
Challenges and limitations of outreach

From the ICTY to the ICC

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Introduction

The communities directly affected by crimes against humanity and war crimes are among the primary stakeholders of an institution like the International Criminal Court (ICC), tasked as it is with holding the perpetrators of such crimes accountable and providing redress to victims. As the experience of other international or internationalised criminal courts has shown, providing accurate information in a timely manner to the communities affected by these crimes not only is responsible practice, but also shapes perceptions of a court's role, with implications for its broader legacy. In Bosnia and Herzegovina approximately a decade after the war in the country had ended, it was not uncommon for the first three or four topics on the evening news to all be related to war crimes, ranging from trials at the International Criminal Tribunal for the Former Yugoslavia (ICTY) to those before domestic courts, and from the discovery and exhumation of mass graves to exchanges and accusations between politicians related to war crimes.

'Outreach' has emerged in the last 15–20 years as both a concept and a set of practices that encompass interaction – related to but distinct from judicial activities – between an international court or tribunal (ICT) and local communities. While outreach is increasingly recognised as a necessary interface between an international court and local populations, it is still an underdeveloped (and frequently underfunded) area of operations. Indeed, outreach is not proscribed or defined in the statutes of any

The views contained herein are those of the author alone and in no way represent an expression of the institutional views of the ICC, the ICTY or the United Nations.

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international criminal courts or tribunals, and has only recently been incorporated in the ICC's Regulations of the Registry.

This chapter addresses outreach practices of the ICC comparatively, by contextualising its work in relation to a broader genealogy of outreach practices and challenges at other international criminal courts and tribunals, particularly the ICTY. It will endeavour to demonstrate that outreach is not the sole or even decisive factor affecting the perceived legitimacy of international criminal proceedings among concerned local communities, whose perception of an ICT may remain negative (particularly in the short term), despite extensive outreach activities.

Furthermore, I argue that policy-makers should not expect international courts and tribunals to produce transformative and restorative societal effects unless other crucial factors are present, including complementary transitional justice measures and domestic political commitment to justice goals. While a strong outreach programme is crucial for making the extrajudicial impact of international justice institutions possible, there may be various factors – both internal and external – limiting an international court's impact that outreach cannot influence. Indeed, international courts and tribunals should be cautious with active involvement in socio-political processes because their legitimacy as judicial institutions – a primary condition for positive impact – depends on their perceived independence and impartiality.

Outreach as an interface between courts and local populations

The origins of outreach

The impact of international criminal justice on local populations surfaced as a policy question in the late 1990s after the initial institution-building phase of the ICTY.¹ The ICTY's outreach activities began in October 1998 with a two-day 'Outreach Symposium' held at the tribunal's seat in The Hague.² The press release issued by the ICTY at the closing of the symposium described it as an opportunity to '[bring] together leading figures from the judicial and legal communities of the former Yugoslavia and [give] them the opportunity to listen to and question senior members of all sections of the Tribunal'. It went on,

¹ See, e.g., M. Klarin, 'The Tribunal's Four Battles', *Journal for International Criminal Justice*, 2 (2004), 546, 552.

² Sixth Annual Report of the ICTY, UN Doc. A/54/187 & S/1999/846 (1999), paras. 146–153.

The Tribunal understands that there exist serious concerns about it among the population of the former Yugoslavia . . . they have been and are still being exploited by those in positions of power in whose interest it is to block cooperation with the Tribunal. These concerns have to be addressed . . . Direct communication and interaction is one of the most effective ways of doing so.³

As President Gabrielle Kirk McDonald had stated in her invitation letter, ‘the Tribunal cannot contribute to the goals of peace, justice and reconciliation if its work is not only not known in the region but also actively misunderstood.’⁴

In brief, then, outreach was conceived of as a vehicle for bringing about understanding of the ICTY’s work in the region of the former Yugoslavia as a perceived precondition for achieving the tribunal’s broader goals – in other words, those beyond the immediate results of judicial proceedings. Outreach was also expected to assist the investigative, prosecutorial and judicial work of the ICTY by reducing resistance to cooperation with the tribunal. It was this reasoning that provided the conceptual basis for the tribunal’s early work when I joined the ICTY’s outreach programme in October 1999.

Later descriptions of outreach programmes of international or internationalised justice institutions have largely followed the direction set by the ICTY. Disseminating information and raising awareness about institutional mandates and proceedings are perhaps the least controversial forms of outreach; indeed, they are contained in one form or another in the mission statements of all ICT outreach programmes. Other purposes have included more ambitious goals, including increasing institutional trust and gaining the support of local populations; promoting ‘two-way communication’ between the institution and the local population, as with the ICC; and promoting ‘ownership’ of the justice process.⁵ The goals of outreach have also increasingly dovetailed with broader goals, such as facilitating reconciliation, prevention, the restoration and maintenance of peace and institutional legacy and capacity building.⁶

³ ICTY Press Release CC/PIU/355-E, ‘Outreach symposium marks the first successful step in campaign for better understanding of the icty [*sic*] in the Former Yugoslavia’, 20 October 1998.

⁴ *Ibid.*

⁵ See, e.g., ‘Outreach’, Extraordinary Chambers in the Court of Cambodia (ECCC) webpage; ‘Strategic Plan for Outreach of the International Criminal Court’, ICC-ASP/5/12 (2006), para. 13 (‘ICC Outreach Strategy’); ‘Outreach and Public Affairs’, Special Court for Sierra Leone (SCSL) webpage (‘SCSL Outreach Description’).

