

Public Proceedings, Outreach and Reconciliation

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1. Transparency of International Criminal Proceedings

In the opinion of this author, international(ised) criminal jurisdictions can contribute to reconciliation provided they conduct fair and transparent proceedings, and this is effectively communicated to the affected communities. The principles of fair and transparent proceedings are enshrined in international human rights documents as basic rights of the accused. Both the International Covenant on Civil and Political Rights (Article 14) and the European Convention on Human Rights (Article 6) guarantee the accused a “fair and public hearing”. These rights constitute fundamental guarantees in proceedings before international(ised) criminal jurisdictions and are also enshrined in the national law of countries that adhere to the international instruments.

While the notion of ‘fair proceedings’ has received much attention from courts and academics alike, both human rights law and the statutes and rules of international criminal jurisdictions provide less guidance on what it means, in actual practice, to hold ‘public’ hearings. This policy brief examines how international criminal jurisdictions have tackled this issue and developed comprehensive outreach programmes, and how this relates to reconciliation in communities affected by the core international crimes in question.

International(ised) courts and tribunals are almost always situated far from the situation country.¹ They also do not benefit from the daily support of state structures in the same way as domestic courts usually do. The first modern international criminal court – the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) –

¹ For example, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court and the Special Tribunal for Lebanon are based in the Netherlands, while the International Criminal Tribunal for Rwanda is located in Tanzania.

explained the issue at hand in one of its annual reports: “The Tribunal is unlike any other Court. National courts exist within each state’s criminal justice system and an institutional framework that supports the conduct of criminal proceedings. Within the international community, there are no such mechanisms to ensure the dissemination and interpretation of the work of the Tribunal. The gap thus created between justice and its beneficiaries [...] is exacerbated by the Tribunal’s physical location far from the former Yugoslavia”.² Most of the international(ised) criminal jurisdictions have faced this problem.

2. Transparency and Outreach

The statutes and rules of procedure and evidence of international(ised) criminal jurisdictions offer the highest protection of the rights of the accused, usually containing a provision stating that all trial proceedings, other than judges’ deliberations, will be held in public. The exceptions generally refer to the protection of witnesses. These same documents also stipulate that judgments are to be pronounced in public,³ reflecting the widely accepted principle in rule-of-law societies that the citizen has a right to scrutinize the work of state institutions.

Back in 1993, the creators of the ICTY displayed commendable foresight by establishing a public infor-

² Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, A/54/187, S/1999/846, 25 August 1999, para. 147 (<http://www.legal-tools.org/doc/28850e/>).

³ See, for example, Rule 78 of the ICTR (<http://www.legal-tools.org/doc/93961e/>), ICTY (<https://www.legal-tools.org/doc/950cb6/>), and SCSL Rules of Procedure and Evidence (<https://www.legal-tools.org/doc/8036f5/>), or Rule 136 of the STL Rules of Procedure and Evidence (<https://www.legal-tools.org/doc/564ebf/>).

mation section within the Tribunal's Registry and appointing a spokesperson to deal with media queries. This was not common in national systems at the time. In order to keep an audio-visual record of the proceedings, the Tribunal also installed six remotely-operated courtroom cameras. When broadcast-media expressed an interest in the Tribunal's first trial, the ICTY allowed them to use audio-visual feed from the cameras. With these initiatives, the ICTY began defining what holding a 'public' trial would mean in the context of international criminal justice.

The Tribunal went beyond that and began issuing regular press releases about significant decisions, judgments and events as well as summaries of the main judicial decisions and witness testimony in court. It continued to provide a courtroom feed which could be broadcast by TV stations, not only in the region of the former Yugoslavia but around the world. As technology advanced and the Internet became more prevalent, this feed was made available on the Tribunal's web site providing the ICTY with what it would often refer to as 'the largest public gallery in the world'. Subsequent international (ised) tribunals and courts followed suit.⁴

However, reliance on media as the sole means of transmitting information about their work renders international criminal jurisdictions vulnerable to the whims and agendas of journalists and their editors. This is exacerbated by the fact that, as a rule, these institutions deal with cases that inspire emotional reactions, either because of the magnitude of suffering, the social status of the accused, or because of the controversy created around the case or the institution. Finally, the media are commercial entities, driven by commercial interests and not necessarily by the interests of justice.

Against this background the then ICTY President Gabrielle Kirk McDonald found in 1999 that "there was a need – a necessity, really – for the Tribunal to do more: to actually communicate with the people of the former Yugoslavia, living hundreds of miles away from the Tribunal that had been established for their benefit".⁵ The term Judge McDonald and the ICTY used was 'outreach', by which they meant that the Tribunal needed to engage in public relations.

In an attempt to communicate as directly as possible, the international (ised) courts and tribunals began engag-

ing directly with and developing a differentiated approach to audiences such as the media, victims, legal professionals, NGO representatives, the academic community and the youth. Activities were gradually tailored to each of these groups, and events such as seminars, presentations, lectures and trainings organised on an array of topics related to the work of the institutions or the broader issues of international criminal justice.⁶ They also produced booklets, leaflets, audio-visual material and other information products on the work of the courts.

