Policy Brief: The Expanding Societal Impact of International Criminal Justice - Exploring the Links with Memory Initiatives

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.

Contents

Summary

In December 2013, Impunity Watch (IW) organised an Expert Meeting in conjunction with the International Criminal Court (ICC) and with the support of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. Representatives from the different organs of the ICC, ICTY and STL joined IW staff in discussing lessons learnt with respect to the wider societal impact of international(ised) criminal justice, building on comparative research conducted by IW into the contribution of memorialisation to transitional justice after widespread violence. In particular, the Expert Meeting was aimed at discussing the key finding from this research that memory initiatives and memorialisation are an important element of transitional justice policymaking and can complement criminal prosecutions. Nevertheless, these linkages remain largely unexplored, with criminal justice and memorialisation often treated as independent from one another. This Policy Brief presents some of the most pertinent findings from IW's research, as well as a short overview of the important topics of discussion raised during the Expert Meeting. A number of focus points are subsequently presented in order to guide policy discussions when considering the wider impact of international criminal justice. These focus points will be at the centre of a follow-up International Conference to be organised by IW in 2014, intended to generate clear policy advice for international policymakers and donors.

Tackling impunity after serious violations of international law

Impunity for serious violations of international law is defined as 'the impossibility, de jure or de facto, of bringing the perpetrators of violations to account'. Whether in criminal, civil, administrative or disciplinary proceedings, impunity will result when perpetrators 'are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.'[1] In this sense, impunity is a consequence of shortcomings in the administration of justice, weaknesses in all three branches of the state, the (negative) influence of non-state actors and societal factors.

According to this view, criminal prosecutions are therefore not the only measure for tackling impunity after violence. For this reason, the UN Commission on Human Rights has affirmed the 'Orentlicher Principles' for combating impunity, including the obligation upon states to take effective measures:

> *[…] to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.*[2]

The 'Orentlicher Principles', *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1 (2005).
Principle 3: A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

It is this reasoning that informs the work of Impunity Watch (IW) and which lies at the heart of this short analysis. In this respect, we understand that tackling impunity demands a broad agenda of action, aimed at achieving the rights of victims and affected communities to truth, justice, reparations and the non-recurrence of violence, as well as transformative objectives that seek to tackle the dynamics and structures that created the conditions for the perpetration of violence.

Based on research conducted by IW according to this approach, this Policy Brief uses five basic assumptions as a framework. These are the following:

- International(ised) criminal prosecutions are just one component of transitional and transformative justice, with particular significance, but also limitations;
- Memory initiatives are an important part of transitional and transformative justice;
- Memory initiatives have both subtle and explicit links to criminal prosecutions, meriting acceptance that the two measures are not independent processes;
- Memory initiatives can complement, contradict, supplement and supplant criminal justice; and
- International(ised) criminal prosecutions can have a wider societal impact than the simple delivery of justice in the courtroom.

A number of pertinent findings from IW's research will be highlighted to substantiate these assumptions. It is these findings that were presented in an Expert Meeting organised by IW in conjunction with the International Criminal Court (ICC) in December 2013. Representatives from the different organs of the ICC, ICTY and STL discussed the findings with a view to exploring the wider societal impact of international(ised) criminal justice and its links to memorialisation in countries emerging from violence. Some of the most important topics of discussion from this Expert Meeting are presented, as well as a number of focus points that we hope can guide policy discussions on international(ised) criminal justice. In particular, these focus points will be at the centre of an International Conference to be organised by IW in 2014, aimed at generating concrete policy advice for international policymakers and donors.

International(ised) criminal justice: Not the be-all and end-all after violence

IW's research supports the belief that dealing with a past characterised by serious violations of international law requires a comprehensive and inclusive approach. Still, in the countries where we have worked (and are working) we consistently find that criminal prosecutions and truth commissions are prioritised by international decision-makers as the central components of TJ policymaking.

A particular consequence of this almost exclusive focus – above all for the most vulnerable groups in society – has been the absence of wider institutional, societal and cultural initiatives to challenge the dynamics and structures that facilitated violence in the first place. This has been referred to as a 'transformative justice' approach,[3] pointing to the need to question the traditional conception of TJ and the wisdom of relying too heavily on international(ised) criminal justice after violence. For the latter in particular, the major shortcomings are well-cited. These include the individualised nature of criminal proceedings making it difficult to tackle the wider structures that exist perpetuating impunity.

