instances, it was felt that ICC outreach mandate was too limited by only focusing on issues directly related to proceedings in court as contrasted to the Special Court for Sierra Leone which extended outreach to programmes geared towards promoting and strengthening diverse human rights issues in the country while maintaining a neutral approach. But while it is conceivable how outreach could afford the luxury of a more expanded mandate in a country where the Special Court was largely accepted by the population without running the risk of being accused of partisanship, it is less certain how an expanded mandate could work in deeply divided societies where the ICC works.

“With the resources at the moment we are completely unable to start Outreach in the Preliminary Examination Phase.”

D. Challenges

Several challenges to outreach have been identified by staff of international courts and tribunals both in the field offices and in headquarters. One of the most commonly mentioned is a lack of resources.

In the history of international criminal tribunals, outreach has been consistently underfunded. The ICTY, the ICTR and the SCSL did not have outreach as part of their mandates and it therefore had to be funded externally through voluntary contributions. This had the effect of limiting the activities that outreach staff could conduct. At the ICC, even though outreach is funded as part of the Court’s budget, the resources allocated are overstretched with the budget remaining largely the same for eight situation countries as it was for three. Field staff therefore still identified a lack of sufficient resources as a key challenge that hinders them from hiring the requisite number of staff and carrying out more activities.

Another challenge is that of overcoming hostile political propaganda which is frequently propagated through an equally hostile media on behalf of political elites that are implicated in the crimes being investigated. This challenge most often came from the former Yugoslavia where outreach activities did not commence for a number of years thereby giving local politicians a free hand to poison the public about the tribunal. More recently, a similar situation was witnessed in Kenya.

Outreach staff also pointed to the lack of clarity regarding reparations which made it difficult for them to engage with victims about the more abstract issues of judicial proceedings while they wanted to know how their losses would be repaired through the court process.

Some field staff identified the lack of execution of arrest warrants, the waning interest among affected communities due to prolonged trials and limited judicial activities and the lack of a clear exit strategy as among the challenges they faced in their outreach efforts. Cooperation from states is crucial in creating a conducive environment for effective outreach including more robust efforts to enforce arrest warrants. The international community also has an important role to play in supporting and promoting the judgments of the ICC to ensure that they are not undermined by political actors on the ground.

Other challenges identified include insecurity; language and cultural barriers; poor infrastructure; and the inaccessibility of the ICC website.

E. Managing expectations

One of the central functions of outreach is managing expectation of victims. This is best done by starting outreach early and through timely provision of information on the whole process and involving victims and witnesses every step of the way. But there are certain challenges to managing expectations.

Most international criminal tribunals, including the ICC follow the common law tradition and yet most of the situation countries fall within the civil law system. The expectations of the victims who are used to an inquisitorial prosecution style may not be met by an institution that relies on an adversarial approach where the judges’ role is much more hands-off. In some instances, the expectations of victims may not be met because they are not only high, but also wide. Some victims may not just want justice, but vengeance, and their perception of the guilt of the alleged perpetrator is cemented at indictment. However, rather than vengeance most victims want their story to be told to the judges rather than that the OTP merely takes the bits of their story that are useful for its own purposes.

Victims also often want their sense of community to be restored. Beyond that, victims understand that judicial proceedings are like a game and are prepared for wins as well as losses. Meeting victims expectations is also difficult not only because of the complex situations in which the Court operates, but also because there are different actors on the ground who support or oppose the process with the latter often hijacking and distorting victims’ expectations.

F. Victim participation

Victim participation could be a tool at the Court’s disposal for ensuring societal impact. It is a ready-made form of two-way communication available to the Court.

“Early Outreach is needed to manage the expectations of victims. You need to explain the role of the Courts, that proceedings might lead to indictment but that there also could be an acquittal. The expectations of a prosecution might never be met.”

Best Practice: “The way we handled the announcement of the decision of 10 December 2009 of the Pre-Trial Chamber II. It was decided that the Registry should go and meet victims. Victims could speak to the camera to send a message to the Chamber. Then there was a public acknowledgement of what the people brought to the judges and that it was taken into consideration. It is relevant to come back to the communities and explain what the Chambers took into consideration and how the information was used. That was a real two-way communication.”

