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**THE ROLE OF OUTREACH IN MANAGING
PERCEPTIONS OF THE ICC:
A VIEWPOINT FROM KENYA**

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I. BACKGROUND

Unlike the ad-hoc tribunals established before it, the International Criminal Court (ICC) established by the Rome Statute is a permanent institution with potentially universal jurisdiction.¹ With one hundred and twenty two States being party to the Rome statute² the ICC's mandate spans different constituents and diverse contexts. The objective of the Court is to end impunity for 'the most serious crimes of concern to the international community as a whole' and to 'guarantee lasting respect for and the enforcement of international justice'³ in its member states. This is an ambitious mandate, one that can only be accomplished with the co-operation support and understanding of member states, civil society organizations and all other beneficiaries of the Rome statute.⁴

Indeed to have an impact, the ICC's work must be understood in the communities most affected by the crimes in its jurisdiction.⁵ In this regard, "Outreach" as understood under the ICC regime so far, involves establishing a sustained, two-way "dialogue" between the court and affected populations to promote understanding about the court's work. Often referred to as outreach and communication "Communications" refers to the court's relationship with and use of international and local media, including print, radio, or televised media.⁶ Outreach is particularly important where the State authorities and civil society are less supportive of the ICC's presence.⁷

The ICC at inception did not undertake outreach comprehensively. By 2004, only three professional staff based in the Hague were in-charge of ICC communications under the Public Information and Documentation Section⁸ This was surprising bearing in mind the lessons learnt from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both these tribunals as well as the Special Court for Sierra Leone all of which were established with limited jurisdiction, to address extreme violations of human rights learnt albeit late the value of an outreach programme. Initially the ICTY for example merely focused on prosecution. Created through

¹ <http://www.ibanet.org/Document/Default.aspx?DocumentUid=F1A250AC-0C11-459E-B965-B2623FA32232>.

² http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx last cited 29th November 2014

³ Outreach and Communication, http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411 last cited 1st December 2014; Rome Statute

http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

⁴ Article 98 Rome Statute

⁵ <http://www.hrw.org/reports/2008/icc0708/8.htm>

⁶ http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411

⁷ Budget and Finance Team Coalition for the International Criminal Court Submission to the International Criminal Court on the preparation of its draft 2006 budget <http://www.iccnw.org/documents/Budget200613June05en.pdf> last cited 1st December 2014

⁸ Outreach and Communication http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411 Accessed 30th November 2014

Security Council Resolution 827, there was no language in the resolution suggesting the court would have any further responsibilities beyond prosecuting individuals who had committed “serious violations of international humanitarian law”⁹ Yet the prosecution would mean nothing if the local population did not accept the rulings reached by the tribunal.

The SCSL learning from ICTYs mistakes established an outreach programme from inception, to educate the population about the court’s mission and procedures. It enjoyed better support and acceptance than any other tribunal at the time¹⁰ and even to-date.

The ICC nonetheless was lethargic in the rolling out of its outreach programme, and despite an increase in its activities, it only undertook comprehensive outreach in 2006.¹¹ It was expected that networks of international and local non-governmental organizations and media could implement most of the court’s outreach functions.¹² PIDS’s primary role was limited to coordinating these efforts.¹³ In 2006 however a strategic plan for outreach and communications was submitted to the Assembly of State Parties and approved.¹⁴ This strategy included specific plans for each of the country situations under investigation at that time (Uganda, the Democratic Republic of Congo, and Darfur, Sudan). “The strategy recognized the importance of outreach to the court’s work, the need for activities to start as early as possible in the situations under investigation, and that primary responsibility for outreach activities lies with the Registry, in collaboration with other organs—such as the Office of the Prosecutor—and the defense.”¹⁵ The strategy also proposed the creation of a specialized Outreach Unit.¹⁶ The ICC has since grown in its outreach work and has developed an integrated strategy for external relations, public information, and outreach for the Presidency, the Office of the Prosecutor, and the Registry. The strategy is aimed at effectively coordinating the diverse communications activities of these organs in a common plan with mutually reinforcing messages, activities, and goals¹⁷