⁶ See, e.g., ‘Outreach Programme’, ICTY webpage; ‘ICTR Outreach Programme’, in *Symposium on the Legacy of International Criminal Courts and Tribunals in Africa* (International Center for Ethics, Justice, and Public Life, Brandeis University, 2010), 34.

The increasingly recognised connection between a local population's trust in and understanding of the work of international courts, and the courts' ability to contribute effectively to these extrajudicial goals – ownership, reconciliation, and capacity building – has often been expressed in terms of legitimacy. Jaya Ramji-Nogales, for instance, suggests that 'By increasing perceptions of legitimacy by as many players as possible, transitional justice mechanisms can ensure greater internalization of their findings and judgments, thereby becoming more effective at reconstructing social norms against mass violence.'⁷

In sum, (1) ICTs form part of transitional justice measures intended to provide peace, stability and the reconstruction of the rule of law and social norms opposing mass violence; (2) for an ICT to contribute to these transitional justice goals, it needs to enjoy support of the population in the area(s) under its jurisdiction; and (3) outreach is one of the key measures for attaining such support, or perceived legitimacy. While outreach alone cannot secure the legitimacy of an international court or tribunal, it is a necessary companion of prosecutorial and judicial activities, and serves as the institution's interface with local populations. In this sense, outreach forms an integral part of court operations and a vital element for the achievement of policy goals.

Development of outreach at the ICC

Outreach, public information and communications activities are not referred to anywhere in the Rome Statute or in the ICC's Rules of Procedure and Evidence.⁸ What comes closest to outreach in the Statute is the reference to 'non-judicial aspects of the administration and servicing the Court',⁹ which forms part of the Registry's responsibilities. Nevertheless, owing largely to lessons learned about the importance of outreach from earlier tribunals, outreach was incorporated in the ICC's institution-building phase from the very beginning. Indeed, it was

Capacity building was featured most prominently in the ICTY and the ICTR as a consequence of their completion strategies endorsed by the UN Security Council (UNSC) and the language of the related UNSC resolutions.

⁷ J. Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach', *Michigan Journal of International Law*, 32 (2010), 1, 21.

⁸ Rule 13 (1) of the RPE provides that 'Without prejudice to the authority of the Office of the Prosecutor under the Statute to receive, obtain and provide information and to establish channels of communication for this purpose, the Registrar shall serve as the channel of communication of the Court'.

⁹ Article 43 (1), Rome Statute.

one of the essential functions provided for in the planning of the Court's operations.

The importance of outreach was formally recognised in a resolution adopted by the Assembly of States Parties (ASP) in 2005:

*[The Assembly of States Parties] Recognizes the importance for the Court to engage communities in situations under investigation in a process of constructive interaction with the Court, designed to promote understanding and support for its mandate, to manage expectations and to enable those communities to follow and understand the international criminal justice process and, to that end, encourages the Court to intensify such outreach activities and requests the Court to present a detailed strategic plan in relation to its outreach activities.*¹⁰

Following this mandate, the ICC submitted a Strategic Plan for Outreach,¹¹ which the ASP acknowledged at its fifth session.¹²

In its introduction, the Strategic Plan notes that the document is the result of an assessment of the ICC's own experience since 2004, but that it also 'draws upon the achievements and lessons learned from the ad hoc tribunals – the International Criminal Tribunals for the Former Yugoslavia and Rwanda – as well as from the practice of the Special Court for Sierra Leone, which has been recognised as being particularly effective'.

While outreach cooperation with civil society was not a new idea – the ICTY's outreach programme had also relied heavily on collaboration with NGOs on the ground – the ICC's outreach strategy took the novel step of explicitly announcing a formal cooperative relationship with partners and 'culturally appropriate intermediaries, particularly where ICC staff is unable to contact the general public due to lack of resources, logistical or other constraints or security concerns'.¹³ Such in-country presence is a fundamental but under-resourced aspect of the Court's work – in the words of former ICC President Sang-Hyun Song, it is 'indispensable' yet 'underappreciated'.¹⁴

¹⁰ 'Strengthening the International Criminal Court and the Assembly of States Parties', ICC-ASP/4/Res.4 (3 December 2005), para. 22.

¹¹ ICC Outreach Strategy.

¹² 'Strengthening the International Criminal Court and the Assembly of States Parties', ICC-ASP/5/Res.3 (1 December 2006), para. 20.

¹³ ICC Outreach Strategy', para. 66. In March 2014, the ICC adopted and publicised 'Guidelines Governing the Relations between the Court and Intermediaries', which regulates the ICC's interaction with intermediaries in this and other fields of activities. See further Chapter 9 by Clancy in this volume.

¹⁴ 'Seminar on the ICC Review Conference: Key Challenges for International Criminal Justice', Seminar Report (New York, 30 April 2010).

In an important normative development, reference to outreach has also been incorporated into the revised regulations of the ICC's Registry, approved in December 2013. Whereas the original regulations, adopted in 2006, contained no mention of outreach, the revised document incorporates a new regulation *5bis*, which stipulates that 'the Registry shall ensure the public dissemination of appropriate, neutral and timely information concerning the activities of the Court through public information and outreach programmes'.

According to the regulation, which codifies existing working methods, several factors differentiate outreach from public information. While outreach specifically relates to 'making the Court's judicial proceedings accessible to those communities affected by the situations and cases before the Court', public information programmes 'shall be aimed at fostering public understanding and support for the work of the Court'. A non-exhaustive list of communication methods – including 'print and broadcast media, internet-based technologies, visits to the Court and public speaking engagements by Court officials' – may be used by the Registry as part of its publication information efforts; however, additional 'appropriate communication tools and strategies' are envisaged for outreach.