In this sense, policymaking is still some way from practically realising the affirmation of the former UN Secretary-General that TJ, 'comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses'.[4] Indeed despite the increased scrutiny of TJ, institutionalised mechanisms are still favoured as the principal means for dealing with past violence, without due attention to corresponding measures for addressing the structures and dynamics that implicate a society's reckoning with its past.

This approach is however under increased pressure, especially in light of conclusions from the academic community such as the following:

> *At present the transitional justice literature does not provide policymakers with the empirical foundations necessary for making informed decisions about when, where and how to promote transitional justice in countries emerging from war or authoritarianism.*[5]

What we find is that TJ policymaking has been commonly based on faith rather than fact, with 'bottom up' input frequently marginalised or completely disregarded in this process. The tendency has been to ascribe lofty goals to TJ mechanisms, which can be partly used to explain evidence that victims and affected communities have often become disconnected from TJ mechanisms.

The International Criminal Tribunal for Rwanda (ICTR), for example, was mandated not only to prosecute those responsible for the most serious violations of international law, but also to contribute to reconciliation, peace and deterring future violations.[6] Similar objectives were given to the International Criminal Tribunal for the former Yugoslavia (ICTY). Nonetheless the common understanding in the Balkans seems to be that concrete changes on the ground as a result of the ICTY are difficult to ascertain, especially in the eyes of local populations. Added to this are problems of the very characteristics of such mechanisms – legalese, strict adherence to procedure, pomp and procedure – that further contribute to the physical, psychological and intellectual distance between the mechanisms and the communities for whom they should ostensibly operate. Whilst fundamental to the administration of justice, these characteristics render the courtroom an inappropriate environment for bringing about wider, transformative objectives. Even the often-cited benefit of creating an historical record by subjecting facts to judicial scrutiny should be treated with caution, since the courtroom deals with only certain 'truths' and permits only certain 'facts' to be heard.

IW understands that accepting the limitations of criminal prosecutions will ultimately benefit and strengthen their position as part of a more comprehensive and viable transitional or transformative justice approach. By doing so, policymakers can guard against 'over-promised and under-delivered justice' in the wake of violence,[7] and the warning that 'trials that seek to do justice on a grand scale risk doing injustice on a small scale'.[8] Indeed it is now largely accepted that trials 'are ill-suited to deal with the subtleties of facing the past'.[9]

Transformative Justice

Arguments for transformative justice draw upon theories of structural violence (Farmer, 2004; Galtung, 1969), connecting them to theories of peacebuilding, conflict transformation, development and human security (see e.g. Mani, 2002; Lederach, 2000). Transformative justice promotes an understanding of justice that not only seeks redress for human rights violations, but seeks to tackle the structures and dynamics that provided the enabling conditions for those violations (Eriksson, 2009). In this sense, it recognises the continuities in the social, economic, political and institutional structures between the past and present, aiming for structural and institutional reform, socio-economic and political justice (Lambourne, 2009), in conjunction with the traditional goals of TJ for accountability, truth, reparations and reconciliation. A fundamental concern of transformative justice is moreover to address the needs and expectations of the local population (Lambourne 2009).

Memory initiatives: Important components of TJ with links to criminal justice

Memorialisation
During the Expert Meeting, the following working definition of 'memorialisation' was used: Deliberate actions and initiatives to preserve the memory of people or events from a violent past, specifically instituted to contribute to truth, justice, reparations and the non-recurrence of violence, whether by establishing an historical record, catalysing social change, providing space for dialogue, or as a form of reparations.

Memory Initiatives
During the Expert Meeting, the following working definition of 'memory initiatives' was used: Activities that aim to commemorate, enhance understanding of, or use the act of remembrance to seek truth, justice, reparations or non-recurrence of a violent past, including – but not limited to – the erection and maintenance of memorials and monuments, ceremonies and rituals, musical and theatrical performances, educational, awareness-raising, dialogue and remembrance programmes, the teaching of history, and the gathering and preservation of information.