⁹ (United Nations Resolution 827 of 1993). http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

¹⁰ Donna E. Arzt, Views on the Ground: The local perception of International Criminal Tribunals in the former Yugoslavia and Sierra Leone, <http://www.jstor.org/stable/25097768> Accessed 29/11/2014

¹¹ Outreach and Communication http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411 Accessed 30th November 2014

¹² Outreach and Communication http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411 Accessed 30th November 2014

¹³ ASP, “Draft Programme Budget for 2005,” ICC-ASP/3/2, July 26, 2004, http://www.icc-cpi.int/library/asp/ICC-ASP3-2_budget_English.pdf (accessed June 9, 2008), para. 432. Beyond outreach, the Public Information and Documentation Section is also responsible for the internal court’s library, public information and communications with the media, publishing court decisions, and maintaining the court’s internet/intranet.

¹⁴ ICC, “Integrated Strategy for External Relations, Public Information and Outreach,” p.1.

¹⁵ Outreach and Communication http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411 Accessed 30th November 2014

¹⁶ *ibid*

¹⁷ ICC, “Integrated Strategy for External Relations, Public Information and Outreach,” p.1.

It must be said from the onset however that, although outreach to a great extent is an effective strategy in obtaining support for the courts work, manage perceptions of the court and eventually fulfill its mandate, it is not a panacea for ensuring the Courts success. Effectiveness of the ICC and its legitimacy therefrom is derived from correct application of laws and legal principles¹⁸, justifiability of the existence of the regime alongside perceptions by the relevant communities towards the court.¹⁹

The court's outreach strategy cannot and should not be expected to erase legitimate dissatisfaction that may arise, nor should it be expected to curry universal support for the ICC. A well-tailored outreach strategy can, however, contribute to greater understanding about the court's work and can improve its impact overall.

Yet, outreach is important. Below is an analysis of the extent to which outreach affects perceptions and effectiveness of the ICC and the extent to which it does not.

¹⁸ Gravity and the Legitimacy of the International Criminal Court Margaret M. deGuzman_ Fordham International Law Journal is produced by The BerkeleyElectronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

¹⁹ *ibid*

I. OUTREACH IN COMPARATIVE PERSPECTIVE

To a great extent, a good outreach strategy can improve the perception of an international tribunal

Perception of tribunal legitimacy

“Just because a tribunal is international in nature does not necessarily mean the local population thinks it is better or that it has enhanced moral authority to punish wrong doing in the place in question”²⁰ With phrases like ‘best practice’ and ‘international standards’, it is easy for international tribunals to presume local communities would accept them as the better alternative. This is not necessarily the case especially where deep seated ethnic division and political machinations are at play or where violations have been particularly gruesome. It is important for a court to explain in a simple clear way exactly what it is doing and why. With regard to the SCSL for example, the chief prosecutor took the unusual step of making occasional public statements explaining contentious prosecution strategies such as not indicting child soldiers or not to subpoena testimony from the Truth Justice and Reconciliation Commission.²¹ This won the SCSL support among the various constituents in Sierra Leone including the victim population. This was a big win considering the permanent disabilities visited on the victims by child soldiers for example.²²

The opposite can be said of the ICTY. Where it was presumed that the only task of the tribunal was to prosecute the alleged perpetrators as the less judicial work was to be undertaken by the civil society actors, the tribunal did not find acceptance within the local communities. The resultant effect was the setting up of an outreach programme a little too late.