In addition to print and broadcast, possible methods of communication envisaged for outreach include 'consultation and townhall meetings', practices that would permit more 'two-way communication' between conflict-affected communities and the Court. Staff members from the ICC's outreach unit have long sought to develop practices that foster dialogue. The Court's second outreach report noted, for instance,

New interaction techniques were developed and implemented in response to indications that a more participatory approach during outreach meetings was needed. Based on the data collected last year, participants claimed that more time needed to be allocated to the debates during the outreach activities. Therefore, the Outreach Unit shifted the communications approach from passive and informative meetings and workshops, with presentations about the Court by officials followed by a session of questions and answers, to more diverse, dynamic and engaging discussion where the participation of audiences is encouraged.¹⁵

One key outreach initiative developed through this 'two-way' communication is the ICC's 'Ask the Court' programme, where members of affected communities receive responses to questions that they have posed, through the outreach unit, to senior Court officials. Other important participatory

¹⁵ 'Outreach Report 2008', Public Information and Documentation Section, 8.

practices include consultative meetings with NGOs in planning outreach activities, interactive radio talk shows, listening clubs, outreach school clubs, facilitating peer-to-peer discussions, and moot court competitions.

Many of the above developments indicate a strengthened institutional position of outreach within the structure and operations of the ICC, acknowledging communication with conflict-affected communities as an essential part of the Court's mandate. As the following section discusses, however, there are a number of limitations that ICTs confront in their efforts to be more responsive to conflict-affected populations.

Limitations of outreach

Any positive societal impact of the ICC or other international tribunals is arguably based on their contribution to actually holding perpetrators accountable for their crimes. Consequently, the results of investigations, prosecutions and trials are among the most important factors determining the effects of international justice interventions. Where those results fall short of their intended goals, they present a serious obstacle that is difficult to overcome. If the prosecution or the court does not carry out their judicial mandate to a high standard, no amount of outreach and explaining will put it right. Typical reasons for disappointment (particularly for victims) in this respect include full or partial acquittals, low sentences and protracted proceedings.¹⁶ The first two of these are considered below in more detail.

Results of judicial proceedings

Acquittals

One of the scenarios most likely to disappoint conflict-affected communities and to distance them from the justice process is when the only case before an international court concerning certain crimes ends in an acquittal. The *Halilović* case¹⁷ at the ICTY is illustrative, as it was the only case in relation to two notorious incidents of mass murder against Bosnian Croat civilians committed in the villages of Grabovica and Uzdol. Following Halilović's

¹⁶ Diane Orentlicher writes that, 'a key area in which internationalized tribunals or domestic courts trying mass atrocities would benefit from improvement is in expediting trial proceedings without short-changing justice'. D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Institute, 2010), 73.

¹⁷ Judgment, *The Prosecutor v. Sefer Halilović*, IT-01-48, Trial Chamber I, ICTY, 17 November 2005.

acquittal, I was personally involved in outreach efforts towards the Grabovica community and found that even in-depth explanations about the judicial process would not offset the disappointment of the families of victims, who had invested time and, above all, mental strength in cooperating with the ICTY Prosecutor's Office (often in the face of general scepticism towards the tribunal in their community), in the hope that the case would give them a sense of closure.¹⁸ Even if the members of the victim community accepted – which they found difficult to do – that Halilović was not guilty, they felt that justice had not been done for them. In the words of a man who lost five family members, 'If he is guilty, he needs to be convicted. If he is not guilty, let him say who is guilty, let them investigate. Let the judiciary investigate who is guilty, they should answer [for the crime].'¹⁹

Another example of a similar outcome causing severe disappointment among victims is the ICC's case against Callixte Mbarushimana, whose confirmation of charges hearing was held in September 2011. In December 2011, the Pre-Trial Chamber declined to confirm the prosecutor's charges. At that time, Mbarushimana was the only person against whom the OTP had sought charges in connection with crimes allegedly committed in the provinces of North and South Kivu in the Democratic Republic of the Congo (DRC).²⁰ A press release issued by the Congolese civil society organisation *La Ligue pour la Paix et les Droits de l'Homme* [The League for Peace and Human Rights] is indicative of the disappointment that often ensues when the outcome of judicial proceedings falls short of the expectations of conflict-affected communities:

Informed about the release of Mr. Callixte Mbarushimana . . . plaintiffs and victims . . . have expressed their total disappointment coupled with a sense of abandonment on them. They also fear for their security in the future . . . They cannot understand that such a judicial body of the caliber of the ICC, with its material and human resources and in which they have placed their only hope for justice, because of the miscarriage of justice by the Congolese National judiciary, is about to fail in its mission.²¹

¹⁸ Disappointment of the family members of Grabovica victims described also in Orentlicher, *That Someone Guilty Be Punished*, 126–127.

¹⁹ Author's translation of comments attributed to Mr Anto Marić in a Bosnian-language media report. 'Halilović oslobođen optužbi', *Radio Free Europe*, 16 November 2005. Three persons have been subsequently convicted in the Bosnian courts for the murder of three victims in Grabovica.

²⁰ The ICC prosecutor later pressed charges related to the same crime base against Sylvestre Mudacumura, who remains at large at the time of writing.

