

Student Paper

Experiences that Count: A Comparative Study of the ICTY and SCSL in Shaping the Image of Justice

Kristin Xueqin Wu*

1. Introduction

International criminal trials are different from domestic trials in various aspects. One of the most notable differences is the symbolic role of international criminal trials, which is deemed essential for the peace process in a post-conflict society; in other words, there can be no peace without justice. However, this can only be achieved when the legitimacy of these trials is endorsed by the very communities involved, and the messages of the trials are embraced by the hearts and souls of these communities. Therefore, if the courts are expected to benefit the reconciliation efforts in the wounded communities, they need to communicate their work to the local populations concerned.¹ Unfortunately, although much progress has been made in the past decade, reaching out to the local populations still remains a significant challenge for the ad-hoc tribunals and the International Criminal Court (ICC).

Apart from external obstacles, there are internal barriers. On the one hand, there are scholars who repeatedly call for more resources to be devoted to the Outreach sections if the courts are to attain their ambitious goals.² On the other hand, there is still a great deal of doubt as to whether it is appropriate for lawyers to engage in promotional work, and whether the courts are responsible for the *perception* of fairness, impartiality and independence. After all, international criminal tribunals are modelled on national courts which, by default, do not undertake this role. The prosecutors and judges, trained in domestic jurisdictions, mostly focus on the technical elements of the crimes and procedures. Besides the legal rules, anything else is deemed 'political', and 'political' is a taboo for lawyers: campaigning and lobbying are dirty words. Nevertheless, it shall be emphasized that the rhetorical functions of international criminal law are fundamentally different from national law: there are pertinent reasons for the international courts to carefully manage their image and rating.

First, international criminal law is still in its infancy. The International Criminal Tribunal for the former Yugoslavia (ICTY), as the first ad-hoc tribunal in recent history, was only established two

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1 For example, in his 12 November 2007 report to the UN Security Council, the ICTY President Fausto Pocar noted, 'In order for the International Tribunal to succeed in its mission of contributing to peace in the territories of the former Yugoslavia, it is essential for its work to be accessible and intelligible to the various communities there'. F. Pocar, Assessment and Report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc. S/2007/283 (2007), p. 10.

2 J.N. Clark, 'International War Crimes Tribunals and the Challenge of Outreach', 2009 *International Criminal Law Review* 9, no. 1.

decades ago. Unlike domestic criminal law which may have centuries of history, there is still a lack of understanding about what those international courts are and what purpose they serve; the ICC still remains unheard of in many parts of the world. Second, apart from this unfamiliarity, international criminal law typically addresses the communities that have no prior experience of an independent judiciary, for otherwise they would have been willing and able to prosecute the crimes themselves. Hence it is important for international criminal law to establish a new start for these communities and to set an example that domestic courts can follow. This can only be achieved if the public perceive a just image of the international courts. Third, international criminal law is only concerned with the apex of the crimes: genocide, crimes against humanity and war crimes. Naturally, the communities devastated by these crimes are full of hatred, fear and revenge. When local politicians and their controlled media continue to agitate these sentiments so as to jeopardise the peace process, no other assistance is available if the international courts do not step in. Unlike national criminal law, international criminal law is not constrained to the role of punishing and deterring wrongdoers; it is intended for the 'peace, security and well-being of the world'.

Given this pertinence, the remaining question is what the international courts could do to ensure a positive public image and sound standing? Moreover, it should be recognized that the experience of justice is a function of multiple factors; the outreach efforts of the courts are only one of them. These factors are closely related to the expectations of the parties concerned. For example, victims desire to receive some form of compensation for their suffering, not just an empty announcement of the guilt of the perpetrators. Thus, their experience of justice is heavily influenced by the courts' effort to meet this desire. Ironically, mass populations in fact care little about the technicality of the trials. Their experiences of justice are not shaped by the actual proceedings in The Hague, but rather by how these proceedings are depicted in the local media.³ Compared to trusting unfamiliar faces from The Hague, people would rather trust their own elites; their opinions are influenced by political and cultural discourses rather than legal ones, and are thus subject to manipulation. However, this does not mean that the international courts are bound to lose in this public relations battle: the more the international courts can do at the right time with the right conditions, the more difficult it becomes for local leaders to distort its image of justice.

Among the ad-hoc tribunals, the Special Court for Sierra Leone (SCSL) is widely held to be the one court that has done almost everything right at the right time with the right conditions. On the other hand, the ICTY remains at the other end of the opinion spectrum. Although the ICTY was the first to start an Outreach Programme, one decade later extensive criticism of its public image still remains.⁴ With the ad-hoc tribunals winding down, international criminal law has entered into a new age: it becomes especially crucial for the ICC, as the one and only permanent face of international criminal justice, to learn from the past experiences of the ad-hoc tribunals. Hence, this paper will compare and contrast the past efforts of the ICTY and SCSL, and further explore how the ICC could better promote its brand of international criminal justice.

This paper will first look at how the 'justice' delivered by the ICTY and SCSL has been viewed and perceived in the former Yugoslavia and Sierra Leone respectively. It will follow by investigating the various non-trial factors responsible for such differing experiences. Finally, it will examine what the ICC has done and what it should further improve with respect to these factors. This paper is primarily based on four structured interviews conducted in November 2011 in The Hague (two at the ICTY, one at the ICC and one at the SCSL office) and on materials collected during this research visit.⁵

3 M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia', 2009 *Journal of International Criminal Justice* 7, no. 1, p. 90.

4 M. Humphey, 'International intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda', 2003 *Journal of Human Rights* 2, no. 4, pp. 495-505.

5 The opinions expressed by the interviewees are their own personal opinions and do not represent the official views of their institutions or of the UN.

2. The experience of justice

2.1. ICTY

Although the perception of the ICTY fluctuates with time and varies across different countries in the former Yugoslavia,⁶ the overall connotation has remained a negative one.⁷ In Serbia, the majority of citizens regard the Tribunal as ‘the greatest danger to national security’. In Croatia, local media almost exclusively air hostile and disparaging statements by public figures. In Kosovo, after the indictment of the former Kosovo Liberation Army leaders, the faith of the Albanians plunged, and the intimidation or even murders of the potential witnesses became commonplace. The opinions are usually much better in the Federation of Bosnia and Herzegovina (BH), where the Muslim population are in the majority. Yet two decades since the Tribunal’s establishment, even the support from BH is waning. The Muslim community, as the predominant victims of the crimes investigated by the ICTY, are increasingly frustrated with the slow pace of trials, the small number of accused, the lack of reparation and the sentences which are perceived to be extensively lenient. The ICTY falls short of their expectations, although they have no better options.⁸

The ICTY is not only seen as political intrusion from the West, it is also utilised as a political tool by parties in the region. In Milošević’s time, opposing Milošević almost implied automatic support for the ICTY. The Tribunal became an ‘ally’ of the opposition in its battle for regime change, although neither side was willing to acknowledge past atrocities. In Croatia, the most widely believed snide remark is that the ICTY is preventing Croatia from joining the EU.⁹ Arguably, rather than promoting the feeling of guilt, the establishment of the ICTY has done more to promote the sentiment of victimhood: the communities increasingly see themselves as not only the victims of the bloodshed, but also the victims of the ICTY.