“In its early years, ICTY personnel were focused on the tasks of institution building and did not pay much attention to the continual fanning of the flames of ethnic hatred by regional leaders and media, who were simultaneously spewing paranoid rhetoric against the tribunal itself. In 1999, more than five years into its operation, the ICTY finally established an Outreach Programme to counter the widespread propaganda against it in the region.”²³ The involvement of the public in these subsequent radio and

²⁰ Donna E . Arzt, Views on the Ground : The local perception of International Criminal Tribunals in the former Yugoslavia and Sierra Leone ,<http://www.jstor.org/stable/25097768> Accessed 29/11/2014

²¹ Elizabeth Cole, Shortcomings of the ICTY outreach Programme: A case study, https://www.academia.edu/3632029/Shortcomings_of_ICTY_Outreach_A_Case_Study_of_Bosnia-Herzegovina, Accessed 1/12/1014

²² *Ibid*; Outreach and Communication http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411 Accessed 30th November 2014

²³ Donna E . Arzt, Views on the Ground : The local perception of International Criminal Tribunals in the former Yugoslavia and Sierra Leone ,<http://www.jstor.org/stable/25097768> Accessed 29/11/2014

television programmes was minimalist.²⁴ It was established on occasion in Bosnia for example in one of ICTY's largest broadcasts only 41 percent of the general public tuned in and even less stayed tuned in for the entire broadcast.²⁵

Judge Gabrielle Kirk McDonald, former presiding judge of the ICTY explained the importance of communicating to the communities in question best when she stated "The people for whom the Tribunal was established must have access to the judgments and must be educated about its procedures and processes. They must 'buy into' the Tribunal if it is to help achieve a lasting peace and lay the groundwork for reconciliation"²⁶

Remedying misinformation

The ICTY was located far from its area of jurisdiction and was operating in a language that was not spoken by either the perpetrators or the victims (Bosnia, Serbian, or Croatian).²⁷ It became easy therefore for local government officials to manipulate the image of the ICTY²⁸ This was particularly tempting for national leaders who would possibly be accused of crimes by the ICTY in the future and had been left in their positions of power through the Dayton Accords²⁹ It was only after the ICTY's image had been so severely tarnished that the Outreach program was created at the end of 1998 as a way to combat the spew of misinformation that was undercutting the effectiveness of the ICTY's work³⁰

²⁴ Elizabeth Cole, Shortcomings of the ICTY outreach Programme: A case study, https://www.academia.edu/3632029/Shortcomings_of_ICTY_Outreach_A_Case_Study_of_Bosnia-Herzegovina, Accessed 1/12/1014

²⁵ *ibid*

²⁶ Donna E. Arzt, Views on the Ground : The local perception of International Criminal Tribunals in the former Yugoslavia and Sierra Leone ,<http://www.jstor.org/stable/25097768> Accessed 29/11/2014

²⁷ Darehshori, Sara. 2007. Lessons for Outreach From the Ad Hoc Tribunals, The Special Court for Sierra Leon, And the International Criminal Court. *New England Journal of International and Comparative Law* 14. <http://www.nesl.edu/userfiles/file/nejicl/vol14/Darehshori-3.pdf> (accessed April 20, 2013).

²⁸ Darehshori, Sara. 2007. Lessons For Outreach From the Ad Hoc Tribunals, The Special Court for Sierra Leon, And the International Criminal Court. *New England Journal of International and Comparative Law* 14. <http://www.nesl.edu/userfiles/file/nejicl/vol14/Darehshori-3.pdf> (accessed April 20, 2013). As cited in Elizabeth Cole, Shortcomings of the ICTY outreach Programme: A case study, https://www.academia.edu/3632029/Shortcomings_of_ICTY_Outreach_A_Case_Study_of_Bosnia-Herzegovina, Accessed 1/12/1014

²⁹ Wald, Patricia. 2001. The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court. *Washington University Journal of Law & Policy* 5. As Cited in Elizabeth Cole *ibid* <http://heinonline.org.proxy.lib.fsu.edu/HOL/Page?handle=hein.journals/wajlp5&collection=journals&page=87>(accessed April 10, 2013).

³⁰ *ibid*

Despite facilitating the understanding of the workings of a tribunal, promoting its acceptance as well as social legitimacy and also correcting erroneous representation of tribunals, outreach programmes have their limitations.