²¹ English translation provided by the Coalition for the International Criminal Court. Original press release in French: 'Les graves violations des droits de l'homme commises

These examples demonstrate that international criminal proceedings may end up severely disappointing victim populations; in such cases, outreach can, at best, reduce the negative impact.²² For instance, it is standard practice of the ICC's Outreach Programme to communicate actively and without delay to the affected communities that by entering a judgment of acquittal, or by rejecting to confirm charges, the judges are by no means belittling the suffering of conflict-affected communities.

An acquittal in an international trial is naturally the only correct outcome if the defendant is found to be not guilty, and certain parts of the affected communities, such as the ethnic group or immediate community of the defendants, may well welcome an acquittal if it concurs with their predominant narrative and understanding of the events in question. Furthermore, an acquittal may carry added value beyond the immediate question of individual responsibility if the judgment helps to clarify the historical record; for example, by determining that some of the alleged crimes or events did not take place at all.²³ However, from a wider perspective, it may also be argued that an acquittal represents a failure on some level for the international court as a whole, since the main purpose of its costly existence is to be a forum for accountability.

Low sentences

Low sentences often have a similar effect as acquittals on conflict-affected populations, which attribute great significance to the length of prison sentences. In Refik Hodžić's words, 'The view shared by many victims is that low sentences imposed on war criminals amount to an implicit denial or to a failure to acknowledge the depth and gravity of their suffering. In an environment where such denial permeates their everyday life in the community, low sentences are seen as an act of betrayal by the courts, which in many cases was their only hope for acknowledgment.'²⁴

sur la population civile à l'Est de la République Démocratique du Congo ne doivent en aucun cas restées impunies', LIPADHO, 31 December 2011.

²² Following the first-instance conviction of Germain Katanga at the ICC, a member of the local community from the area where the crimes took place was reported as saying that 'his acquittal would have felt like a knife thrust through the hearts of all the victims of the crimes he was on trial for'; 'What Do Ituri Residents Say About the Katanga Verdict', *Radio Netherlands Worldwide*, 12 March 2014.

²³ In most cases, however, the occurrence of the alleged crimes is not disputed, but rather the individual responsibility of the suspect or the accused.

²⁴ R. Hodžić, 'A Long Road Yet to Reconciliation: The Impact of the ICTY on Reconciliation and Victims' Perceptions of Criminal Justice', in R.H. Steinberg (ed.), *Assessing the Legacy of the ICTY* (Leiden: Brill, 2011), 115, 134.

The ICTY has handed down sentences ranging from two to five years' imprisonment in several cases, on the grounds of the limited responsibility of the accused for the crimes in the indictment.²⁵

Naturally, such an outcome may well be fully correct – for instance, when a court finds that the accused was responsible for only a small portion of the charges contained in the indictment, or that the accused was a passive rather than an active participant. Even if this is 'successfully' explained to victim populations, however, they may feel disappointed by the justice process, in particular if none of the perceived main culprits is successfully prosecuted.

While the ICC has not pronounced any sentences as short as some of those handed by the ICTY, the sentencing of Germain Katanga to 12 years in prison was similarly criticised by some as too lenient. The Court's outreach programme was credited, however, with preparing the affected populations in advance, which facilitated a positive reception of the judgment.²⁶ Timely outreach that is sensitive to the expectations of the affected communities can thus, to some extent, pre-empt and mitigate negative reactions.

Systemic obstacles

Individual responsibility in response to mass victimisation

When assessing the satisfaction of victim populations with ICTs, it is important to remain mindful of the inherent limitations of criminal justice in providing remedies to victims of international crimes. Return of displaced persons and the reconstruction of destroyed houses may be possible, but the psychological effects of victimisation remain. Even with the best of efforts, victims of mass atrocities are unlikely to feel satisfied by the measure of justice provided by court proceedings involving a limited number of perpetrators. As a telling example, victim groups in Prijedor, Bosnia and Herzegovina, told me in 2006 that they felt that 'the ICTY had not done much for them'. This was despite the fact that the tribunal had more cases in relation to crimes committed in Prijedor than any other municipality in the former Yugoslavia; moreover, even though some defendants received relatively low sentences, all trials ended in convictions

²⁵ See, e.g., Judgment, *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, IT-01-47, Appeals Chamber, ICTY, 22 April 2008; Judgment, *Prosecutor v. Kvočka et al.*, IT-98-30/1 Appeals Chamber, ICTY, 28 February 2005.

²⁶ 'Reactions to the Sentencing of Germain Katanga: Some Comfort, Some Frustration', *International Justice Monitor*, 11 June 2014.

and some of the ICTY's highest sentences were pronounced for Prijedor crimes. The local reactions in Ituri, DRC, to the second sentence pronounced by the ICC (in the *Katanga* case) reflected in a similar manner an impatient expectation that the Court must do more to provide justice.²⁷

Another phenomenon illustrating the tensions between criminal and mass victimisation is the tendency to project collective traumas onto the trial of one, or a handful of, accused – especially if the communities perceive the trial as the first significant measure of justice for the crimes. In this context, it may be difficult to appreciate or explain that the sentence of a convicted person is determined in accordance with the level of his or her personal culpability and not (solely) according to the extent of the entire crime in connection with which he or she is convicted. While judges may impose a shorter prison sentence to reflect the extent of one's personal criminal liability, the public may interpret this as belittlement of the victims' suffering. This highlights the importance of outreach in communicating the parameters of the criminal justice process and 'managing expectations' from early on, as well as the significance of complementary transitional justice measures accompanying international criminal justice interventions.