With respect to outreach, whilst it is not the ideal forum for the direct participation of victims, it can ensure the indirect, passive forms of participation that many victims may seek. Knowing that thousands of victims will never have the opportunity to directly participate in proceedings, marrying some of the benefits of outreach with the principles of victim participation could bring real benefits to victims and the Court.¹⁹

Direct participation that facilitates two-way communication can be ensured through providing victims with a real role to be able to challenge the OTP before the Court, especially where they feel their interests are threatened. Unfortunately, with recent judicial decisions interpreting the Rome Statute, victim participation is becoming somewhat artificial and inconsistent. Recent proposals to have all victims represented by in-house Office of Public Counsel for Victims (OPCV) lawyers are disconcerting because not involving local lawyers would mean a loss of knowledge of local circumstances that they bring to victim representation. While conceding that cost is a factor, one proposal for dealing with it while at the same time retaining the expertise of local lawyers is to rationalise the budget allocated to victims and defence lawyers and ensuring that resources are found to support legal representation of victims and to ensure that victim participation remains a key component of the Rome Statute system.

G. Lessons learned and best practices

According to the predominant perceptions gathered from the interviews, for outreach to be successful, it must be neutral, independent, non-political, linked to judicial stages, timely, relevant, meaningful, and tailored to specific segments of the public. As an ongoing two-way process, outreach is critical to address misperceptions in an atmosphere of genuine dialogue.

Outreach in a new situation should start with a baseline survey and regular follow-up surveys to assess impact in order to consistently revise the framing of key messages to address perceptions. There should also be a prior mapping of affected communities and identification of potential partners that will support the implementation of the outreach activities. It is also critical to have local staff in outreach teams due to their unique understanding of the local context and the fact that they are respected and trusted by the local communities.

Outreach should start early, be kept up even during periods of low judicial activity to prevent the vacuum being filled by destructive rumours, and maintained after judicial proceedings end to respond to emerging issues and concerns. However, due to resource constraints, outreach activities after the end of proceedings are better left to competent civil society partners.

It is widely agreed that NGOs are a critical partner in outreach activities as outreach staff do not have the capacity to meet all the needs in affected communities. Such partnerships should be Court-led to ensure consistency. Outreach works when NGOs act as gate-openers on the ground to gain access to local leaders and other opinion shapers; they engage them from the outset on how best to communicate with the people. Local partners are also a critical component of an exit strategy as they can keep the work of outreach going after the termination of proceedings. However, NGOs themselves are limited in what they can achieve due to funding constraints. A way needs to be found to help these partners to source funding for outreach activities without compromising the independence and neutrality of the Court.

There should be early and transparent intervention of the TFV in all situation countries to meet immediate needs of victims. In addition, both outreach and Victims Participation and Reparations Section (VPRS) can benefit from clear and concise messages on reparations and assistance programmes which has not always been forthcoming.

H. Enhancing societal impact through improved outreach

Given the importance of outreach for the delivery of meaningful justice to victims, the following were identified as ways through which societal impact of international tribunals can be enhanced through improved outreach.

1. Integral part of the mandate

Given the importance of outreach in bridging the gap between international courts and the communities they are established to serve, it is surprising that many of these institutions have not had outreach explicitly included in their mandate from the outset. This has led this important

function to be under-appreciated, understaffed and underfunded as policymakers tend to regard it as a non-core function of the court. Outreach therefore should be formally included in the mandate of the international courts and tribunals, preferably in their founding statute and rules of procedure²⁰, as is already the case for the Rome Statute of the ICC.

2. Funding

Outreach should be funded through the court's regular budget as it is arranged now at the ICC. Interviewees pointed out that lack of sufficient funding prevented them from carrying out more effective outreach or reaching more people. Funding outreach through separate or voluntary contributions means that staff spend valuable time and energy fundraising at the expense of carrying out critical outreach functions.²¹ There have been proposals from some members of the Assembly of States Parties (ASP) pushing for budget cuts that would see outreach funded through voluntary contributions. This would be a mistake and it should be resisted.