Unfortunately, although the Tribunal is aware of its negative image, ‘there is not too much we can do to change minds and hearts.’¹⁰ During the interview, Petar Finci stressed that there is still no political and social space for an objective analysis of the Tribunal, as the rhetoric of the war is still very much present. It is still too early to write records. ‘Historical experience from the Nuremberg trials shows that only the second generation, who are untouched by the violence, can start to face these trials objectively. However, that day will come; we have hope for the future generation, and much of our work now focuses on leaving a legacy for the future generation. Obviously there are mistakes: we have no precedence to follow, and most of the time we are inventing “rulebooks” ourselves. However, we believe that the work of this Tribunal is best accessed in the future. We play for the long run.’¹¹

2.2. SCSL

While the public perception of the ICTY remains complex and multifaceted at different levels, the situation in Sierra Leone reveals a rather uniform picture; however, in the beginning, the public perception of the SCSL was far from positive. Although the SCSL, unlike the ICTY, enjoys the full backing of the national government, civilians do not trust the government to genuinely prosecute the rebels, especially against the backdrop of the Lomé Peace Agreement which granted a blanket amnesty. There were more suspicions than support, and there were strong beliefs that the trials are nothing more than an expensive show. Fortunately, over time, the extraordinary efforts of the SCSL Outreach Programme have paid off; unlike that of the ICTY, the public perception of the SCSL has demonstrated a tremendous improvement.

6 The only comprehensive country-by-country survey regarding the attitudes towards the ICTY was carried out in 2002 by the International Institute for Democracy and Electoral Assistance (IDEA). The key conclusion was that the more accused come from these ethnic communities, the less popular the ICTY is in these regions. According to the survey, the approval rating of the Tribunal was highest in Kosovo (83%) and the Federation of Bosnia and Herzegovina (51%), and lowest in Serbia (8%) and Republika Srpska (4%). Available at <http://www.idea.int/europe_cis/balkans/upload/serbian_press_release.pdf> (last visited 11 November 2012).

7 Klarin, *supra* note 3, p. 89.

8 Klarin, *supra* note 3, p. 90.

9 The fact remains that the EU makes complete cooperation with the ICTY compulsory, and it is part of the prosecutor’s mandate to report on the states’ level of cooperation. The reporting is purely factual; the ICTY does not make any recommendation to the EU.

10 Author’s interview with Petar Finci, Senior Information Assistant, ICTY, 9 November 2011.

11 *Ibid.*

Most notably, in the beginning the Court faced significant challenges in prosecuting members of the Civic Defense Forces (CDF). It was the CDF that brought back the elected government and ended the civil war. They were highly regarded as ‘volunteers who have safeguarded the country’. To the local population, the CDF were heroes, and what they did was simply what it takes to defeat the rebels. Yet, few recognize the diverse groups and complex structures under the loose term ‘CDF’, and not all of them are ‘good people’. Expectedly, the indictment of the CDF leaders spurred a huge public uproar. Especially in the South and the East where the base of the CDF was located, the more active the CDF were, the more hostile the people were towards the Court. The Prosecutor thus took pains to explain to the population — most of them are illiterate — the kinds of crimes committed by the CDF, such as torture, extra-judicial killings and the mistreatment of prisoners of the war. Slowly, when people began to accept facts and details, the sentiment shifted. A village in the South even crowned the Registrar of the Court as the village chief!

The SCSL is definitely *the* success story in terms of managing public perceptions. It is popularly seen as a people’s court, and it has built a strong bond with the community. According to the survey conducted between October and November 2006 by Memunatu Baby Pratt from the University of Sierra Leone and a cross-section of civil society groups, 88% said that the Court is relevant to Sierra Leone.¹² Moreover, 62% of the respondents indicated that peace cannot be achieved without justice, and 88% indicated that setting up the Court was the most appropriate option for addressing crimes committed during the war.¹³

3. Image management

3.1. ICTY

3.1.1. Outreach strategies

The most common explanation for the ICTY’s negative image in the former Yugoslavia region is that its Outreach Programme started too late. When it was finally set up in late 1999, six years had passed since the Tribunal’s existence. During these six years, as Judge Gabrielle Kirk-McDonald recalled, the Tribunal had ‘almost totally neglected its constituency in the countries of the former Yugoslavia.’¹⁴ Unfortunately, this was also the period when Serbia, Croatia and Bosnia were still ruled by the political and military elites who were themselves in danger of being indicted for war crimes. In the case of Serbia, major indictments had already been issued.¹⁵ Unsurprisingly, the desperate incumbent rulers were doing all they could to defame the ICTY as a biased entity and a threat to national security. Moreover, throughout this period, the local media remained loyal to the government. Hence, the same editors and journalists who stirred up the hatred and fear behind the war were soon busy covering up those war crimes in the name of ‘national interests’.¹⁶

Consequently, as David Tolbert (the former ICTY Deputy Prosecutor) noted, ‘the tribunal’s work was subject to gross distortions and disinformation in many areas in the former Yugoslavia.’¹⁷ After six years of the Tribunal’s existence, those distortions resulted in permanent scars in the Tribunal’s relationship with local people.

Finally, in 1999, the then president of the ICTY, Judge Gabrielle Kirk McDonald, decided that the Tribunal should speak to the region. As she explains, ‘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’.¹⁸ However, when the Outreach Programme was finally up and running, it failed to deliver the expected results: public perception of the Tribunal in Serbia, Croatia and BH actually deteriorated after 1999. The Programme

12 *Nation-Wide Survey Report on Public Perceptions of the Special Court for Sierra Leone*, 2007, p. 23. Provided by the SCL Outreach Office, The Hague.