Prosecutorial choices

A common form of criticism against international criminal courts is the claim that they are biased against a particular ethnic or national group because members of one national group are being disproportionately targeted for prosecution, or because the crimes committed against members of a group have not been adequately addressed (or both). In either case, the determining factor is case selection, which is the responsibility of prosecutors.

This was a common ground of criticism against the ICTY in Serbia, for instance, when the tribunal's prosecutor did not prosecute anyone for crimes allegedly committed by NATO (North Atlantic Treaty Organization) forces during the 1999 bombing campaign against the Federal Republic of Yugoslavia, and was seen as paying insufficient attention to crimes committed against Serbs in Kosovo. By contrast, a frequent claim among Bosnian Serbs has been that the ICTY largely ignored crimes committed against Serbs in Bosnia and Herzegovina and disproportionately targeted Serbs for prosecution.

²⁷ *Ibid.*

The ICC has dealt with this challenge repeatedly as well. In the context of the Court's first trials concerning crimes committed in the Ituri province of the DRC, where much of the conflict was between the ethnic Hema and Lendu communities, the cases initially concerned only to a very limited extent victims from the Lendu tribe.²⁸ As a result, the International Center for Transitional Justice noted that 'the Lendu overwhelmingly believe the court is little more than an instrument in the hands of forces ranged against them', despite the fact that the ICC judges had been 'scrupulously fair'.²⁹ Subsequently, the case against Bosco Ntaganda – transferred to the ICC in March 2013 – has in fact been broadened to encompass a number of alleged crimes against Lendu victims. More broadly, the ICC has met extensive criticism on account of the fact that all of its investigations thus far have been restricted to the African continent.

Criticism of this sort is very difficult for outreach staff to counter if they do not represent the OTP; they are unfamiliar with, unauthorised and plainly unable to discuss the reasons for prosecutorial strategy and case (or situation) selections. Indeed, when working for ICTY outreach, I was often caught in the dilemma of whether to try to explain the OTP's policies with the information available from public statements, or whether to simply state that I was not able to answer the question, and that it should be put to the OTP. In practice, I would usually opt for the first course of action in an attempt to uphold the tribunal's overall reputation and integrity, and in hopes of not alienating the audience; however, this was a highly awkward position, not least for having to de facto speak for an organ that is not neutral in the same way that chambers or the Registry are meant to be.³⁰

To that end, one should be cautious not to go too far with a 'One Court' approach. This principle, pronounced by the ICC in its 2006 Strategic Plan, foresees that the various organs and officials of the Court share a common mission and work together in coordination on matters of common concern.³¹ From an outreach perspective, the coordination of

²⁸ In the context of allegations against Mathieu Ngudjolo Chui relating to the use of child soldiers.

²⁹ 'ICC Asked Tough Questions by Historic First Judgment', International Center for Transitional Justice, 19 March 2012.

³⁰ In my personal experience as a staff member of ICTY outreach, failing to engage in substantive discussion on a question that the audience considers important is one of the surest ways to alienate them, and to reduce one's own legitimacy as a court representative.

³¹ 'Strategic Plan of the International Criminal Court', ICC-ASP/5/6 (4 August 2006), paras. 14–15.

activities is certainly advisable, provided that the independence and specific roles of each organ are fully respected; however, insistence on representing a court like the ICC as an indivisible institution may compromise its perceived neutrality and that of the judges.

Risk of perpetuating imbalances

While prosecutors should endeavour to attend to the interests of all victims equally,³² in reality this is very difficult to achieve. It is highly likely that in situations of mass violence the investigation and prosecution of certain crimes will be left to the national judiciary, which may entail a significant delay, if the national jurisdiction is not yet capable of processing such cases. Some crimes may well remain unpunished due to the number and extent of the crimes committed, limited resources, the unavailability of sufficient evidence or a combination thereof. Accordingly, a certain degree of 'imbalance' – a lack of universal coverage – of prosecutions is inherent to international criminal institutions. Even a sound and logical decision of prosecutorial policy can lead to dissatisfaction, a perception of bias and reduced legitimacy amongst certain groups who see such decisions as ignoring the crimes committed against them. Particularly zealous attempts by an international court to inject information about its judicial proceedings into domestic public discourse – for instance, through statements of its principals – may in some scenarios have the effect of perpetuating and amplifying the perceived imbalances.

Judicial actors in socio-political processes

There are also more general dilemmas concerning the engagement of judicial actors in socio-political discourse. First, as judicial institutions, ICTs are not well equipped for such tasks, which require political skill and a comprehensive understanding of the conflict and its societal context. In this respect, the knowledge possessed by judges of an international court is, in principle, limited to the evidence presented in the courtroom, primarily concerning the alleged criminality of the defendants. Judges would thus have to seek information and advice from other sources for the purposes of extrajudicial intervention, actions that would potentially be inconsistent with their judicial mandate.

³² Ramji-Nogales, 'Bespoke Transitional Justice', 18.

Even if an extra-judicial role could be reconciled with a judicial mandate, for a court to engage extensively in socio-political activity would likely undermine its identity as a judicial institution.³³ Furthermore, this could complicate the governance structure of a court like the ICC, which functions in a delicate balance involving judges who are independent by definition. Unless this structure were to be radically altered, any extrajudicial role would probably have to be placed in the presidency/registry pillar (as outreach functions usually are), which would be at odds with the fact that presidents are professional judges, and usually inclined to place emphasis on neutrality. As a 2010 report of the ICTY president notes, ‘the Tribunal is and remains a criminal court. It should focus on its key expertise and make use of the possibility of cooperating with other actors who are best positioned to assist it.’³⁴ Often, however, it is outreach staff who participate in socio-political discourse through the media or public events, which requires careful balancing acts on their part.