3. Capacity

Related to funding is the need to increase the capacity of outreach to work effectively in situation countries through the recruitment of sufficiently qualified numbers of staff at the relevant level of seniority to enable outreach teams in the field to engage with different constituencies. The ICC's current model of deploying relatively junior officers to head field offices needs to be revised. The Special Tribunal for Lebanon, with its outreach and legacy section that is run by experienced staff including a P5 level officer who heads the Beirut field office is a good example to follow. "There should be a strong, high level, spokesperson who understands the context and the culture, communicating consistently with the public and affected communities."²²

4. Early Start

Many commentators have bemoaned the late start of outreach in the ad hoc tribunals where outreach activities were not commenced until at least five years after the tribunals began their work. The effects of this were rumours and distortions that undermined the work of the tribunals in their early years. One interviewee from the ICC's Outreach Section expressed similar views:

"One best practice is an early start of outreach to provide broader understanding of the mandate of the institution. Absence of an earlier start opens the flood gates for sceptics and detractors of the Court to fill the void... with misinformation aimed at discrediting and delegitimizing the institution."²³

The key lesson learned is that outreach should start at the earliest possible opportunity "preferably whenever an interest in a particular country is indicated or work begins in a particular country,"²⁴ or at the preliminary examination stage in the case of the ICC. Unfortunately the Outreach Section has so far been unable to conduct proper outreach during the preliminary examination stage partly due to resource challenges but also because, as stated above, the OTP regards preliminary examination as its exclusive preserve.

At the moment, the OTP is the organ of the Court that is solely involved during the preliminary examination stage and it endeavours to share information and communicate with victims and affected communities throughout this stage, though there is room for improvement. The process of handing over contacts to Outreach by the OTP as soon as a preliminary examination becomes an active investigation needs to be better coordinated. There is also a role for local NGOs to conduct outreach during preliminary examination.

To institutionalise outreach during the preliminary examination stage, the example of the situation in Kenya where the pre-trial chamber directed Outreach and the VPRS to collect the views of victims before determining whether to open an investigation, should be followed. The rules of the Court should be amended to make this applicable to all situations and to require the Registrar to start mapping of victims and outreach as soon as a country is referred to the ICC and a preliminary examination starts. This should be buttressed by a Court-wide digital communication strategy comprising information that the public will find themselves which may include publishing annual reports on preliminary examinations and marketing them through social media.

5. Coordination and cooperation with other organs

In addition to providing information on judicial activities, outreach is increasingly charged with other aspects of international tribunals' work or may be needed to respond to questions that are not directly within its purview. An interviewee noted that although inter-organ cooperation had

"The initial approach of having presence in the field was to provide logistics to those who work in the field, for protecting witnesses and for victims to participate, but we now know that we need more focus on the ground. Outreach also appointed a more senior person who is also able to engage with diplomats and the government."

"We need to provide a much more efficient hand-over from OTP in the preliminary phase to the Outreach and Public Affairs Unit. It should be a more systematic process."

“Exit Strategy: “The Rome Statute does not say when to stop. But at some point it has to happen. We need to include the local actors since the very beginning. They are the gate-openers but also the ones to continue the information process.”

“The TFV is a double-faced monster. Before it enters in the phase of Reparation it goes to people to give assistance (not a judicial process) and after the final judgements the reparations start (which is judicial and the TFV only a participant, used to transfer things to victims). It is difficult to explain to victims.”

improved in recent years, a lot more needed to be done to continue to provide Outreach with the support it needs to do its work effectively.

“Outreach is faced with questions which should be responded to by other organs or semi-autonomous bodies. The delay or absence of supplying the messages and responsive lines has the potential of fuelling misperceptions that will ultimately undermine the credibility of the Court and related judicial processes.”²⁵

In this regard, Communications is a matter of concern for an international court as a whole and not just the departments charged with outreach and communication. In the Special Tribunal for Lebanon, the Chamber has been involved in outreach including through opening the Chamber to the public. The President of the STL also holds discussions twice a year with the bar association in Lebanon.