Moving to deal with the next two basic assumptions together, it is important to recognise that there is an emerging international norm of memorialisation after violence. It is in relation to this norm that we understand that memory initiatives are an important part of transitional and transformative justice, and moreover that memory initiatives have both subtle and explicit links to criminal prosecutions. The latter in particular merits acceptance that the two measures are not solely independent processes after violence.

These assumptions are grounded in research conducted by IW in five countries emerging from violence: Burundi, Bosnia-Herzegovina, Cambodia, Guatemala and South Africa. The comparative research was initiated to understand the role that memory initiatives can play in tackling impunity and with respect to victims' rights to truth, justice, reparations and the non-recurrence of violence. In fact, the origins of the programme lie in the desires of local actors in Guatemala to understand alternative processes for dealing with the country's entrenched culture of impunity and violence.

Though memorialisation is of course an almost instinctive reaction to violence, occurring in intimate local spaces within the family and community, more sustained attention to the practice as part of TJ has only recently gathered pace. The research we conducted supports the conclusion that memorialisation contributes in dynamic ways to attempts to deal with a violent past, including truth and justice, and should therefore be considered beyond the paradigm of commemoration and as more than a mere sub-component of symbolic reparations. The traditional conception of memorialisation and memory initiatives remains however, meaning that these initiatives are still an under-considered measure of TJ. In fact, we find that some of the most effective uses of memorialisation outside of commemorative and symbolic practices have been in support of state-sanctioned narratives, having a negative impact on the principles of TJ.

One of the reasons that IW decided to organise the Expert Meeting in 2013 was to explore the more dynamic interpretation of memorialisation with criminal justice practitioners. An important outcome of the comparative research was the production of eight Guiding Principles of Memorialisation intended to assist policymakers, donors and practitioners in decision-making on memorialisation.[10] Among these Principles, 'Complementarity' between TJ measures is distinguished. According to this Principle:

> *Memory initiatives must be considered as part of a framework for transformative justice that includes complementary mechanisms for guaranteeing truth, justice, reparations and the non-recurrence of violence […]*

In the Expert Meeting we above all sought to explore this Principle and the corresponding conclusion from the comparative research that memory initiatives and other TJ mechanisms can be mutually reinforcing. According to this reasoning, memorialisation and memory initiatives must be considered as constitutive elements of a TJ policy agenda after violence. Indeed, we support the conclusion that 'the repeated failure to deal with memorials […] can imperil transitional justice efforts and peacebuilding in the long-term'.[11]

Complementing, contradicting, supplementing & supplanting criminal justice

The ECCC in Cambodia

Despite the well-cited criticisms of the ECCC, our research found that the criminal process had opened space within Cambodian society for memory initiatives and for (re)commencing talking about the past for the purposes of – among other things – memory. Thus after the establishment of the ECCC in 2006, the number of memory initiatives increased in Cambodia, with new impetus for Cambodians to face memories of the past that had previously been suppressed. In this sense, criminal justice institutions provide foundational moments in a country's history that enable wider processes to develop that were previously blocked or circumvented.

Recognising the place of memorialisation and memory initiatives within TJ – and consequently as intertwined with the politics of post-conflict countries – means acknowledging both the constructive and destructive dynamics that these processes can introduce.

Beginning with the constructive dynamics, the conclusions from our research back the claims that 'history may be reaffirmed in the long-term through the construction of museums and monuments'[12] and that 'properly engaging in memory centrally figures in the process of justice'.[13] Specifically, memory initiatives have a role in recasting identities and (mis)interpretations of the past, which can ultimately reinforce the efforts of criminal prosecutions and the judicial record of events. It is in this sense that we have found that memory initiatives can be used to 'translate' the judgements of tribunals 'into something broader and more immediately and culturally cognizable by victims and society',[14] thus extending the impact of criminal prosecutions.

The research therefore finds that memory initiatives can complement criminal prosecutions, affirming historical records and extending the impact of the judicial record of the facts. There is also strong evidence showing that memory initiatives can supplement the work of criminal institutions. For example, where measures such as prosecutions are considered overly institutionalised and centralised, memory initiatives can counteract with processes that are participatory and local, thereby supplementing prosecutions. Moreover, we conclude that memory initiatives can develop from criminal proceedings, meaning that criminal prosecutions can open space for memory initiatives, the latter thus emerging as a result of formal justice proceedings. And the reverse may also be the case, with memory initiatives leading to criminal justice, for example by sustaining the memory of atrocities or the long-term call for justice.