External obstacles

Negative perceptions of ICTs in the communities of perpetrators

Even if an ICT performs to a high standard, this does not guarantee that it will be perceived well by the local population, since ‘How a society responds to the work of an international tribunal is a function of myriad variables’,³⁵ with judicial proceedings and outreach being one among many. One of the rationales presented for international justice interventions is that they ‘individualize guilt’.³⁶ However, expecting that this logic will win the support of the communities from which an accused comes would be misguided.

My own experiences at the ICTY indicated that while some people might be receptive to information about crimes committed by members of their own community, they are often in the minority. In any case, a

³³ Orentlicher quotes a comment by Serbian journalist Filip Švarm that ‘ICTY prosecutions veered too far into the realm of “social/political acts”, which “undermines the legitimacy of the ICTY”’. D. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (New York: Open Society Institute, 2008), 77.

³⁴ ‘Report of the President on the Conference Assessing the Legacy of the ICTY’, ICTY Report (27 April 2010), para. 11(iv).

³⁵ Orentlicher, *Shrinking the Space for Denial*, 12.

³⁶ J.N. Clark, ‘The ICTY and the Challenges of Reconciliation in the Former Yugoslavia’, *e-International Relations*, 23 January 2012.

community's own, internal interpretations of events will often dominate their assessment of a court's findings about the crimes committed and the responsibility of those accused. Such dynamics partially explain the fervent reactions among some groups to charges brought against community or political leaders, for instance in the context of the ICC's operations in Côte d'Ivoire, Kenya or the Central African Republic. The supporters of Jean-Pierre Bemba and Laurent Gbagbo have staged frequent protests in The Hague, while, in Kenya, popular support for the ICC's involvement has declined following the confirmation of charges. The building of domestic political alliances and campaigning around the ICC – for instance, calling the elections 'a referendum on the ICC' – have also been notable consequences of the Court's intervention.

Furthermore, international criminal trials may have the effect of stigmatising groups; it has been noted that the 'trials support the underlying societal objective of conferring shame on a much larger body of people – bystanders and the lesser involved'.³⁷ Frédéric Mégret has discussed this at length in the context of the ICC and even suggested that stigma could be a principal function of international criminal justice.³⁸

Rhetoric of political leaders

Reluctance to amend popular narratives about conflict is even stronger when reinforced by political leaders, media reports and other major opinion-shaping factors. Refik Hodžić, for instance, suggests that 'political leaders who openly deny facts about crimes established by the ICTY judgments and who undermine its credibility with hostile and baseless accusations directed at the Tribunal must be called to account and not be ignored'.³⁹ It is important for policy-makers, however, to grasp the Sisyphean nature of the task that outreach faces if it is expected to transform the political discourse of a nation and alter deep-rooted, emotional views perpetuated by the domestic elites. Diane Orentlicher notes that 'With limited resources – the ICTY has only one outreach officer in all of Bosnia – the ICTY is vastly outmatched when it comes to creating a compelling narrative'.⁴⁰

³⁷ L.E. Fletcher and H.M. Weinstein, 'A World Unto Itself? The Application of International Justice in the Former Yugoslavia', in E. Stover and H.M. Weinstein (eds.), *My Neighbor, My Enemy* (Cambridge: Cambridge University Press: 2004), 44.

³⁸ F. Mégret, 'Practices of Stigmatization', *Law and Contemporary Problems*, 76 (2014), 287.

³⁹ Hodžić, 'A Long Road Yet to Reconciliation', 117.

⁴⁰ Orentlicher, *That Someone Guilty Be Punished*, 104.

Similarly, the ICC has only one outreach officer stationed in Kenya, where Court proceedings are a subject of enormous public interest and a heated topic of political discourse. The Kenyan government has a vested interest in the proceedings – not least due to the fact that two of the accused persons were the president and deputy president – and has engaged in advocacy regarding the ICC in the region and beyond. Developments since the confirmation of charges have included intensive discussions in the African Union (AU), a request by the AU (at the behest of the Kenyan government) to obtain a deferral of the proceedings from the UN Security Council, two attempts in the National Assembly of Kenya to effect withdrawal from the Rome Statute and amendments to the ICC's Rules of Procedure and Evidence that allow for partial absence of an accused from trial. All of these developments were closely covered by the media in Kenya, influencing the public's opinion of the ICC in the country.

Obviously, the imbalance is more than a question of numbers. Courts, even if equipped with large outreach teams, cannot impose a historical narrative on a society because changes ultimately have to come from within. Moreover, this should not be the task of ICTs. Confronting political leaders' public rejection of judicial findings about past crimes is a sensitive issue that raises fundamental questions about the relationship of judicial truths and historiography. As William Schabas argues, 'neither trials nor truth commissions should be allowed to stifle a constant reconsideration and reassessment of the past, something that is the essential contribution of professional historians'.⁴¹

From an outreach perspective, the ability of ICT officials to counter denial is also restricted by the nature of the judicial process and fair trial rights. International criminal proceedings typically take several years from surrender or arrest to final judgment, and as long as the case is pending, all matters are subject to dispute and have to be treated as such in any public statements. Even when a final judgment is issued in one case, the same facts may be disputed in another case before the same court. These factors are a very real concern for outreach staff.