While Outreach at the ICC is centralised in one office, joint missions are undertaken as and when necessary. Court principals are also able to conduct outreach, including judges who may speak generally about the Court without jeopardizing their own independence. The ICC has also taken the right step in adopting a more proactive, timely, engaged, court-wide and coordinated strategic approach to, and establishing an inter-organ working group on, communications. This overarching communications strategy is important to maximise on lessons learned and making outreach more effective and efficient overall.²⁶

6. Exit strategy

International tribunals need to have a clear exit strategy from the outset in readiness of shutting down operations after judicial proceedings are completed or in the event of scaling down the court’s work due to lack of arrests of alleged perpetrators. In the case in northern Uganda, there was no clear exit strategy and the current ‘maintenance strategy’ has led to heightened fears among the victims following rumours that the alleged impending withdrawal of the ICC would mean that Joseph Kony and the LRA rebels would return.

Such fears and rumours need to be countered through an effective exit strategy. However, a clear exit strategy is now part of the planning of outreach at the ICC. Given the importance of an exit strategy and the reality of resource constraints, it is important to link the work of the Court with local partners who can carry on the work of outreach after the Court winds down its activities. As part of its exit strategy, therefore, Outreach engages the local legal community by training lawyers on international criminal justice and how the Court operates; local media through training of journalists and keeping them updated on judicial proceedings; and youth and children through academic outreach programming including promoting teaching of international criminal justice. The expectation is that this will develop a local capacity capable of carrying out outreach work after the end of proceedings.

IV. Complementary transitional justice initiatives

A. Restorative justice and the expectation gap

International criminal justice institutions are not likely to be able to deliver restorative justice for the vast numbers of victims whose perpetrators are not being tried. Victim participation remains limited and disputed, with different approaches being taken in different cases. Procedures for participation remain bureaucratic and complex, and the experience by victims of the Court is likely to remain remote.

The Trust Fund for Victims has a comparatively small budget of around 8 million Euros that has to be split between assistance and reparations. Around 3.6 million Euros is currently earmarked for reparations. In Uganda, generally the work of the TFV is positively perceived, but its link with the Court had to be downplayed. Also, as will be discussed more below, as the Court is winding down its judicial activities in Uganda, the TFV likewise is reducing its activities. In Kenya, the TFV was not yet able to deploy for an assessment, because of security concerns arising from the high controversy linked to the Kenyatta case. In fact, victims in Uganda and Kenya will have to resort to localised transitional justice processes in order to satisfy their quest for justice. Nonetheless, the presence and profile of the ICC, with its purported commitment to restorative justice, is bound to leave an expectation gap. As expressed by a civil society activist in the context of northern Uganda, “prosecuting 5 persons cannot respond to the needs of 3 million victims in the North.”

There is no clarity yet on reparations. While the ICC pronounced itself in 2012 on the principles to be followed in the Lubanga case, this decision is now on appeal. Meanwhile, in August 2014, the Court issued an Order instructing the Registry to report on applications for reparations in the case against Germain Katanga. In the Order, the Chamber instructed the Registry to consult with individual victim ‘applicants’ regarding ‘the harm suffered as a result of the crimes’, as well as reparations sought. However pending the outcome of the Lubanga appeal, there is still no clarity on how reparations should be implemented.

While it is critical to consult with victims, there are likely to be communication challenges as consulting them is likely to open a Pandora’s box of raised expectations. The TFV with its dual role of providing assistance and being the mandated channel for reparations is confusing to victims. Outreach should develop a communication strategy to inform victims on reparations and explain the role of the TFV. If properly informed, victims are more likely to understand the limitations in the capacity to meet their needs. In this regard, there are ongoing internal consultations on how to deal with these challenges between the chambers, TFV, the legal representatives of the victims and PIDS.