Omarska & the ICTY

Perhaps the most famous photograph from the Balkans wars was taken at the concentration camp in Omarska. On several occasions in several judgements, the ICTY has ruled that crimes against humanity were committed at Omarska. Nevertheless in spite of these authoritative judicial pronouncements, supposedly quelling any doubt as to the crimes perpetrated, memory initiatives in the locality provide a forum for disputing these very facts. At these memory initiatives the facts established at the ICTY are disputed and ethnic divisions consequently maintained via polarised collective memories of the past.

Equally, the research demonstrates that memory initiatives can have a destructive impact on truth, justice, and the non-recurrence of violence.

Whilst they can be important initiatives for the process of (re-)establishing the truth, memory initiatives can also become the sites where facts and historical records are disputed. We found clear evidence from ethnically divided societies in particular that memorialisation can undermine the efforts of other TJ measures by providing space for cultivating alternative identities and myths, consequently acting as sites for the continuation of divisions within a particular society. Because memory initiatives are often in closer proximity to local communities than institutionalised measures such as criminal prosecutions, we find that they can have more resonance among those communities, meaning that any negative dynamics that are introduced will have a greater impact.

In this sense, greater openness to the consideration of what 'justice' involves and what TJ encompasses is important, avoiding an approach to policymaking that considers justice and criminal prosecutions as solely synonymous.

The wider societal impact of international(ised) prosecutions & the role of memorialisation

In the remaining sections of this short Policy Brief, we intend to summarise some of the most important topics of discussion from the Expert Meeting held in December 2013.

The first session of this Expert Meeting was animated on the basis of a short presentation of the above research findings, and the final basic assumption, namely that international criminal prosecutions can have a wider societal impact than the simple delivery of justice in the courtroom. The following questions were posed:

> *What lessons can be learnt (positive and negative) from the ad hoc tribunals, hybrid tribunals and the ICC in terms of the wider societal impact of criminal justice?*
>
> *Have the various tribunals contributed to truth? Reconciliation? Historical record(s) of the past?*
>
> *What challenges do legal practitioners face to considering the wider impact of criminal prosecutions in their day-to-day work? Is it possible to consider the effects that 'legal' decisions such as the selection of charges or the processes of investigating and prosecuting*

crimes will have upon wider social processes, for example individual and community processes of memory, reconciliation, etc.?

In the second session, IW presented a number of cases from our research to demonstrate examples of the links between criminal justice and memorialisation. The discussion was intended to encourage critical reflection on how memory initiatives can be a part of the work of criminal prosecutions. The animating questions were:

Can we identify key focus areas where memory initiatives may link to criminal justice?

In what ways might memorialisation be used by criminal tribunals?

What are the political, legal and ethical challenges that this presents for criminal justice institutions?

The ensuing discussions, facilitated by IW, raised a number of overlapping issues. These issues have been summarised and grouped according to the following principal themes.

Managing Unrealistic Expectations & Misconceptions

Addressing the question of the wider impact of international(ised) criminal prosecutions, a general consensus exists that the goals and objectives commonly attributed to justice institutions have not been met. This is particularly the case when we consider the expectations of victims. In turn, this has led to negative perceptions about these institutions being fed within the societies where the crimes being tried were perpetrated.

ICC Outreach: Managing Expectations

"[…] because the mandate is limited you need to find a way to coordinate with local actors and you need to manage the expectations of the communities. Most communities are very poor and in need so you need to explain from the very beginning that you are not bringing food or clothes, but that you give information about the Court and answer all their questions. They do appreciate the fact that we are not ignoring them."
(Participant, ICC Outreach Department, Expert Meeting, December 2013)

This being said, there is an implicit agreement that rather than posing the question of whether the expectations of criminal justice have been met, a more appropriate question is to ask whether those expectations have been realistic. Posing this question instead, we accept the premise that criminal justice should not be implemented in isolation or as the be-all and end-all of transitional and transformative justice; moreover, this acceptance allows us to begin looking for concrete lessons learnt and ways forward for future criminal trials. In the words of a representative from the ICTY's Outreach Department:

We need to ask ourselves what is meant in the mandate of the ICTY and how it has been perceived both in the region and in the international community. If the idea was that one institution that has been built from scratch 20 years ago can single-handedly resolve the conflicts in the Balkans that go back centuries I don't think that was a realistic expectation. If the idea was that the judgements of the ICTY can somehow start the process of reconciliation I don't think that was a realistic expectation.