Challenges for outreach at the ICC

As has been discussed previously, the ICC's outreach strategy and activities have in many ways drawn from the experiences of other courts and

⁴¹ W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 172.

tribunals, and bear many similarities to the outreach programmes of the earlier tribunals. Fundraising for outreach activities, for instance, is a challenge that has been shared, to a varying extent, by all of these institutions. The ICTY, the ICTR and the Special Court for Sierra Leone (SCSL) all operated their outreach programmes with voluntary donations outside the regular budget of those institutions. Against this background, the inclusion of outreach in the main budget of the ICC, while still limited, was a major positive development.⁴² Provision of budgeted funds for outreach arguably reflects states parties' acceptance of the necessity and importance of outreach as a companion of investigative, prosecutorial and judicial activities.

That said, there have been persistent attempts by a number of states parties to reduce funding for outreach, under the pretext that it does not constitute a 'core' activity of the Court. Particularly during the tenth and eleventh sessions of the ASP in 2011–12, when a number of the largest budget-contributing states were pushing hard for a 'zero nominal growth' budget for the ICC, outreach came under a real threat of facing budget cuts. Much of these dynamics occurred in the informal talks in the lead-up to the assembly's annual sessions and is therefore not visible in the official documents of the ASP meeting. The seriousness of the threat is, however, well reflected in the recommendations of the Coalition for the International Criminal Court, which noted ahead of the eleventh session that 'a voluntary funding approach runs counter to lessons learned from previous international tribunals and courts'.⁴³

While the number of situations subject to investigation and prosecution increased from four to eight between 2008 and 2014, funding for the Public Information and Documentation Section (which includes outreach) has only increased by 30 per cent during the same period.⁴⁴ The ICC's mandate, which is not geographically limited like that of other ICTs, poses additional challenges for outreach. To begin with, the ICC deals with multiple situation countries as opposed to a single situation country, as

⁴² It should be noted, however, that the ICC's outreach unit was not allocated the number of staff initially proposed by the Court.

⁴³ Coalition for the International Criminal Court, Comments and Recommendations to the 11th Session of the Assembly of States Parties, 9 November 2012, p. 7.

⁴⁴ While the ICC itself has not publicly complained about lack of resources for outreach, NGOs have been critical of the slow growth of the communications budget: 'Zero-growth in the Court's budget has resulted in an over-stretch in the limited resources available for PIDS . . . Due to budgetary constraints, the Court has suspended several public information projects . . . PIDS has had to shuffle resources – both human and material – available for outreach around to meet the increasing demand.' *Ibid.*

at the SCSL or ICTR, or one region with closely related situation countries, as at the ICTY. Even equality of coverage within the same country can be an issue for the ICC. As noted in the Court's 2009 report,

Another challenge that has been identified and will require further consideration is related to geographic coverage and timing of Outreach operations. Due to constraints, the programme has prioritised communities affected by crimes currently heard before the Court. Hence, activities have been conducted in areas where crimes were committed or where communities that were affected by the crimes live. As a result, a communications gap is growing within the same countries of operations.⁴⁵

New situations not only increase the number of local communities requiring the ICC's attention, but also frequently create the need for the translation of various information materials into additional languages. Re-allocating existing human resources may be complicated, as the cultural expertise and language skills fitting one situation may not be suitable for another. The strategic approach to outreach activities also has to be tailored anew for each situation. An initial assessment of political, cultural, historical and sociological factors must be carried out at the outset of operations in a new situation, as well as a mapping of the media environment.

Finally, a number of the ICC's situation countries remain in a state of armed conflict. As a result, the security situation is very difficult; indeed, in cases like Sudan, the Court has no access to the country whatsoever. To add to these challenges, the ICC's physical distance from the situation countries is far greater than what was the case with both the ad hoc tribunals and the SCSL, which was, uniquely, located in Sierra Leone.

Reflections on methods for advancing the ICC's extrajudicial effects

It has been noted that a 'realistic understanding of the possibilities and limitations of international justice is a prerequisite to its success'⁴⁶ and that raising expectations that subsequently cannot be met may lead to disappointment, frustration and apathy.⁴⁷ Communication with the

⁴⁵ Public Information and Documentation Section, 'Outreach Report 2009', Executive Summary.

⁴⁶ ICC president Judge Sang-Hyun Song, 'From Punishment to Prevention: Reflections on the Future of International Criminal Justice', lecture held on 14 February 2012.

⁴⁷ See J. Lincoln, *Transitional Justice, Peace and Accountability: Outreach and the Role of International Courts after Conflict* (London: Routledge, 2011), 90–91, 143.

concerned societies and managing expectations is therefore crucial for the ability of ICTs to achieve their goals. The Strategic Plan of the ICC's outreach programme is in line with these considerations, as it is fundamentally based on the principles of neutrality and independence. Further, it places emphasis on the provision of information, promoting understanding of the ICC's mandate and its activities, as well as the 'management of expectations'.⁴⁸

As argued above, judicial results form the fundamental basis of an ICT's legitimacy. In the words of a former ICC judge, 'The [ICC] will be judged by our ability to dispense international criminal justice at the highest level – that means securing those accused of the world's most egregious crimes before the court and delivering timely and fair justice.'⁴⁹ Accordingly, the quality of investigations, prosecutions and trials should be any court's primary preoccupation. Conversely, poor quality of judicial and prosecutorial activity would present a major obstacle for an ICT's ability to achieve its goals.⁵⁰ This is the ICC's core challenge.