13 *Ibid.*

14 Klarin, *supra* note 3, p. 96.

15 Milošević, Milutinović, Karadžić and Mladić.

16 Klarin, *supra* note 3, p. 90.

17 D. Tolbert, ‘The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings’, 2002 *The Fletcher Forum of World Affairs* 26, no. 2, p. 11.

18 G.K. McDonald, ‘Problems, Obstacles and Achievements of the ICTY’, 2004 *Journal of International Criminal Justice* 2, no. 2, p. 569.

itself has been repeatedly criticised for being too soft and too conservative. Initially, what it did was merely 'making available the trial information in BCS (Bosnian, Croatian, and Serbian) at the field offices.'¹⁹ There were no thoughts about pushing the information through. Understandably, as the first ad-hoc international criminal tribunal, it felt innately inappropriate for a legal institution to handle promotional work. However, facing the aggressive anti-Hague propaganda fired up by the political elites in the former Yugoslavia region, the newly created Outreach Programme soon found itself in a losing battle. Unsurprisingly, the general feeling is that not only the effort came too late to have any real effect, but also that the effort that finally came was too limited in scope.²⁰

The turning point came in 2010. Under the leadership of Nerma Jelacic (the Spokesperson for the Registry and Chambers, Head of the Outreach Programme), more ambitious outreach strategies were formulated. On the one hand, the Programme started to seek funding more proactively; on the other hand, the Outreach Programme has now been refined into four pillars:

(1) Providing information

Since 2010, media outreach efforts have been intensified. Outreach now writes editorials and combats grave misconceptions in the local media. It also brings in journalists from the region for study visits in the Tribunal, especially those who are not from the capital cities. During the visit, journalists have real opportunities to ask questions and gain in-depth knowledge about the Tribunal. Hopefully, knowing the true facts will stop them from using biased sources of information.

Furthermore, Outreach has gone on Youtube and Twitter. Its twitter account, ICTYnews, has garnered over three thousand followers.²¹ It tweets new decisions, new initial appearances and other press releases. Its Facebook page is now under construction. Despite the struggles surrounding the content of the Facebook page, there is concern about the page being abused by extremists who may spam the page with hate posts. The Tribunal's existing 'Ask the Tribunal' section on its web page has already resulted in an avalanche of hate emails.

(2) Producing informational material

The Outreach Programme seeks to be active in producing documentaries. It has finished the production of a 40 minute documentary, which will be featured in regional as well as international film festivals.²² The documentary is largely educational, and it will be provided free of charge to the public: it will not only be shown free in film houses in The Hague, but will also be distributed free of charge at the field offices. It was filmed through recycling the footage of the trials and interviews, and there will be no copyright holder. Anyone can make use of the documentary for commercial or non-commercial purposes. Before the tribunal closes, a few dozen more documentaries will be produced, focusing on the trials (e.g. Karadžić) and topical subjects (e.g. sexual violence, command responsibility). Ideally, they will be completed before the 20th anniversary of the Tribunal.

Outreach also plans to increase publications, especially conference publications, as an attribution of the legacy of the Tribunal towards the region. It cooperates with the main holders (e.g. UCLA) to obtain the copyrights and publish in BCS at no cost.²³ It aims to render more publications free to the people of the region.

(3) Organizing conferences in the former Yugoslavia

Outreach has organized a series of conferences in the former Yugoslavia. The most notable examples are *Bridging the Gap*²⁴ and *Facing the Past*. *Bridging the Gap I* focuses on the crime scenes. It explains to

19 See author's interview, supra note 10.

20 V. Hussain, 'Sustaining Judicial Rescues: the Role of Outreach and Capacity Building Efforts in War Crimes Tribunals', 2005 *Virginia Journal of International Law* 45, no. 1, p. 563.

21 Last checked on 11 November 2012.

22 For example, the Amnesty International Film Festival.

23 The English version currently costs more than 200 dollars.

24 The 'Bridging the Gap' series consisted of five conferences that were held between May 2004 and June 2005 in different parts of Bosnia, namely Brčko, Foča, Konjic, Prijedor and Srebrenica. These are areas in which both a significant number of crimes were committed during the 1992-1995 war in Bosnia, and in relation to which the ICTY has conducted and completed a substantial number of trials. The core purpose of these conferences was to provide local people with a comprehensive and detailed picture – in layman's terms – of the

the mass population how everything has happened. These conferences were held in the towns where the crimes occurred. It gave victims' perspectives. *Bridging the Gap II* focuses on local judicial professionals. *Facing the Past* focuses on the facts and the judgments. It concentrates on the role of the defendants, with an objective (fact-based) approach. It urges the community to reflect why these crimes occurred, and teaches the community how to deal with these elements themselves. There are also special seminars for local parliamentarians.

'Youth Outreach' engages in seminars with high schools and universities. It has been very successful in Kosovo and was expanded to Croatia and Bosnia in the spring of 2012. For high school programmes, there are political obstacles, especially the requirement to obtain permission from the local Ministry of Education. Comparatively, university programmes have received more interest. Although the primary audiences are currently law/criminology students, there are also students from other disciplines interested in Joint Criminal Enterprises.

(4) *Networking with regional NGOs*

Outreach is constantly networking with NGOs interested in the rule of the law. Outreach has regular meetings with them; they conduct regular joint activities together, thereby hoping that they will become the ICTY's new spokespersons once the Tribunal is closed.

Other than going into the field, another important aspect of the Outreach Programme is to receive visits by groups from the former Yugoslavia. Outreach takes concerted efforts in encouraging and receiving these visitors, as it is the best method to spread the message of the Tribunal. It is free, and it is effective, as people tend to trust the words of their friends and family members. Noting that the Tribunal can only deal with a small fraction of cases, support from the local judicial system is crucial. Hence, the Outreach Programme especially encourages visits by legal professionals from local judicial branches.

3.1.2. *Press strategies*

The Media Unit deals with two types of journalists. The first type is from the mainstream media, both international and regional, such as the BBC and AFP. They receive press releases every day from the Media Unit, including daily updates, and selections of the most important findings. Although this first type of media select what is most interesting for their national audience, they normally present information in a fair and balanced manner. The second type is the tabloids and smaller TV stations which are only interested in the highlights, such as the next major initial appearance. For them, the Media Unit takes the opportunity to transmit key messages. It packages the information so as to offer all the related issues, thereby ensuring that key messages (e.g. the protection of witnesses) are emphasized in addition to the facts, hoping that the journalists are willing to report on the wider picture.