B. The need for other justice mechanisms

In the wake of mass violence, international prosecutions are considered a necessary but not sufficient response to restoring the rule of law, upholding human rights and meeting the needs of victims. According to the UN Special Rapporteur, ‘a policy based exclusively on prosecution is likely to be experienced by victims as an insufficient response to their own justice claims’.²⁷ This echoes the UN, which defines transitional justice as consisting ‘of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof.’²⁸ International criminal justice therefore is likely to have its greatest societal impact when implemented as part of a broader transitional justice response to gross human rights violations. There is therefore a strong argument for a more integrated approach with local transitional justice initiatives. As one field officer stated:

“When interacting with victims of the situation we find it extremely useful when members of local civil society can accompany Outreach in its meetings and speak to victims about other initiatives that might benefit them outside of the Court process. This helps to reduce the feelings amongst victims of the situation that they’ve been treated unfairly by the ICC... The Court and other transitional justice initiatives should therefore work hand in hand as far as possible without prejudicing the rights of the accused.”²⁹

International criminal tribunals can better serve the needs of victims and affected communities through a more integrated approach with local transitional justice initiatives to achieve accountability, truth-seeking, reparations and memorialisation.

C. Role of domestic criminal justice, positive complementarity and legacy

“...it was helpful that many cases of the direct perpetrators were dealt with in the local courts in the region... it would be important to assist the local courts to develop victim support mechanisms with regard to protection of privacy, moral support, providing information about rights and procedures and so on.”³⁰

As mentioned, international criminal tribunals are expected to contribute to societal transformation through their primary judicial function of prosecuting and punishing offenders. As such, their first contribution to transitional justice is to promote accountability through their own proceedings. In this regard, the tribunals need to make the best quality decisions as to whom to prosecute and for what crimes. They should avoid the appearance of bias in their selection of cases. The entire judicial process from preliminary examination through investigations, pre-trial, trial, sentencing and appeal should be fair and thorough. They should also clearly explain the basis of their decisions to victims and affected communities through robust outreach.

In addition, international criminal tribunals should support domestic accountability mechanisms through the principle of positive complementarity. The ICC has a critical role to play in supporting a localised response to international crimes at the national level through shaping national responses to international crimes. This includes capacity building on investigation and prosecution

“There is a dialogue between OTP and national authorities. We report on the status of the preliminary investigation and present the gaps to the States. If States do not take action we might open investigations., galvanizing effect on the situation. If we increase trials then it means we failed in the preliminary examination phase.”

"If you want to have more national prosecutions you need to communicate where they are going to get the evidence, how they are going to coordinate, where do they get expertise from. It is difficult to do the job without access to our resources. For the ICTY the focus on national jurisdiction is part of its completion strategy but it was never intended at the beginning."

"Courts don't tell stories, they are a Court."

"I disagree to 'Courts don't tell a story'. Historic memory is created through a judicial proceeding; it is important that the voices of victims are heard, even though we do not hear all of them."

"In Guatemala the UN Truth Commission findings were admitted as evidence for the hearings."

at the national level including witness protection; sharing information with national authorities to facilitate local prosecutions; continuous monitoring of countries at preliminary examination stage with the aim of triggering prosecutions; and judicial exchanges on interpreting international criminal law.

The concept of complementarity, in terms of strengthening domestic legal systems, was extensively debated during the Review Conference in Kampala in 2010, and is strongly supported by the Assembly of States Parties. The Court itself has taken some limited steps to support domestic legal systems in specific situations, through exchange of information; participating in capacity-building programs and conferences; advocating for national trials; or receiving visiting professionals or legal counterparts in The Hague.

The ICTY regards positive complementarity as an important part of its exit strategy. As it transfers some of its cases to local jurisdictions, the tribunal is engaged in building the capacity of local judiciaries. It has also preserved and made accessible its archives to local judiciaries and civil society to ensure that the archival legacy is used to fight impunity and to safeguard the future impact of the ICTY after the tribunal closes down.

The relationship between the ICC and non-judicial transitional justice processes is less clear, and is not currently part of a policy. Non-judicial transitional justice processes are not an alternative to criminal prosecutions and cannot be used to challenge the admissibility of cases before the Court, but in daily life such processes often are closer to the victims. This particularly becomes an issue when the Court reduces its activities or prepares its exit. Unlike the ICTY or the SCSL, the ICC does not have a clear "legacy strategy." For instance, in Uganda the TFV is currently winding down its operations according to the Court's reduced judicial activities and its "maintenance strategy." This means that in the future, victims will need to rely on national authorities for any forms of continued assistance. The TFV is cooperating with the Health Ministry to try to ensure continuity in this regard. Overall, the Court could benefit from conceptualizing how its efforts can be amplified through more synchronization with localised transitional justice initiatives.