Thus a key lesson to be learnt from the ICTY is that its implementation as the sole mechanism of TJ logically led to all of the hopes of victims and affected communities being placed in this one institution to a large extent because there was – and is – little else. This over-promise of justice, reconciliation and peace-building has stoked emotional responses to the Tribunal, but over the years criticism has increased as the ICTY has been unable to meet these expectations. People have consequently realised that their expectations may never be met by the Tribunal.

For the ICC, the risk of a similar emotional response and consequent unmet expectations is acute. In fact the challenges may be even more considerable since the ICC is situated far away from where the crimes were committed, and must find a way to respond to different cultures, groups and nationalities whilst dispensing the same justice. According to one senior ICC staff member:

[…] you have to multiply the challenges of, for example, the Special Court for Sierra Leone with the number of countries that the ICC works in.

The consequences of the unrealistic expectations attributed to criminal justice institutions means that a key challenge is how to manage the expectations of local communities in particular. The same applies to the misconceptions about international(ised) criminal justice and what it can achieve or is mandated to do, including with respect to the different notions of 'justice' that may exist within groups, cultures and societies. This does not mean a radical overhaul of the basis of international criminal law, but promoting understanding of it.

Still there is disagreement among practitioners and criminal justice actors on exactly how to manage unrealistic expectations. Whose duty it should be to manage expectations, whose role it should be to address the hopes of victims, and what the precise objectives are of international(ised) criminal justice are each issues that attract different opinions. According to one senior lawyer, perhaps the ultimate paradox is that the best way for lawyers to serve victims is by "absolutely ignoring their demands" and maintaining absolute subservience to the law alone. The divide among international criminal lawyers that is visibly revealed in response to such opinions is demonstrative of the need for (for example) alternative and complementary processes of TJ.

Victim-Centred Justice

There is a basic tension between traditional approaches to (international) criminal justice that take a classically retributive stance and those approaches that merge wider notions of restorative justice in the prosecution of international crimes. These divisions become particularly apparent when examining the impact and lessons learnt from international(ised) justice with respect to victim-centrism.

Meaningful Justice for Victims

"We need to set priorities, to have a system which is meaningful for the victim and the communities, and which could have a further societal impact. In my opinion, the social impact of the Court will be different depending on the society and the country, so you need to think about the diversification."
(Participant, ICC OTP, Expert Meeting, December 2013)

The traditional approach holds that tribunals must remain insulated from victims, focusing on trials and applying the law in an entirely apolitical manner. According to this view, criminal trials should focus on:

> *[…] taking a very independent view based on the parameters of your jurisdiction and its procedures […] to maintain the judicial independence which is the core of the integrity of the institution.*

This view holds that establishing guilt or innocence is first and foremost the major concern, with the establishment of an objective truth a secondary goal. The challenges of putting victim participation into practice at the ECCC and ICC demonstrate that the courtroom is not the appropriate place for victims, other than as witnesses. In this sense, the traditional approach maintains that we must continue to manage the expectations of victims in order not to undermine the legitimacy of the criminal process.

By contrast, the opposing view holds that victims are the very foundation of international(ised) prosecutions. According to this view, without a victim-centred approach it is impossible to speak of an institution's integrity. One senior ICC lawyer thus assesses the situation as follows:

> *I'm a little bit astonished when I see lawyers from international criminal courts say – and they repeat that quite often – that they have to insulate themselves from victims […] I would say that we are to implicate victims in our proceedings at all stages. Because that is the only way to contribute to the establishment of the truth, and for me the establishment of the truth is much more important for international criminal justice than to decide if someone is guilty or not.*

Here the standpoint is that victims should "call the tune", which is the only way to ensure wider societal impact. Although there are different degrees of such victim-centrism – ranging from victims having a say in deciding the charges, to the OTP effectively taking the lead from victims in the selection of situations, cases and charges – the traditional exclusion of victims from criminal processes is rejected. Proponents cite lessons learnt from the *Lubanga* case with respect to the selection of charges to make this case, including the well-cited effects of excluding gender crimes from the charges, as well as the narrow charges indicating that the main preoccupation of the OTP is to select those charges that can ensure that a case is won, rather than ensuring that the case itself is important for the people in the country.