Limitations of outreach

Even the best designed and executed outreach programme has its limitations. These limitation can be described as limitations from above, from below, and from the middle.

From above, outreach may be limited by the quality of justice that the court delivers. This is because outreach is not a public relations exercise that is designed to package and market what would otherwise be unsellable. If the quality of justice delivered by the judicial institution - including the prosecutorial strategy, the choice of cases, the quality of rulings and judgements – is substandard, outreach cannot redeem it.

From below, outreach may be limited by the dominant narrative of the conflict among the affected communities. This is because the perceptions of a particular community towards a judicial process may be shaped not so much by the amount of accurate information availed to them through outreach, but by their own self-perception as victims of the conflict.³¹ One of the greater signs of limitations of outreach in the former Yugoslavia was the continued denial by Serbs in Prijedor that Duško Tadić had committed any serious crimes even though the court sentenced him to 20 years in prison because of his actions in several of the detention camps in the Prijedor region.³²

From the middle, outreach may be limited by everything a court does. As one commentator stated, referring to the ICTY:

“... everything a court with such a mandate does is in fact outreach, whether active or passive. Decisions on indictments, convictions, acquittals, witness support and protection, the behaviour of investigators and field staff, public statements and their absence, stunts that judges let defendants, lawyers and prosecutors get away with in the courtroom, the length of trials, the

³¹ Stuart Ford, A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms, http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Ford_CR_4_12.pdf.

³² Clark, Janine. 2009. International War Crimes Tribunals and the Challenge of Outreach. *International Criminal Law Review* 9. <http://web.ebscohost.com.proxy.lib.fsu.edu/ehost/pdfviewer/pdfviewer?sid=9091f7f9-d4b5-4207-8fdb-de35e2a601db%40sessionmgr114&vid=2&hid=122> (accessed February 3, 2013).

way all tribunal staff, from judges to security guards, conduct themselves at work and outside it, and even administrative edicts – everything plays a role in how Tribunal’s work is perceived.”³³

Outreach may therefore be limited by the actions and decisions, whether conscious or not, of court staff at all levels, as this affects how the court is perceived by victims and affected communities.

³³ Accepting a Difficult Truth: ICTY is Not Our Court, Refik Hodzic , <http://www.balkaninsight.com/en/article/accepting-a-difficult-truth-icty-is-not-our-court>, Accessed 1/12/2014

II. PERCEPTION OF THE ICC IN KENYA: EFFECT OF OUTREACH

Has outreach determined the perception of the Court in Kenya? To a great extent it has, but the limitations outlined above have also played themselves out in the situation in Kenya, especially the limitations from above and from below.

1. *Impartiality/Legitimacy of the Court*

With just one outreach coordination officer dividing her time between Uganda and Kenya, despite the latter being acknowledge to be the most challenging situation that the Court has ever faced, the ICC has used very limited resources as regards outreach in Kenya³⁴ Its impact is therefore small in comparison to the size of the country, the target audience and the domestic appetite for information about the Court. To bridge this gap different NGO's came together under an umbrella institution, Kenyan for Peace with Truth and Justice KPTJ.³⁵ **KPTJ** is a coalition of over 30 Kenyan and East African legal, human rights, and governance organizations, together with ordinary Kenyan civilians and friends of Kenya, convened in the immediate aftermath of disputed 2007 presidential election and its violent aftermath to agitate for truth, peace and justice. It is under this framework largely that civil society actors in Kenya have educated different constituents in the Country concerning the working of the Court. Through interpreting the ICC's decisions as well as explaining the Court's rules of procedure and evidence, the civil society organizations have gotten much of the country to understand the workings of the Court. From the market vendor to the university student, the general population has been made aware of the ICC and its workings.³⁶