In general, the Media Unit aims to be as present as possible, to be as instant as possible, to provide as much information as possible, and to use as clear language as possible. The Media Unit also issues press advisory opinions to 'help' the journalists report as neutrally as possible. 'We tell them who is the accused and what he is accused of. We give them detailed records, and they also have access to our database.'²⁵

However, although the Media Unit issues press releases, it does not have ultimate control over whether and how the local media use them, and neither does it have sufficient weight to influence public opinion in the region. In other words, the strategy is never to *tell* them what to do, but to *hope* that they will listen. The Media Unit has tried to maintain a good working relationship with journalists, hoping that they will listen more closely. Unfortunately, despite all the efforts, significant problems with the local media still remain.²⁶ Currently, media reports are followed twice daily, but the Media Unit will only email

Tribunal's work in these five areas, from the investigations stage to the issuing of indictments to the trials conducted and, finally, to the judgments themselves. The basic idea was that local people would be able to follow a case from start to finish.

²⁵ Author's interview with Victoria Enaut, Public Information Assistant, Media Office, ICTY, 9 November 2011.

²⁶ Most of the local media focus solely on the accused and tend to ignore the victims. Also, the level of interest in the Tribunal has been dropping in the local press and on TV.

the editor-in-chief if ‘something becomes really shocking.’²⁷ Furthermore, according to Victoria Enaut, ‘at least we send a voice, although they don’t always apologize.’²⁸

Nevertheless, it should be acknowledged that the Media Unit has its own constraints. It relies on its bosses, the judges and prosecutors, to decide what it is allowed to say. Despite being an aggressive media unit itself, the judges are rather cautious and conservative. This led to an information crisis after Milošević’s death, when the reticence of the Media Unit sparked serious suspicions among the public. Since then a heavy lesson has been learnt. ‘We now want to be even more present. If similar issue happens again, we will immediately call for a press conference.’²⁹ Furthermore, the Media Unit has formulated a policy of never saying ‘no comment’, which could easily trigger suspicions. If something cannot be said at a certain moment, the Media Unit will explain why it cannot say this, and when it may be able to say so.

3.1.3. Resource management

Apart from the conceptual constraint that ‘a legal institution shall not become an advertising outlet’, one physical constraint is the lack of resources. This deficiency has severely limited the Tribunal’s capacity to combat well-funded state propaganda in the region. ‘Honestly speaking, our work is still far from a real “fight”. We can only deny the most blackened line.’³⁰ Even now at its peak workload, the entire communication department consists of only 22 staff members: 5 in the Media Unit and 5 in the Outreach Programme. Hence, on average, only one or two people are in liaison with each state and entity of the former Yugoslavia. The four field offices (Zagreb, Sarajevo, Priština and Belgrade) are equally understaffed: just two employees in each office, only one of whom can speak on the record. For many years the office in Zagreb had only one employee.

This dire lack of human capacity is the result of a lack of funding. Despite the critical importance of the Outreach Programme, it has never been budgeted by the Tribunal, ‘which illustrates the view that the tribunal’s impact in the region in general (...) is of marginal interest to UN policymakers.’³¹ Currently, it receives external funding from the EU, which only covers basic expenses such as employees’ salaries. There is a zero budget for the activities. As a result, all activities rely exclusively on donations,³² and Outreach is constantly seeking funding before it can contemplate any programme. Any evaluation of the work of Outreach should take this into consideration; it must be stressed that producing documentaries with a zero budget is more than impressive!

While Outreach is again expected to receive funding from the EU from 2013 to 2014 (in the biannual budget), it is striking to see that Outreach does not cost very much. At most, it costs € 1 million per year for employees’ salaries, plus € 1 million for all the activities. The total budget for the Tribunal was more than € 300 million in the last biannual budget. As compared to Outreach, the Tribunal itself, funded by the UN, is far less efficient when it comes to its money. In fact, the budget for the Tribunal has been growing year by year. While the Tribunal has an image of a biased, conspired entity in the former Yugoslavia, it is frequently seen as a wasteful bureaucratic institution by the Western world. Even the Tribunal itself admits on its website that ‘this budget is not small.’³³ Although there are indeed reasons for the Tribunal to spend more than an average national court,³⁴ its lavishness cannot be justified by the sheer absence of a victim compensation scheme, notwithstanding its core mission of ‘bringing justice to victims’. However, there is no guarantee that the image of the Tribunal can be drastically improved if

27 Ibid.

28 Ibid.

29 Ibid.

30 See author’s interview, *supra* note 10.

31 Tolbert, *supra* note 17, p. 13.

32 For example, journalists’ study visits are funded by the Organization for Security and Co-operation in Europe (OSCE).

33 ‘The Cost of Justice’, <<http://www.icty.org/sid/325>> (last visited 11 November 2012).

34 First, it is complicated to prove the guilt of someone who did not pull the trigger. Yet most cases deal with this problem: the foot soldiers are not the ones who are most responsible for the crimes. In order to prove that those leaders are at the top of the chain, the Prosecutor first needs to prove the existence of the chain, and it needs to prove it beyond reasonable doubt. Second, the working languages are English and French, yet the victims speak BCS. This adds to the cost of translation and interpretation, as the documents now need to be presented in five languages. Third, the Tribunal covers the cost of the defence if the accused cannot afford this. This is expensive, and legal aid costs 11% of the total budget. Fourth, the Tribunal pays for the detainees who need expensive medical services. Fifth, the Tribunal pays for the victims to fly to The Hague and testify. Moreover, the Tribunal has to pay a lot for administration, just as any regular UN body does.

some victim compensation is offered, since procedural difficulties remain, and unfair compensation is probably worse than no compensation at all.³⁵

One favourable argument employed by the ICTY is that ‘peacekeeping efforts by the international community are incomparably more expensive.’³⁶ Indeed, to date since the Tribunal’s establishment, the total budget has been less than \$ 2 billion. This is less than one year of the peace keeping budget. ‘But we have done more for peace! What kind of peace has been kept by the peace keeping?’³⁷ Although this argument makes certain sense, even Petar Finci himself acknowledges that the SCSL has achieved much more with much more limited resources.