To that same end, however, it is vital that parent organisations provide international courts with the requisite resources and tools necessary for them to conduct their judicial mandate to a high standard. Furthermore, it is of critical importance that states respect their obligations to cooperate with investigations and prosecutions. The ICC's principals regularly seek to highlight the importance of these issues when addressing the Court's states parties, as well as the UN Security Council.

While acquittals are a natural phenomenon in any criminal jurisdiction, prosecutors should be particularly mindful of the negative societal impact that they are likely to carry and, accordingly, endeavour to pursue cases with overwhelming evidence establishing strong responsibility for grave crimes – in other words, cases with a high likelihood of a conviction and a substantial sentence. The new Strategic Plan of the ICC's Office of the Prosecutor, publicised in October 2013, represents a step in this direction, as it puts increased emphasis on ensuring the trial-readiness of cases before charging suspects and states that one of the expected

⁴⁸ ICC Outreach Strategy. See also Integrated Strategy for External Relations, Public Information and Outreach, International Criminal Court.

⁴⁹ A. Fulford, 'The Reflections of a Trial Judge', *Criminal Law Forum*, 2 (2011), 215–216.

⁵⁰ As reflected in the ICC's risk register, an internal draft document of the ICC, referred to with the permission of ICC management.

results of the amended strategy will be ‘an increased confirmation of charges and conviction rate’.⁵¹

As this chapter has sought to illustrate, courts should also be equipped with a strong outreach programme from the outset to make their work fully accessible to local populations, as well as to promote a realistic understanding of their mandate. Outreach activities should be launched as early as possible for a variety of reasons, including trying to prevent inaccurate information from taking root. As the experience of the ICTY shows, the relatively late launch of the outreach programme left space for other stakeholders to steer the discourse freely and no doubt contributed to the negative views and prejudice towards the tribunal, much of which still endures. Outreach conducted by the prosecutor’s office on its own account – for instance, to explain decisions not to investigate certain crimes – could also be considered a method for promoting transparency and preventing the alienation of affected communities.⁵²

Outreach programmes should also include a strong field presence with sufficiently senior staff at the helm of the country teams. In my experience, seniority of outreach staff based in the field is crucial to allow them to liaise effectively with local authorities, as well as international organisations present on the ground. Similarly, only assigning junior staff to field positions may create a perception that the court is not paying due attention to the needs of the local population.

Lastly, policy-makers should address transitional justice needs in a comprehensive manner; international courts should not be relied on to conduct transitional justice tasks other than those that are clearly within their mandate. ICC interventions should therefore be supported with accompanying mechanisms to foster transitional justice processes related to criminal accountability, notably constructive socio-political discourse on atrocity crimes, as well as access to and public acknowledgment of facts about past atrocities.⁵³ Robust outreach programmes can support these processes to an extent, but they should not be relied on as the main avenue for advancing transitional objectives.

⁵¹ ‘Strategic Plan June 2012–2015’, Office of the Prosecutor (11 October 2013), para. 23.

⁵² See M. Karwande, ‘Implementing an Engagement Model: Outreach at the Special Court for Sierra Leone’, in C. Ramírez-Barat (ed.), *Transitional Justice, Culture, and Society: Beyond Outreach* (New York: International Center for Transitional Justice, Social Science Research Council, 2014).

⁵³ See Fletcher and Weinstein, who note that, ‘to reach these broader goals [of peace and stability], additional interventions are necessary to complement the work of criminal tribunals’, 34.

Conclusion

Outreach is an integral element of international criminal justice, and it is crucial for enabling an affected society at large to benefit from accountability efforts in a wider socio-political context.⁵⁴ Fortunately, the ICC outreach programme seems to have avoided the pitfall of ‘overselling’ the Court’s mandate, having learned from the experiences of the ICTY and other ad hoc tribunals in this regard. The ICC’s programme has focused on providing neutral information about the Court’s activities through appropriate channels and facilitating dialogue between the Court and affected communities. Including references to outreach in the Regulations of the Registry of the ICC in 2013, as well as the adoption of guidelines governing the relations between the Court and intermediaries – including those assisting outreach – has further helped institutionalise and regulate outreach as an integral part of the Court’s operations.

However, outreach cannot produce positive societal effects in the absence of other fundamental preconditions. The quality and integrity of investigations, prosecutions and trials should remain a central concern for ICTs, as well as for those actors on whose support they rely in the conduct of their judicial mandate. A political climate conducive to positive change is another critical factor for the extrajudicial impact of a court like the ICC, and this should be an essential consideration for transitional justice policy-makers.

Ultimately, domestic actors are the ones who should ‘translate judicial findings of the tribunal into political facts’,⁵⁵ not only for the sake of ‘local ownership’, but also because this is the most effective way to entrench social norms prohibiting mass violence. Outreach should actively assist local society in accessing the ICC’s work in a comprehensible and usable form, but it is the local stakeholders – civil society, politicians, the legal community, historians and the media – that can use that information for other extrajudicial purposes. If a court too actively tries to achieve effects such as reconciliation or satisfaction of victim communities, it risks undermining its own impartiality and integrity, which remain the cornerstones of its legitimacy.

⁵⁴ See, e.g., J.N. Clark, ‘International War Crimes Tribunals and the Challenge of Outreach’, *International Criminal Law Review*, 9 (2009), 99, 116.

⁵⁵ Expression borrowed from comment of Emir Suljagić, quoted in Orentlicher, *That Someone Guilty Be Punished*, 98.