D. Truth-seeking

"There were different truths and it would be important if the tribunal could help to establish one truth on the basis of the established facts."³¹

International criminal tribunals through their judicial work, contribute to a measure of truth about a conflict. However, it should be remembered that the "truth" established through judicial proceedings is not sufficient to establish a true historical record of the conflict. It is limited by the rules of evidence and by the scope of the trial so that, even if true, it may only be a part of the larger truth and in isolation may distort the overall truth".³² Still, there are victims who prefer their truth to be established in a court of law as they regard a truth commission as a lower vision of justice in the transitional justice hierarchy. But others are more focused on restorative justice and truth commissions alongside tribunals can play an important role in that sense.

However, in the event of criminal prosecutions and a truth commission being undertaken concurrently as in Sierra Leone, robust outreach must be undertaken to ensure that victims are not confused about the two processes.

While respecting the limits of their mandates, international criminal tribunals can also enhance their contribution to truth-seeking by considering making publicly available some of the information they have gathered on the conflict and the situation of victims that is not needed for trials but is still relevant in understanding the overall context of the conflict. This can be done subject to the necessary safeguards to protect legitimate public interest.

But international tribunals and their supporters would also benefit from linking their efforts to those of local truth-seeking initiatives. Particularly with the inherent limitations on victim participation, those seeking to tell their stories could be referred to local documentation initiatives. There is also need for enhancing and supporting local truth and healing efforts such as the *Caravan de la Paix* (Peace Caravan) and traditional conflict resolution initiatives such as the *barza community structures* in DRC created to prevent conflict and maintain dialogue between communities to diffuse latent conflict.

E. Memorialisation

In the Expert Meeting that IW organised in December 2013, the relationship between international criminal justice and memorialisation was explored. In addition, research by Impunity Watch shows that prosecutions and memorialization initiatives can complement one another. Memory initiatives have a role in recasting identities and (mis)interpretations of the past, which can ultimately reinforce the efforts of criminal prosecutions. The archives and judgments of tribunals can also be used to contribute to a society's memory of the conflict thereby enhancing the societal impact of the prosecutions.³³

Because memory initiatives are often in closer physical and cultural proximity to local communities than institutionalised measures such as criminal prosecutions, these initiatives often have much greater resonance among those communities.³⁴ This can have both positive and negative consequences for criminal justice. In this respect, two-way communication between field offices of the Court and local communities that engage in memory initiatives is crucial for ensuring that the information originating from Court proceedings is understood correctly and debated appropriately.

The ICC can also make valuable links with institutions such as universities and law schools, where both the substantive and procedural aspects of its decisions can be debated and internalised or absorbed into curricula.

F. Reparations and victim support

Reparations for victims remains one of the most contested and underdeveloped areas in international criminal law. The ICC can support the enactment of legislation and programmes at national levels using the framework in the Rome Statute as a guide to either stand-alone legislation and programmes or in the domestication process of the Rome Statute. The development of principles on and administration of reparations by the ICC can serve as resources for national courts and programmes to manage the reparations process. It is also important to find ways to meet victims' immediate needs such as livelihoods, health, psychosocial support and education. For this reason, court and tribunal staff interviewed called for the involvement of the TFFV at a much earlier stage in all situation countries.

However, as the courts and tribunals do not have the capacity nor the mandate on their own to provide this immediate support, they should partner with NGOs and humanitarian organisations. The experience of the TFFV is relevant in this regard: it collaborates extensively with humanitarian organizations. In general, the TFFV also has taken an open-ended approach to its beneficiaries when it gives assistance and it does not restrict the categories of victims to those linked with cases. For instance, in Uganda the TFFV will assist persons victimised by the Ugandan army even though there is no case pending against them. Perceptions of the work of the TFFV are largely positive and have sparked debate for a possible expanded role of the TFFV. Some have advocated for the TFFV to become a reparations commission. However, as stated above, the judicial (reparations) and non-judicial (assistance) mandates of the TFFV are potentially confusing to victims and robust outreach is necessary to explain to the victims how the fund operates and how they can benefit from it.