The aim of these activities has been to inform and educate the public about the work of the institution in question, on the assumption that an informed public would have a better understanding (and appreciation) of the work done. As the International Criminal Court put it succinctly in its booklet 'Understanding the ICC', a "well-informed public can contribute to guaranteeing lasting respect for and the enforcement of international justice".⁷ It is tempting at this point to explore whether an informed public will always be favourably inclined towards a court, but such a debate, though interesting and relevant, falls outside the scope of this brief.

The international (ised) criminal jurisdictions have continued to emphasise the importance of outreach. Following the issuance of its comprehensive communications strategy that was presented and endorsed at the 2005 Session of the ICC Assembly of States Parties, former Court President Philippe Kirsch referred to "proceedings, outreach, securing cooperation and responsibilities towards participants" as "the Court's core activities".⁸ The annual reports of the international (ised) jurisdictions are replete with descriptions of outreach activities and their importance. In an unprecedented move, the judges of the Special Tribunal for Lebanon ('STL') added a reference to outreach in the Tribunal's Rules of Procedure and Evidence, tasking the Registrar with setting up an outreach programme to "disseminate accurate and timely information to the public, particularly in Lebanon, about the general role and functioning of the Tribunal".⁹

This approach is supported by the United Nations ('UN'). In 2000, in relation to the Special Court for Sierra Leone ('SCSL'), the UN Secretary-General called for "a broad public information and education campaign

⁴ See the web sites of the International Criminal Court (<http://www.icc-cpi.int>), Special Tribunal for Lebanon (<http://www.stl-tsl.org>), or the Extraordinary Chambers in the Courts of Cambodia ('ECCC') (<http://www.eccc.gov.kh>).

⁵ Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, as quoted in J.N. Clark's "International War Crimes Tribunals and the Challenge of Outreach", in *International Criminal Law Review*, 2009, vol. 9, issue 1, p. 101.

⁶ See, for example, ICTY Annual Reports at the following link: <http://www.icty.org/sid/31>, last accessed on 28 June 2015.

⁷ "Understanding the ICC" (<http://www.legal-tools.org/doc/9ea9fa>).

⁸ Philippe Kirsch, Opening Remarks Fifth Session of the Assembly of States Parties, 23 November 2006, p. 2 (<http://www.legal-tools.org/doc/ae912f>).

⁹ Rule 52 of the STL Rules of Procedure and Evidence (<https://www.legal-tools.org/doc/564ebf>).

[...] as an integral part of the Court's activities".¹⁰

A later UN-commissioned expert report stated that "effective outreach programmes are essential",¹¹ not only so that the people in affected communities can understand the work of the court, but also so that judicial officials are aware of how the work of the court is perceived and whether or not they have been effective in countering revisionist interpretations of prosecutions.¹²

A 2007 report on the steps taken to establish the STL emphasised that "the development of an effective and comprehensive outreach programme bringing the activities of the Special Tribunal closer to the population of Lebanon and the wider region is a priority".¹³

International NGOs also appear to be unanimous on this issue. In a memorandum to the ICC, Human Rights Watch referred to its field experience when warning that the Court's mandate will not be accomplished only by the conduct of successful investigations and fair trials, but requires "an effective strategy for external relations, public information and outreach to popularize its work".¹⁴ Such a strategy would "require meaningful engagement, dialogue and exchange with local communities and media" and "must also start early to be most effective".¹⁵

In its Comments and Recommendations to the 13th Session of the Assembly of States Parties, the Coalition for the International Criminal Court stated that "lessons learned [...] demonstrate that early, Court-led communications is essential for the meaningful delivery of fair and credible justice to victims".¹⁶

REDRESS invited the ICC to support increased outreach stating that, in order to "be relevant to communities most affected by the crimes within its jurisdiction",¹⁷

¹⁰ 'Report of the Secretary-General on the establishment of a Special Court for Sierra Leone', UN doc. S/2000/915, 4 October 2000, para. 2 (<http://www.legal-tools.org/doc/4af5d2/>).

¹¹ Diane Orentlicher, 'Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity', UN ECOSOC, Commission on Human Rights, UN doc. E/CN.4/2004/88, 27 February 2004, para. 40 (<http://www.legal-tools.org/doc/7c388d/>).

¹² *Ibid.*

¹³ Report of the Secretary-General submitted pursuant to Security Council resolution 1757 (2007) of 30 May 2007, UN doc. S/2007/525, 4 September 2007 (<http://www.legal-tools.org/doc/4afc92/>).

¹⁴ Human Rights Watch, 'Human Rights Watch Memorandum for the 4th ICC Assembly of States Parties', November 2005, pp. 2–3 (<http://www.legal-tools.org/doc/08fa78/>).

¹⁵ *Ibid.*

¹⁶ Coalition for the International Criminal Court, 'Comments and Recommendations to the 13th Session of the Assembly of States Parties,' p. 1 (<http://www.legal-tools.org/doc/173047/>).