In order to reach a wider audience, NGO's have both educated and used the media actors as a platform. By holding workshops for media actors including editors, journalist, media owners and media associations, the outreach programme by the ICC and the NGO actors have ensured the bearer of the news on the ICC transmits the news correctly. In this regard, it was easy for the general public to watch proceedings of the Court right from the pre-trial stage to the trial stage as the various media houses understood the importance of the proceedings to the country at

³⁴ One officer Maria Kamara conducting outreach for both Kenya and Uganda(Interview with Officer)

³⁵ Who is KPTJ , http://www.africog.org/kptj_homepage accessed 1/12/2014

³⁶ In one of the villages in rural Kenya, Muranga, one of the hills is now called " the Hague" after the Hague in Netherlands where the ICC is situated; ICC and Kenya- Understanding the Confirmation of charges hearing, KPTJ REPORT <http://www.africog.org/category/kptj>

large. The general public could then make independent judgement of these proceedings without being misguided by interested parties.

The nature of the language used in the outreach programme conducted both by the ICC outreach co-ordinator as well as Civil society actors was simple, less legal and often-times a mere conversion of the more complex legal framework, procedure and even decisions of the court into simple 'question-answer' format.³⁷ This allowed for a more conversational discussion on the issues of the court. This way the population, civil society actors, the media and even government representatives were able to better understand. It is as a result of this that support for the ICC at the initial stages of the investigation and pre-trial process was at 66 percent in the Country.³⁸

The NGO's undertaking the outreach within the country coordinated their efforts with the ICC outreach coordinator to ensure both teams were reading from the same script. Not to be mistaken for propagandists or apologists for the Court, the coordination of the material to be used for outreach was to ensure standardization of the process.

2. *Respond to damaging misrepresentation*

The persons indicted by the ICC from Kenya presently are the President of the republic, his deputy, and a radio presenter.³⁹ With access to the instruments of power, it is very easy for the accused persons to access the entire country either physically, through holding of public rallies, or through the media platforms to explain their narrative to their advantage. It has been argued to some extent for example, that the popularity of the two indictee's leading to their election into government was based on the narrative they popularized creating the perception by the larger Kenyan public that the ICC was a neocolonialist instrument used by the global north to re-colonize the country.⁴⁰ The ICC was therefore seen as an affront to Kenyan sovereignty and the vote by a large number of the members of the public was a protest vote. As this narrative was

³⁷Implications of a Kenyatta Ruto Presidency for Kenya file:///C:/Users/Admin/Downloads/REPORT%20-%20THE%20IMPLICATIONS%20OF%20A%20KENYATTA%20RUTO%20PRESIDENCY%20IN%20KENYA%20(1).pdf

³⁸ ICC and Kenya- Understanding the Confirmation of charges hearing, KPTJ REPORT <http://www.africog.org/category/kptj>

³⁹ <http://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf>; <http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf>

⁴⁰ Background Paper, University of California, Irvine School of Law ICC-UNSC Workshop, November 2012 , THE AFRICAN UNION, THE INTERNATIONAL CRIMINAL COURT, AND THE UNITED NATIONS SECURITY COUNCIL,

perpetuated, the voices of the civil society actors were muzzled and with limited resources by the ICC invested towards a robust outreach machinery in Kenya, it was difficult to counter it. Support for the ICC subsequently dropped quite significantly.

Limitations :