These differing standpoints and interpretations of criminal prosecutions raise a number of crucial questions to which criminal justice practitioners have difficulty in finding common answers. The tensions are especially vivid when examining the wider societal impact of criminal prosecutions. The paradox is that practitioners agree that more needs to be done to ensure wider impact, but friction arises when trying to find the most appropriate solutions.

On the one hand we may re-consider the traditional foundations of criminal justice, thus acknowledging that "it is a choice to say that we have a limited mandate"; or on the other hand we may give more attention to other initiatives, for example the Victims Trust Fund at the ICC or other

TJ initiatives when trying to ensure societal impact. Of course the division does not have to be so hard and fast, with a solution also to be found somewhere in between.

Legacy, Impact & Historical Records

The 'success' of international(ised) criminal justice will not only be based upon the number or the nature of convictions, but in large part will be based upon societal impact. It is because of this realisation that a senior staff member at the ICC states:

> *If we would only focus on the judicial aspects of our work we would be half as successful. It is the extra layers that determine success – reparations, memorialisation, outreach. Justice is more than the work of lawyers. There is a need for creative interpretation of mandates.*

In this respect, legacy, future generations and the (re-)dignification of victims become crucial considerations for criminal tribunals. Among the range of initiatives that can thus assist the mandates of criminal justice institutions, memorialisation is one of the most under-explored. Nonetheless, memorialisation and memory initiatives can be a way to dignify victims and extend the impact of prosecutions, particularly since they may potentially provide redress that is closer to what victims and affected communities are looking for, rather than attempting to account for international crimes numerically.

Whereas memorialisation during the ongoing prosecution of crimes raises a number of questions, especially concerning the most appropriate timing of initiatives, initial practice suggests that memory initiatives can indeed spread the impact of prosecutions and even be determinative of 'success' in the long-term. Related to initiatives aimed at education and outreach, memory initiatives can be a way to engage a wider number of persons with affected communities and societies. Equally, ensuring the accessibility of witness testimonies and providing the historical record of proceedings in a manner that is digestible – and thus accessible – can itself constitute an important memory initiative. Consequently, memory initiatives can spread the impact of criminal prosecutions.

Moreover, as suggested, criminal justice institutions can inspire memory initiatives, can feed them with information and can begin ensuring wider societal impact through creative engagement with memory initiatives. In this sense, the traditional paradigms of criminal justice and memorialisation should be considered as interrelated rather than distinct. To some extent the Rome Statute is an innovation in this regard, particularly with respect to its provisions for reparations and for the Victims Trust Fund. However, these innovations aside, we should be careful not to over-burden or over-emphasise reparations. They can be creative tools for the Court, but must be accompanied by other initiatives.

Nevertheless, memory initiatives that are promoted by or connected to criminal justice institutions can also have a damaging effect for criminal prosecutions. Indeed when attempting to extend the legacy or the historical record of proceedings, it is noted that this can "perpetuate selectivity" since tribunals inherently make decisions that exclude certain victims and communities, which memory initiatives may end up reinforcing. The same applies to the damaging effects of politicisation by national political actors. Memory initiatives can easily become political fodder that can be used to undermine the criminal process. In this line one practitioner is of the belief that the job of criminal tribunals "is not to create an historical record but [only] unearthing evidence to the light of day".

Similar concerns exist with respect to the scope of prosecutions, including the selection of charges and the exclusion that necessarily results. This once again raises the tension between traditional conceptions of criminal justice and conceptions that incorporate restorative notions of justice. For example, whether criminal justice decision-making can or should be influenced by societal concerns is a matter of intense dispute. Consequently ideas of 'truth' and 'memory' are hotly disputed; on the one hand we find the belief that criminal justice can only ever be selective, whereas on the other hand we find the belief that "the prosecutor is just a tool to establish the truth". Here again alternative and complementary initiatives will be important to offset the impact of such decision-making.