3.2. SCSL

3.2.1. Outreach strategies

Compared to the ICTY, the Outreach of the SCSL is widely admired as *the* success story. According to Perriello and Wierda, ‘the Special Court for Sierra Leone boasts the strongest Outreach program of any tribunal to date.’³⁸ The Outreach Programme in Sierra Leone started in 2003, shortly after the Court was established in 2002. From the very start, it has been an integrated component of the Court, and it was highly valued as a centrepiece of the Court’s work. Different from the ICTY, the Outreach Programme of the SCSL goes beyond the traditional public relations mechanism; it is meant to be a two-way communication channel between the public and the Court. In other words, it not only makes people understand what the Court does, but also receives and responds to people’s questions and critiques. Since its inception, this two-way communication channel has been the core of the Outreach Programme. In order to ensure the smooth functioning of this channel, Outreach has paid attention to even the most minor details and deploys some very inventive measures. For example, it has opened a full discussion programme on the community radio, the most common form of media in Sierra Leone, and anyone can call this program to voice his or her concerns. Considering that not everyone can afford to make phone calls, the programme only requires people to ‘flash’ the Court, and an officer will phone the person back instead of answering the call directly.³⁹ Furthermore, considering that many people have no continuous electricity supply, small booths have been set up in shops and markets to help them charge their phones.

The Outreach has branches in all districts of the country. In each district, it has offices at all levels of the administration, from the major towns to the most remote villages. Given this extensive network at all three levels (district, major towns and villages), Outreach heavily relies on community (unpaid) volunteers to organize training programmes, workshops and seminars. Most notably, it organizes town-hall meetings, together *with* the local community. The meeting is often the major event in the town, accommodating 50 to over 100 residents on each occasion. Outreach organizes over 1,000 town-hall meetings per year. Officers visit and revisit the communities, each time focusing on a particular aspect of the trials, such as the mandate of the Court, the rights of the accused, the presumption of innocence, and the right to a fair trial. Although these concepts are not easily accepted by a community of illiterate villagers who frequently question ‘how can they have a right to defend themselves when they first trampled on our rights’, these town-hall meetings do remain relevant as they are the talk of the town. As such, the Outreach Programme has become well integrated in the public affairs of the country.

Outreach produces audio and video summaries of the Court’s proceedings in local languages. Since trials often last for years and they can be overwhelmingly technical as far as non-lawyers are concerned, Outreach recognises the importance of making it accessible to a community that is largely illiterate. Its video summaries show only the highlights of the trials, just like a feature film. At the town-hall meetings, the screenings of trial proceedings are always the climax; most residents *enjoy* viewing and asking questions.

35 First, who should we compensate? Those who come to testify? Obviously we cannot have all victims here, and then we may create new inequality.

36 ‘The cost of Justice’, *supra* note 33.

37 See author’s interview, *supra* note 10.

38 T. Perriello & M. Wierda, ‘The Special Court for Sierra Leone Under Scrutiny’, International Center for Transitional Justice. <<http://ictj.org/static/Prosecutions/Sierra.study.pdf>> (last visited 22 December 2011).

39 Clark, *supra* note 2, pp. 109-110.

Although the SCSL has the unparalleled advantage of having the Court in its own country, those who are most affected by the war crimes often live in remote villages, and they cannot afford to visit the Court in Freetown. However, Outreach recognises that it is important to inform them that justice is done. Hence, through the district outreach networks, Outreach selects representatives from all villages, and brings them to Freetown for one to two weeks. Transportation and accommodation are provided at the expense of the Court. During these weeks, the representatives talk to the judges, watch real trials, and ask questions. Hence when they go back to their communities, they can spread key messages on behalf of the Court. When Charles Taylor was on trial, the first case to be tried outside the country, Outreach even flew over 100 local representatives all the way to The Hague! Upon their return, these representatives were responsible for explaining to their fellow countrymen what they saw.

3.2.2. Press strategies

During the Charles Taylor trial, the Court made arrangement with the BBC World Service Trust to bring journalists from Sierra Leone and Liberia to The Hague, and to assist them in reporting back to their homelands. The only condition was that all reporting had to be fair and balanced. The Court does not interfere with the press, but its press office ‘feeds’ journalists with information which is as complete as possible, so that they have little leeway for misreporting. Also, all reports are checked by the press office twice daily. If something goes wrong, a correction will be sent to the journalist or editor. However, to date, very few incidents have occurred. Unlike the ICTY, the SCSL has almost no problems with the local media.

3.2.3. Resource management

The SCSL receives no funding from the UN. It is funded entirely by voluntary donations from ‘peace-loving states’. As donors are often subject to domestic constraints, such as approval by congress, or state budget deficits, those who have made the pledge rarely pay on time. This makes the cash flow difficult to predict, and consequently, it is difficult to plan the budget for the Court. Since its establishment, the SCSL has encountered financial hardships on several occasions. There were even rumours that Taylor would be released because there was no money to continue the trial.⁴⁰ Hence, although finance has so far not affected the judicial process, the judges at the SCSL unofficially take on an extra task: they need to ‘run the Court like a business’. They know that they do not have the luxury to go on and on with the trials, so that they learn to manage the process. The SCSL has been highly praised for its expedited judgments: eight convictions in its eight-year existence, and now a speedy entry into the residual mechanism.

However, it should be emphasized that compared to the ICTY, the SCSL has a much narrower mandate which to a great extent explains its efficiency. Since the SCSL only investigates ‘those who bear the *greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 1996’,⁴¹ the Prosecutor is able to focus on just a few selected cases, and only 13 people have been indicted. In contrast, the mandate of the ICTY is to prosecute ‘persons *responsible* for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’. This wording has left the Prosecutor with ample discretion to decide on the ‘cut-off line’ in terms of the degree of responsibility, and the Prosecutor started by pursuing both the ‘big fish’ and the ‘small fish’; as a result, the Tribunal has indicted 161 persons, and there are still ongoing proceedings for 35 of the accused. Understandably, it becomes difficult to start a residual mechanism, if there is any. The SCSL further saves costs through its translation department: the SCSL only has English as its working language, and the documents only need to be translated into Krio, the local language in Sierra Leone. On the contrary, the ICTY has to make its documents available in five languages: BCS in addition to English and French, the Tribunal’s two working languages.

Therefore, compared to the ICTY’s lavish € 300 million biannual budget, the SCSL’s budget started at a modest € 50 million per year and decreased over time. Last year, with the ongoing financial crisis in 2011, the SCSL did not even use € 20 million; this year, it has planned just € 5 million. The secret to

⁴⁰ The crisis ended when the UK and Canada came up with emergency funding.

⁴¹ In practice, all crimes have been indicted under international law.

saving money is the SCSL's milestone procedure: the Court is scaled down once a milestone is reached. When the Court operated in full force, there were 500 staff in Sierra Leone. Now, more than half of them have been laid off.⁴² Witness protection and safe houses have also been downsized to a minimum. The Hague sub-office used to operate in a rented private building, now it is housed in the Special Tribunal for Lebanon: all for the sake of cost saving. There is only one trial chamber remaining; the other one has been dissolved. Legal officers at the SCSL are mostly employed on a temporary basis: they are offered a contract that ends once the particular case is finished.