V. Conclusions

The intervention of the international community in post-conflict societies through international criminal prosecutions usually triggers heightened expectations by victims and affected communities that those who violated their rights will be punished and that the harm they suffered will be repaired. However, such prosecutions often prove a necessary but not sufficient response to mass violence due to the fact that they can only prosecute a handful of perpetrators. The restorative aspect of the ICC is equally constrained due to the limited mandate and resources of the Trust Fund for Victims, while victim participation is hampered by bureaucracy, complex application processes and inconsistent jurisprudence by different chambers of the Court. All this has had a negative influence on how these courts are perceived by victims and affected communities and their ability to deliver meaningful justice.

To mitigate this reality, there is need for more effective outreach to manage the expectations of victims. Such outreach needs to be an integral part of a tribunal's mandate, to be internally and adequately funded, to start at the earliest possible opportunity and to have a clear exit strategy. It also needs careful coordination with all organs of the court.

"In the Katanga case we now enter into an interesting phase. At the time of the final judgement we start the phase of Reparations. It will be good to follow that process as there is a possibility to have some impact (through reparations)."

Supporters of international criminal prosecutions also need to accept their limitations and embrace a more integrated approach with local transitional justice mechanisms such as domestic trials, truth seeking, reparations and memorialisation in order to expand the scope of meaningful justice that is available to victims.

VI. Policy recommendations:

1. Outreach should start as soon as there is a decision to start a preliminary examination and victims should be consulted before the investigations are opened. The precedent set by the Kenyan case by Pre-Trial Chamber II which ordered a mapping of victims and affected communities in December 2009 prior to authorizing an investigation should be adopted as standard practice for all potential situations by amending the relevant rules of procedure to require the Registrar to start mapping victims and outreach in the whole country where atrocities have been committed.

2. The two-way communication between the Court and the victims should be continually reviewed and strengthened. Again, the precedent established by Outreach in Kenya where victims were recorded on camera to send their views to the judges is a good example to follow.

3. There should be a wholesale look at how the ICC uses digital tools to communicate. A Court-wide digital communication strategy should be adopted containing information that the public can easily access. An annual report on preliminary examinations can be published and marketed through social media. The ICC website needs to be overhauled to make it more accessible and user-friendly.

4. There is need to continuously monitor and evaluate Outreach in order to continuously improve societal impact on international criminal tribunals.

5. The judgments and rulings of the Court should, to the extent possible, but without interfering with the substance, be made comprehensible to victims and affected communities. The ICTY outreach practice of explaining judgments to affected communities has important lessons for other tribunals and the ICC, as does the Special Tribunal for Lebanon's practice of including explanatory head notes in its judgments and rulings and the Special Court for Sierra Leone summarizing the Charles Taylor appeal judgment to 50 pages. NGOs and states also have a critical role to play in explaining judgments to affected communities. In particular, the international community should play a more robust role in supporting the judgments of the Court so as to mitigate the tendency by rival groups on the ground to politicise and undermine the decisions of the Court.

6. The dual role of the Trust Fund for Victims should be explained clearly to victims to avoid confusion. In addition, as a long term measure, the ICC could adopt the lesson from the STL where a judgment of the tribunal can be used as a legal title for Lebanese Courts to get reparations. In similar vein, states parties should consider allowing ICC judgments to be executable and to be a legal basis for domestic claims for reparations.

7. Victims views should be sought whenever there is a possibility of early release of a convicted perpetrator which should be made conditional upon good behaviour for the remainder of the suspended jail term.

8. The recently announced policy of having victims solely represented by in-house lawyers should be reconsidered and the Court's budgets rationed to ensure that resources continue to be found to hire local lawyers who bring a unique perspective to victim representation in the Court.

¹ Report of the Secretary General on The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004.

² Ibid.

³ Eric Stover and Harvey M. Weinstein (Eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*.

⁴ Impunity Watch, *The Expanding Societal Impact of International Criminal Justice - Exploring the Links with Memory Initiatives*, February 2014. Available at: http://www.impunitywatch.org/docs/Policy_Brief_-_The_Expanding_Societal_Impact_of_In1.pdf.