1. As stated above, defects in judicial rulings invariably contribute to a sense of dissatisfaction by the supposed beneficiaries of the court and take away from its legitimacy.⁴¹ In the Kenyan cases, as the cases proceeded, the Deputy President who was indicted alongside the radio presenter applied to be excused from day to day sitting in the trial to attend to his duties as the deputy president.⁴² Subsequently, the radio presenter applied to the court to obtain leave off the hearings to attend his child's graduation as a singular excusal.⁴³ While the court granted the deputy president leave of absence from the trial except in specific identified times, it declined to grant the journalist leave for this single event. It becomes difficult therefore to explain to the Kenyan audience, that the ICC framework does not recognize status of an accused person.⁴⁴ Fairness of procedures and punishments may provide the key to the institution's overall legitimacy. Outreach cannot cure flaws in the prosecutorial strategy or prosecutorial arguments.
2. Outreach and communication are not a mouthpiece for the office of the prosecutor, but an expression of the entirety of the ICC system. Subsequently mistakes or decisions made by the prosecutor can and should be explained by the prosecutor. In the Kenyan scenario two issues have formed fertile ground for political manipulation. Firstly, the question on prosecutors choice on who to prosecute and secondly the question on gravity of the Kenyan cases. With regard to the prosecutors choice on who to prosecute, soon after the Office of the Prosecutor listed the names of the persons who would be indicted, debate was rife in the country and questions arose as to why the prosecutor had chosen not to prosecute the more 'obvious' alleged perpetrators. The question that constantly arose was "since the prosecutor chooses to prosecute the most senior and most responsible individuals of the grave violations" why were the leading political candidates for whom people allegedly committed the violence not indicted as well. Since prosecutorial discretion in this regard falls squarely within the prosecutor's

⁴¹ Gravity and the Legitimacy of the International Criminal Court Margaret M. deGuzman_ Fordham International Law Journal is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

⁴² ICC judges deny Sang leave to attend daughter's graduation, <http://www.nation.co.ke/news/politics/-/1064/2055130/-/wgx9c7/-/index.html> Accessed 1/12/2014

⁴³ *ibid*

⁴⁴ Article 27 Rome Statute

purview it would have been important for the prosecutor to explain his choice to the Kenyan public thereby avoiding the politicians manipulating the situation to their advantage as they did. Robust debate has also been had concerning whether the gravity of the Kenyan cases all together meets the threshold of the ICC framework.⁴⁵ Since neither the Assembly of State Parties nor the ICC through judgments has defined the gravity threshold, this yardstick is shifting and therefore takes away from the legitimacy of the court.⁴⁶

3. To some extent political manipulation and deep seated causes of injustice

“By virtue of its operation in communities ravaged by conflict and sometimes sharply divided along political and ethnic lines, the ICC’s work is ripe for political manipulation by those with an interest in seeing it fail. The ICC cannot, through its outreach campaign, talk reason into years of hatred by hardliners.”⁴⁷ Not all persons will support the work of the ICC and where parties feel aggrieved by its decision, not even outreach can alter this position.

⁴⁵ Chandra Lekha Sriram and Stephen Brown, Kenya in the Shadow of the International Criminal Court: Complementarity, Gravity and Impact *International Criminal Law Review* 12 (2012) 219–244, *Martinus Nijhoff Publishers* at 18

⁴⁶ Gravity and the Legitimacy of the International Criminal Court Margaret M. deGuzman_ *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

⁴⁷ Outreach and Communication http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411 Accessed 1/12/2014

III. CONCLUSION

“While an effective strategy is essential, there are limits to what outreach can achieve. It is simply not realistic to expect that implementing an outreach strategy will lead to universal support for the court’s work in affected communities.”⁴⁸

For outreach to be effective the ICC needs to invest more in a robust system. To date, the court has operated with a very limited number of staff in both headquarters and field offices. A more tailored and targeted approach is required in order to enhance the court’s impact on the ground. Reliance on Civil Society while important cannot be the only outreach strategy the ICC relies on.

“The court’s outreach and communications strategy should not be conceived as an instrument of “propaganda” aimed solely at gaining support. Providing one-sided information to this effect would only bolster efforts by those trying to undermine the court’s independence and impartiality. The best way for the court to combat misinformation is to disseminate objective information about its efforts, including its limitations, in ending impunity.”⁴⁹

⁴⁸ Courting History: The Landmark International Criminal Court’s First Years <http://www.hrw.org/reports/2008/icc0708/8.htm>

⁴⁹ http://www.hrw.org/reports/2008/icc0708/8.htm#_ftnref411