Similar to the ICTY, the Outreach Programme has a separate budget from that of the European Union, and it is roughly the same size.⁴³ When the Court had just started, the Outreach office in Freetown was staffed with 20 people. Gradually, consistent with the Court's dogma of 'efficiency', the Outreach has been trimmed down together with the Court. In 2008, the Outreach Section and Press and Public Affairs Sections were merged into a single Office of Outreach and Public Affairs. Now there are only one or two paid Outreach officers per district, a situation comparable to that of the ICTY when it first started its Outreach. However, contrary to that of the ICTY, the Outreach of the SCSL has spent far less money at its Hague office despite having hosted over 300 groups from all over the world.

The SCSL is the first international criminal tribunal to achieve this level of budget efficiency; there is no negative image or serious criticism. The only notable comment was raised before the Court was established: since Sierra Leone is one of the poorest countries in the world, the international community should devote resources to help the victims instead of pursuing symbolic trials. Fortunately, countries that support the Court also financially support the reconstruction process. Although the Court has no mandate to pay reparations to victims, this has been handled by the truth commissions, at least nominally.⁴⁴

4. Lessons for the ICC

Many scholars have attributed the success of the SCSL to the 'obvious advantage' that it has a seat in its home country.⁴⁵ Yet, few appreciate the downsides of this arrangement. Indeed, having the Court in Freetown facilitates communication and community bonding; on the other hand, since people who committed the crimes are still in the country, and even involved in public affairs, there is little security guarantee for the Court. Any indictment or judgment could easily spark new violence. Besides, the location of the Court is only one of the 'right' factors; overemphasising its location would risk crowding out other more important factors. Furthermore, the trial of Charles Taylor has offered similar challenges for the SCSL just like the ICTY, and the SCSL has fared fairly well as compared to any trial of the ICTY. Hence, the following question arises: what are the secrets of success apart from having the 'right' location? This question is especially pertinent as the ICC cannot afford to have seats in all the countries in which it has initiated investigations.

4.1. Gaining acceptance

According to Mr Moriba, the success of the SCSL stems from the fact that the Court is *accepted* by the people. First, the SCSL is a hybrid court. Unlike the ICTY, it was formed at the request of the Sierra Leone government. Also unlike the ICTY, it is based upon a mixture of both international and domestic law and cases are tried by both international and domestic judges. As a result, the SCSL is not perceived as something 'imposed upon us', but rather, as something 'with us'. Second, over time, the leading commanders from all factions in the civil war have been indicted— not just the rebels, but also the CDF— so the trials are not perceived as being the 'victor's justice'. Nevertheless, it should be noted that

42 According to Solomon Moriba, the Outreach and Media Affairs Officer at the SCSL office in The Hague, 'it is definitely difficult to tell your college that "you have to go, not because you are not helpful, but because your service is no longer needed". We are all emotional animals. However, since everyone knows that we have budget constraints, it becomes easier as people tend to be more understanding.' Author's interview, 23 November 2011.

43 0.5 to 1 million per year.

44 The truth commission is equally short of funding.

45 Clark, *supra* note 2, p. 110.

these two factors are factual legal matters which the Outreach and Media sections have no control over. Fortunately, apart from the 'hard' factors, there are still some 'soft' factors that could help in winning hearts and minds.

4.1.1. Reaching out to ordinary people

Arguably, while the ICTY blames the local media for their wrong focus—their obsession with the accused rather than the victims—the Tribunal itself has got its focus wrong. Its Outreach primarily targets legal scholars and local elites; it has seldom reached out to ordinary people directly. Despite its Outreach mandate to 'bridge the divide' between the Tribunal and the communities it serves, instead it focuses more on its financial donors and diplomatic supporters. Hence, few understand the work of the ICTY, and thus few believe in the story told by the ICTY. The ICTY could, of course, blame this on the lack of funding for Outreach: after all, its Outreach still has no share of even a slice of the Tribunal budget, thus it has to constantly seek external funding before it can 'focus' on its activities. However, as compared to the SCSL for which the entire Court is subject to voluntary contributions, the ICTY should first examine the effectiveness of its Outreach, especially the target audience of its activities.

Yet, it is not that the ICTY explicitly sends out invitation cards to scholars and elites only; rather, it is the content of its Outreach activities that makes it only interesting for a selected base of the potential audience. When it does organize events targeted directly at the grassroots level—including debates, meetings and community discussions—more often than not it borrows the format of an academic conference. Hence, the low turnout at many of these activities is somehow expected: people do not feel that this is for them. It is not just a gap in knowledge, but more fundamentally, a gap in the mindset between lawyers and ordinary people. Indeed, even the Tribunal's Outreach Programme has itself acknowledged that its events 'confirmed the need for further ICTY engagement on the community level to disseminate the information on the established facts as part of the legacy effort.'⁴⁶

Hence, the Outreach of the SCSL is particularly impressive when considering its much more constrained resources and its much poorer and less educated population base. Sierra Leone is arguably one of the least developed countries in the world, and yet that Court has managed to reach out – using some very basic communication methods – to even the smallest groups in the most remote areas. The will and focus is the key, financial resources are only secondary: it is of the utmost importance to inform the *people* about the Court, and the ICC must get this focus right from the very beginning. The ICC has not been established to refine the technicalities of international criminal law; it is for the welfare of the *people* around the world. Hence, the ICC should avoid spending limited resources on self-congratulatory 'scholarly discussions'; instead, it should strive to reach ordinary citizens from all walks of life, all over the world. They are the owners and beneficiaries of the ICC, not politicians or lawyers. This is not just a factual truth, it is vital that the people – especially those in the Central African Republic, the Democratic Republic of Congo, Darfur, Uganda and now Kenya – perceive it as the truth. The ICC may be physically far away in The Hague, but its brand of justice should touch the hearts of all citizens who come to believe that the Court is always there for them. In order to achieve this, the ICC Outreach Programme should put people at the centre of its strategy. One should not just think of what Outreach can offer, but rather what the people need: do they need a mouthpiece, or do they need a listening ear? Do they need a TV programme, or do they just need some booklets with pictures? Moreover, the ICC needs to address different people in different countries with different strategies; given the diverse country profiles that the ICC is dealing with, even contemplating these details could be hard work. However, the SCSL experience has demonstrated that any effort put in will eventually pay off.