⁵ Ainley, Kirsten. The International Criminal Court on Trial. *Cambridge Review of International Affairs*, 2011, 24 (3) pp. 309-333.; Stahn, Casten, "Editorial Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?" *Leiden Journal of International Law*, Volume 5, issue 2, 2012 at pp. 257-258.

⁶ Zacklin, Ralph. "The Failings of Ad Hoc International Tribunals." *Journal of International Criminal Justice* 2 (2004), 541 at p. 544.

⁷ Nino, Carlos. "Radical Evil on Trial", 1996, p. 131.

⁸ Staff involved in outreach activities would likely dispute whether this is indeed the role of outreach in the first place.

⁹ Madoka, Futamura, *Japanese Societal Attitudes Towards the Tokyo Trial: A Contemporary Perspective*, *The Asia-Pacific Journal* Vol. 9, Issue 29 No 5, July 18, 2011.

¹⁰ See Orentlicher, Diane. "Shrinking the Space for Denial: The Impact of the ICTY in Serbia." *OSJL*, 2008. See also the OSCE and Belgrade Center for Human Rights, *Attitudes towards war crimes issues, ICTY and the national judiciary*, Oct. 2011.

¹¹ Victims and the ICC Review Conference: Interview with David Tolbert, President of ICTJ, <http://www.ictj.org/sites/default/files/ICTJ-Global-Newsletter-June-2010-English.pdf>.

¹² ICTJ, *Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice*, <http://ictj.org/sites/default/files/ICTJ-Global-Making-Impact-2011-English.pdf>

¹³ ICC Website, Outreach page, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx

- ¹⁴ As IW noted, reiterated by the latest report of the UN Special Rapporteur on TJ, “Given the physical and cultural distance that often separates victims and affected communities from TJ mechanisms, information and outreach conducted in a two-way dialogue is fundamental to participation, and may be a fundamental form of participation.” Impunity Watch, *Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?*, April 2014, p.35.
- ¹⁵ Human Rights Watch, *Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina* http://www.hrw.org/sites/default/files/reports/bosnia0312_0.pdf.
- ¹⁶ Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Ford_CR_4_12.pdf.
- ¹⁷ Refik Hodzic, *Accepting a Difficult Truth: ICTY is Not Our Court*, <http://www.balkaninsight.com/en/article/accepting-a-difficult-truth-icty-is-not-our-court>.
- ¹⁸ This section and those that follow draw upon a number of interviews conducted by Stefanie Geiss for IW with Outreach and Victim Support Units’ staff of the various international courts. One of the primary purposes of these interviews was to hear their views on “Best Practices and Lessons Learned”.
- ¹⁹ For a discussion of victim participation in more detail, see Impunity Watch, *Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?*, April 2014.
- ²⁰ *No Peace Without Justice, Making Justice Count: Assessing the impact and legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia* (September 2012).
- ²¹ Ibid.
- ²² Interview with a Kenyan civil society activist.
- ²³ Interview with ICC field officer.
- ²⁴ Ibid.
- ²⁵ Interview with ICC field officer.
- ²⁶ CICC Team on Communications Statement at Hague Working Group Roundtable on ICC Communications Strategy 15 May 2014, http://www.coalitionfortheicc.org/documents/CICC_Statement_HWG_Comms_May2014.pdf.
- ²⁷ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff - http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf.
- ²⁸ Guidance Note of the Secretary General: United Nations Approach to Transitional Justice, March 2010 http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf.
- ²⁹ Interview with ICC outreach staff.
- ³⁰ Interview with ICTY outreach staff.
- ³¹ Interview with ICTY outreach staff.
- ³² Jeremy Sarkin, *Enhancing the Legitimacy, Status and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies*, http://www.americanstudents.us/IJHRL6/articles/IJHRL_v6_2011-2012_Sarkin_pp.83-102.pdf.
- ³³ Impunity Watch, *Policy Brief: The Expanding Societal Impact of International Criminal Justice -Exploring the Links with Memory Initiatives*, http://www.impunitywatch.org/docs/Policy_Brief_The_Expanding_Societal_Impact_of_In1.pdf.
- ³⁴ Ibid.

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