¹⁷ Redress, 'Making the ICC relevant to affected communities', Report prepared for the 6th Assembly of States Parties, New

the Court must go beyond providing information about its decisions and must maintain "a sustained capacity to respond and engage communities on new issues as they arise".¹⁸

The International Bar Association also found that extensive outreach campaigns are of key importance in all situation countries and called for adequate resources to be made available to outreach in connection with any future ICC investigations.¹⁹

The Victims' Rights Working Group goes even further and sees outreach as a way to support a multitude of ICC operations by securing co-operation in investigations, countering misinformation, facilitating the participation of victims in proceedings, explaining the criminal proceedings and rights, and generally assisting with creating "a supportive environment for field engagement and presence".²⁰

As can be deduced from the above-quoted sources and practices, there seems to be a general consensus on the importance of outreach for the international(ised) criminal jurisdictions and communities concerned, despite the possible concern of whether or not it is appropriate for an international judicial institution to engage in public relations. Mirko Klarin (Editor-in-Chief of SENSE News Agency which has been reporting on the ICTY on a daily basis since 1998) has summed it up well as regard the ICTY:

There are at least four reasons why it was indeed necessary in the case of the ICTY [to be concerned about its image and rating, and to promote an impression of fairness, impartiality and independence]. First, because the ICTY is the first international *ad hoc* criminal court in history. There are no precedents it could be compared with or which would help to understand what kind of court this was, and what purpose or whom it served. Second, because the ICTY addresses the public in countries that have no experience at all of an independent judiciary. The public was weaned on the Marxist maxim that law was 'an instrument in the hands of the ruling class'; it was only natural that it saw the ICTY as an instrument to ensure the interests of 'a new world order' were served in the region. Third, the public the ICTY faces has been traumatized by the experience of large-scale criminal conduct and has long been brainwashed by the nationalist propaganda

York, 28 November–14 December 2007, p. 3 (<http://www.legal-tools.org/doc/a637c0/>).

¹⁸ *Ibid.*

¹⁹ International Bar Association Human Rights Institute, 'ICC Monitoring and Outreach Programme First Outreach Report', June 2006, p. 6 (<http://www.legal-tools.org/doc/a59289/>).

²⁰ Victims' Rights Working Group, 'International Criminal Court at 10: the implementation of victims' rights', 11th Session of the Assembly of States Parties, 14–22 November 2012, p. 4 (<http://www.legal-tools.org/doc/583b6e/>).

of hatred, fear and revenge. These emotions are present in every nation, but it is the duty of any responsible political leadership and media to educate against them. In the former Yugoslavia, it is precisely the politicians and the media loyal to them who have churned out such emotions in unlimited quantities. Fourth, because the ICTY mandate is not limited to the prosecution and punishment of persons responsible for crimes and deterring possible future wrongdoers; it is expected to contribute to a lasting peace, democracy, protection of human rights and inter-ethnic reconciliation in the Balkans.²¹

Although Klarin addresses the ICTY specifically, his reasoning applies to other international criminal jurisdictions. Even though they may not be ‘the first *ad hoc*’ court in history, the ICTR, SCSL, STL, ECCC and others were the first in their respective regions. Some were established in or for countries that have little or no prior experience with an independent judiciary and all have jurisdiction over countries traumatized by large-scale criminality. In addition, international judicial institutions are (rightly or wrongly) expected to deliver and accomplish far more than prosecution, in particular contribute to reconciliation and the rehabilitation of damaged societies.

3. Public Proceedings as the Most Effective Contribution to Reconciliation

Transparency of proceedings is one of the fundamental principles of criminal justice, at both the national and international levels. Transparency takes on additional importance in international(ised) criminal jurisdictions which often deal with contentious facts that divide entire populations, come under intense public scrutiny, and are at the same time widely expected to contribute to reconciliation in affected communities. In addition, international(ised) criminal jurisdictions are regularly subjected to serious attacks from opponents, often conducted through concerted media campaigns with clear aims of undermining the institution and its work.

As we have seen above, international(ised) courts and tribunals have responded to these challenges by gradu-

ally adopting a proactive role to providing information about their work. Over the years, these efforts have evolved from simply making information available to the public, to actively conducting public relations. This evolution from a practice of public proceedings to active outreach has enjoyed very broad support by the creators, funders and observers of the courts, even if they have faced a number of obstacles. In this way, over the years, international(ised) courts and tribunals have in many ways redefined the expectations of what it means, in practice, to conduct ‘public’ proceedings.

With an ever-increasing demand for justice and the proliferation not only of international courts but also national judicial efforts to address serious past violations of human rights, domestic jurisdictions are increasingly facing the same issues. Technological advances (including the Internet and social media) and the ways in which they have affected how people receive and process information, have also had an impact on how criminal courts are expected to be transparent. It is by ensuring that proceedings are conducted transparently that both national and international criminal jurisdictions can contribute most effectively to reconciliation.

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²¹ Mirko Klarin, “The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 1, pp. 95–96.