4.1.2. Engaging the Prosecutor and community volunteers

There are few shortcuts, but there are definitely some tried and tested paths. One is to make Outreach an integrated part of the prosecutors' tasks, not just an independent unit which has no bearing on the lawyers. One notable aspect of the SCSL Outreach is the involvement of the Chief Prosecutor, David

⁴⁶ ICTY Outreach, *List of Outreach Events, July-December 2007*, 2007. Provided by the ICTY Outreach section.

Crane, who ‘literally travelled the countryside, visiting every district and every major town.’⁴⁷ While David Crane felt that it is important to personally meet the local people and hear what happened, it is equally important for the local people to personally meet *their* prosecutors and know who is working on *their* behalf. Face-to-face talks convey more than just messages, they build trust and affection. Even in today’s era with advanced communication technologies, this personal touch is still difficult to replace. Just like the fact that understanding breeds trust, unfamiliarity breeds hostility. Especially since the ICC is constantly dealing with ‘foreign’ countries, the extensive personal involvement of the prosecutors is essential for the success of ICC Outreach.

Moreover, besides using the people within the Court, the ICC should use the people outside the Court, who are unpaid volunteers who know their community better. In fact, the SCSL has used far more community volunteers than its own Outreach officers. Apart from the obvious cost-saving for the Court, there are several advantages in using volunteers; the most critical one is the language. In the case of the ICTY, while all its public information documents are translated into BCS, it was not until 2000 that somebody could officially speak on behalf of the Tribunal in BCS. Due to the lack of involvement by community volunteers, the Tribunal’s voice in BCS becomes particularly weak. The challenge for the ICC is similar: while the Court’s working languages are English and French, the people in the community may speak neither of the two. In most African countries, English is only mastered by those who are fortunate enough to go to school, while the vast majority of the population use their tribal language for daily communication. The problem is that there can be as many as hundreds of tribal languages in just a single country! Resource-wise, it is almost impossible for the ICC alone to convey its message in all the local languages. Yet, as long as the ICC can effectively engage community volunteers, or even local NGOs, it does not need to deploy an army of Outreach specialists. There are other advantages in using volunteers. Through adequate training beforehand, these volunteers, equipped with sufficient knowledge, can become the local faces of a ‘foreign court’ at the town-hall meetings. Just like the SCSL, in order to portray an image of a ‘people’s court’, the ICC needs to be not only ‘for the people’, but also ‘of the people’. The ICC needs a participatory mechanism, and the inclusion of volunteers will do just that. Although the prosecutors and judges are not ‘of the people’, the use of volunteers at the Outreach section can well make up for this deficit.

4.1.3. Choosing the appropriate means of communication

While the ICTY was busy publishing conference materials, the SCSL Outreach published a little booklet called *The Special Court Made Simple*. Just as the name suggests, it is a slim volume explaining the mission and procedures of the Court. It takes the format of a comic book, consisting of illustrations depicting each step of the investigative and trial processes, accompanied by a few simple sentences explaining the key concepts.⁴⁸ As such, it does not just cater to those who do not speak English; it is meant to be ‘read’ by even people who cannot read at all! This booklet again embodies the SCSL’s people-centred approaches: think about what the people need, not just what Outreach can offer. In other words, think about what is the most appropriate and acceptable means of communication. The ICC should learn from the success of the SCSL and publish a similar booklet as soon as possible. Like the SCSL, the ICC must do the right thing at the right time. At least, it should avoid the mistakes of the ICTY whose Outreach took off too late to be effective. Since the security situation in many of the African countries has prevented the Court from sending Outreach personnel, such an easy booklet is urgently needed to inform the local public of the work of the Court. When the security situation improves, the ICC can then swiftly step up Outreach’s power with other means of communication, such as radio programmes. There is no fixed manual on the ‘best’ means of communication, as it differs at different times and in different spaces, subject to different socio-political constraints. Yet, ultimately, it is decided by the very people who the Court is striving to reach: the best means is always what the people prefer.

47 D.M. Crane, ‘Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts’, 2005 *Case Western Reserve Journal of International Law* 37, no. 1, p. 6.

48 Outreach Section, Special Court for Sierra Leone, *The Special Court Made Simple*, 2003, <<http://www.sc-sl.org/specialcourtmadesimple.pdf>> (last visited 22 December 2011).

4.2. Smooth communication

While the means of communication decides whether a message reaches the people, the content of the message is what truly matters once a message is conveyed. In other words, what to say is just as important as how to say it. If the ICC wants to brand itself as a fair and efficient administrator of justice – not a ‘cosy club’ or a ‘puppet’ under Western force – it should observe the following points in its messages.

4.2.1. Communicating the prosecutorial strategy

There are two essential elements in the prosecutorial strategy: the first is the mandate, i.e. ‘who we are catching’; the second is the timeframe, i.e. ‘how long we are going to stay here.’ These two elements must form the backbone of any message which the ICC conveys. Most of the time, the nature of the indictment is apparent; thus, more attention should be paid to the proposed timeframe for the ICC’s activity both within and outside the country. More specifically, the ICC must tell the local people what it intends to achieve within this timeframe. An information vacuum is a bad thing. If the ICC does not ‘feed’ the public with information, some other parties will exploit this opportunity to further their interests at the expense of the standing of the ICC. One of the greatest failures of the ICTY is that it has conveyed neither of these elements. In fact, its Outreach focused so much on constructing history that it had little resources left to properly explain its prosecutorial strategy. As a result, the image of the Prosecutor fell under the control of local politicians: it can be easily distorted into a ‘completely random indictment’ at best, or a ‘politically contracted indictment’ at worst. If the Serbs could have understood the mandate and timeframe of the ICTY, they would be far less vulnerable to their politicians’ manipulation; fewer Serbs would have believed that the ICTY uses the Serbs as scapegoats.

Nevertheless, it can be argued that it was not the Outreach Section that failed to communicate the prosecutorial strategy; the ICTY did not have any clear plan in the first place. It has indicted hundreds of individuals, only to drop charges, to enter into plea bargains, or to refer cases back to the national courts at a later stage. It also lacks any timeframe per se: the Tribunal can be extended as long as the Security Council wishes. The closure of the Tribunal has been guessed at for years. Yet even until now, no one knows what the residual mechanism is or when it will kick off. In contrast, shortly after the establishment of the SCSL, the Prosecutor mapped out a clear prosecutorial strategy. It was tailored-made for the SCSL’s mandate: to ‘prosecute persons who bear the *greatest responsibility* for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law [emphasis added].’⁴⁹ The key words are ‘greatest responsibility.’⁵⁰ The implication is that the Court would only go after those who were responsible for the murder, rape, maiming, and mutilation of over 500,000 people.⁵¹ It also features a painstakingly detailed timeframe, from pre-deployment to trial, even including the Prosecutor’s movement into Sierra Leone. This clear focus not only allows the Court to deliver justice in an efficient and effective manner, it gives the Outreach a much easier task in crafting the messages. Furthermore, when the Court does stick to its messages – it pursues what it plans, and it stays within its timeframe – it is perceived as being trustworthy. Expectedly, a good working relationship is developed between the Court and the community.