Making Use of the Information Amassed During ICC Investigations?

"[…]We see it as part of our mandate, specifically as part of our preventative role to support and contribute when we can to educational activities and projects, where we can contribute in a manner that will fit into these projects. We could develop networks and contacts with either academics or NGOs or institutions that want to help us build a historical record other than a situational case. Because we will collect a lot of information and evidence during the building up a case and everything will be presented for the judges of course, but it can also fit in to building an historical record. Our goal is not to present a broad view of a given situation; however this information can be useful for other projects that would contribute to memorialisation of the crimes and of the situation."
(Participant, ICC OTP, Expert Meeting, December 2013)

Wider Impact: Lessons Learnt & Proposed Ways Forward

In light of the issues raised with respect to the expectations of affected communities, with respect to victim-centrism, and with respect to memorialisation, a number of ways forward are proposed, as well as a number of specific focus points emanating from the discussions during the Expert Meeting.

First and foremost, we still suffer a lack of information about exactly how the ICC is being received in local communities. Research conducted on the ICTY, ICTR, ECCC and other international(ised) tribunals can be used to interpret the ICC's proceedings, but much greater efforts are required to understand the ICC now that the first case has been completed. We should work towards TJ policymaking that is meaningful for victims and affected communities, which includes looking at the wider societal impact of criminal justice.

The same goes for the impact of victim participation. Greater information here would assist the Court in ensuring that participation becomes more than another TJ policymaking buzzword, and instead has real, tangible benefits for victims. Beginning to better understand this principle would also contribute to the sometimes polarising discussions between traditional 'retributive' justice approaches, and those drawing from 'restorative' justice.

An important issue for societal impact, but also for memorialisation, concerns the importance of defining roles and the most appropriate actors for ensuring wider transformative justice after violence. For whilst criminal justice institutions "can begin a process to be taken forward by local actors", we must define those actors; whilst the ICTY can be applauded for having generated "enormous amounts of documents and facts" for communities in the Balkans to take forward as "the chief generators and those who should actually lead the efforts", we must find a way to safeguard such processes from abuse; and whereas "cooperation with local NGOs is crucial", "passing the torch to them" may be no less problematic or sensitive than the prosecutions themselves. This being said, the legacy of justice should be carried forward to combat cultures of impunity. Memorialisation can be important for this process.

Moreover, because the mandates of criminal justice institutions are necessarily limited, coordinating with local actors who can help to manage the expectations of affected communities is important for the work of institutions such as the ICC. Only through coordinating and engaging with local actors can we have a comprehensive TJ approach after violence that targets transformation in the structures and dynamics that criminal justice alone is unable to address. In this respect, promoting understanding of the bigger concept of 'justice' and the limitations of its institutions should still be a crucial objective.

By recognising the continuing importance of such objectives, we reaffirm the significance of outreach and engagement with local communities in a two-way dialogue. Whilst this message may not be knew, the message has yet to be fully heeded that outreach is of critical importance to international(ised) criminal justice institutions. In this sense, we can refer to the necessity of simply explaining courtroom procedures, making judgments available to victims and affected communities in a digestible manner, and engaging with communities to better understand and respond to their expectations, whether through the criminal justice institution or through other initiatives.

For the ICC, unlike its predecessors, the positive step has been taken to incorporate outreach as part of the Court's work, and significantly, as part of its budget. The challenge now for the ICC – in the words of its own practitioners – is to better integrate the various mandates that the Rome Statute encompasses, including the somewhat ambiguous position of the Victims Trust Fund. It is clear that, in the same manner as its predecessors, there is a need for much better communication and coordination between the different organs of the Court and their staff. This should perhaps begin with the recognition that the 'assistance mandates' are just as crucial for the operation of the Court as the OTP, Chambers, etc.

Finally, a number of specific focus points – or recommendations – were directly raised during the Expert Meeting which we present here as issues that may begin guiding policy discussions and as points for further uptake.

- Outreach must begin as soon as a formal investigation is initiated. It must engage people at a local level, utilising a variety of projects tailored to the particularities of diverse target groups and cultures.

- Outreach and engagement must be given sufficient funds to fully realise its potential, and to be able to work in conjunction with local actors who can positively and constructively assist the mandate.

- Coordination between the different organs of the ICC is crucial for outreach and engaging with victims, especially because Outreach, the OTP, and VTF each have contact in the field with affected communities. However, the opportunities for coordinated approaches are not being fully grasped.

- 'Exit strategies' must be put in place for the ICC for after the closure of all cases from a particular situation, which may contemplate initiatives such as memorialisation.

- International criminal justice institutions cannot reconcile populations. Alternative and complementary initiatives of transitional and transformative justice are needed, recognising that true reconciliation necessarily takes decades.

- Memorialisation and memory initiatives can be extremely important for victims and affected communities, but we must guard against over-burdening these initiatives with unrealistic objectives.

- States must "put their money where their mouth is" and provide the funding needed to fully enable the ICC to carry out the full potential of its mandate.

- Donor support is required to assist the various organs of the ICC to strengthen their collaboration and scale-up initiatives that are aimed at achieving wider societal impact. Equally, by strengthening collaboration, the organs of the Court may attract more donor support.

- Donors should financially and politically support local actors as they seek to challenge local power structures, dynamics and entrenched interests that otherwise maintain the status quo. Support for genuine initiatives that target social, political and institutional transformation is needed.

- Too much emphasis is still placed on international(ised) criminal justice for achieving wide-ranging objectives. TJ policymaking must diversify, whilst not reducing its support for criminal justice.

Endnotes

[1] Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 (2005).
[2] Ibid, Principle 1.
[3] See for example: Lambourne, W. (2009) Transitional Justice and Peacebuilding after Mass Violence, *International Journal of Transitional Justice,* 3(1): 28-48; Eriksson, A. (2009) A Bottom-Up Approach to Transformative Justice in Northern Ireland, *International Journal of Transitional Justice,* 3(3) 2009:301-320; Daly, E. (2001) Transformative Justice: Charting a Path to Reconciliation, *International Legal Perspectives*, Volume 12, Numbers 1&2: 73-183.
[4] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN Doc. S/2004/616 (2004).
[5] Thoms, O.N.T., Ron, J. and Paris, R., 2008. The Effects of Transitional Justice Mechanisms: A summary of empirical research findings and implications for analysts and practitioners. Centre for International Policy Studies, Working Paper, April 2008.
[6] UN SC Resolution 955 (1994)
[7] Bosire, L., 2006. Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa. International Center for Transitional Justice Occasional Paper Series, July 2006.
[8] Rosenberg, T., 1995. The Haunted Land: Facing Europe's Ghosts After Communism. London: Vintage Publishing.
[9] Ibid.
[10] Impunity Watch, Policy Brief: Guiding Principles of Memorialisation, January 2013, available at: http://www.impunitywatch.org/docs/Policy_Brief_Guiding_Principles_of_Memorialisation.pdf.
[11] Barsalou, J. and Baxter, V. (2007) The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice, *USIP*, Stabilization and Reconstruction Series No. 5, p. 2.
[12] Kritz, N.J., (1995) Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume III, Washington: *USIP*, p. xxviii.
[13] Piranio, C. and Kanterian, E. (2013) Memory, justice and the court: on the dimensions of memory-justice under the Rome Statute, *Cambridge Review of International Affairs,* 24(3): 425-447.
[14] Mégret, F., 2009. Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice. SSRN. Available at <http://ssrn.com/abstract=1403929>.

This publication has been made possible by

OAK FOUNDATION

Hivos people unlimited

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 on the root causes of impunity that includes the voices of affected communities to produce research-based policy advice on processes intended to enforce their rights to truth, justice, reparations and non-recurrence. IW works closely with civil society organisations to increase their influence on the creation and implementation of related policies.

Contact Us:

Impunity Watch

't Goylaan 15
3525 AA Utrecht
The Netherlands
Tel: +31.302.720.313
Email: info@impunitywatch.org
Twitter: @ImpunityWatch

www.impunitywatch.org

impunity watch