Yet, apart from these two basic elements – mandate and timeframe – the ICC has something extra to offer. At first, it is praiseworthy that the ICC has learnt the right lesson from the ICTY, especially the trial of Milošević. It has so far avoided ‘mega trials’; thus, instead of dealing with crimes occurring across the region and spanning over a decade, the ICC has broken down the lengthy charge sheet into several pieces, each focusing on a distinct and separate incident. In terms of prosecutorial strategy, these incidents are selected and ranked according to the strength of evidence against the accused. This selective approach helps to ensure that the trials can start and end promptly, and that the judgments are delivered within a politically acceptable timeframe. Hence, although Lubanga was only accused of recruiting minors, it does not mean that his other misdeeds are forgiven or forgotten. Unfortunately, the ICC has not sold this

49 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2002, <<http://www.sc-sl.org/scsl-agreement.html>> (last visited 22 December 2011).

50 Crane, supra note 47, p. 2.

51 Ibid., pp. 1-2.

well to the local people. More often than not locals ask ‘so, is he innocent of other charges?’ Just like the plea bargains, prosecutorial discretion is a sensitive subject. It is not sufficient that the lawyers endorse this strategy; the ICC needs to ensure that the public understand the underlying goodwill. Indeed, when facing a large crowd of illiterate faces, it can be tough and frustrating to explain this. On the other hand, the ICC should have noted that any public grumblings may reignite violence, and thus jeopardize the transition process of the affected community.

Frequently, this prosecutorial discretion is highlighted as one unique power of the ICC Prosecutor. The common perception is of a man who flies around and catches people subject to his own whims. Worse, so the story goes, the current overconcentration of cases in Africa was due to its first Prosecutor, Mr. Luis Moreno-Ocampo, an Argentine lawyer with a profound ‘interest’ in Africa. Hopefully, the recent election of a new prosecutor, Fatou Bensouda from the Gambia, will defeat these rumours. Yet, on the other hand, the ICC should do more to counter this distorted portrait, not only in Africa where it has already overwhelmingly directed its resources, but also in other parts of the World such as Asia and Latin America where people know little about this ‘Court in The Hague’. It should emphasise to the world its ‘checks and balances’: its Prosecutor is only the ‘first push’ for the cases; they are constantly checked by the pre-trial chamber. Thus, the ‘prosecutorial discretion’ is far from absolute. When the Prosecutor accepts or turns down a case, he needs solid reasons, and these reasons are not only judged by the judges, they are scrutinised by the public as well! The ICC should communicate these checks and balances along with its prosecutorial strategy, so that the public can receive a holistic picture of the ICC’s work.

4.2.2. *Explaining the law and its legitimacy*

It may sound technical in the first instance; yet, in order to gain long-term acceptance and cooperation from the community involved, the ICC needs to, after all, answer two questions. First, whose law is this? Second, what gives the ICC legitimacy?

Arguably, the first question, in essence, could not be determined by the Outreach. The SCSL is a hybrid court by default, and this becomes its advantage by default. The ICTY was formed under an ‘imposed’ Security Council resolution, and the Tribunal can do nothing to change its ‘law’ of creation. Fortunately, unlike either the SCSL or the ICTY, the ICC was established through the Rome Statute; in other words, it offers a voluntary treaty-based system in which states can opt in or opt out. Hence, the image problem for the ICC is not whether its creation is legal, but whether the Court is competent to judge a case. In fact, defence lawyers have repeatedly invoked the principle of complementarity to challenge the admissibility of cases. However, this is not necessarily bad for the ICC, especially for the public perception of the Court. Outreach should not shy away from it simply because it is a tactic used by defence counsel. If the principle of complementarity is the cornerstone of the ICC’s brand of justice, as enshrined in the Rome Statute, the Outreach should do more to explain it to the public. In fact, this could be the best opportunity to frame the ICC as a court of last resort, rather than an intruder at first instance. Also, it is only when the ICC demonstrates solid respect for domestic laws that it can command respect in return. This principle should not just be a legal term at trials; it should form the working spirit of Outreach. It should carefully avoid any cultural arrogance, and there should be no such thing as ‘our law’ versus ‘your law’; instead, the ICC should make a humble gesture and approach the question as to how international criminal law is supplementing the domestic system. Moreover, it should make it explicit to the people: this is not unsolicited help, it is help that has been silently screamed for by thousands of people who are being tortured, mutilated, and slaughtered.

During the interview, Fadi El Abdallah specifically referred to three factors that give the ICC its legitimacy: 1) a real opportunity for fair trials; 2) good public information strategy; 3) the high quality of the judges’ work.⁵² In other words, the legitimacy of the ICC is buttressed by both its procedural structure *and* the public understanding of its procedural structure. Technically speaking, the ICC contains all of the due process protections guaranteed by most domestic systems around the world, ranging from the presumption of innocence, to the right to have all exculpatory evidence disclosed by the prosecution. However, the public understanding of these procedural protections is far from automatic. For the majority

52 Author’s interview with Fadi El Abdallah, Public Affairs Unit, ICC, 17 November 2011.

of the victims who have no more than a basic education, the very notion of the 'rights' of the defendants sounds ridiculous: as experienced by the SCSL's Outreach, the public widely doubt the meaning and purpose of these 'rights' when 'they have trampled on our rights first'. Hence, explaining these rights, especially the purpose of granting these rights, should form the bulk of Outreach's work. Otherwise, these 'rights' could be easily perceived as unjust privileges, especially when these rights are not afforded to the people in the affected country.

4.2.3. Moderating expectations

Expectation management is arguably one of the most important strategies of Outreach: it is both the goal and the means. Like the SCSL, the ICC should moderate the public expectation right from the very start. It was formed for the 'well-being of the world', but it is not, and it does not intend to be, a world saver. Its brand of international criminal law is not the best form of justice, but rather, it is the worst except for all those who have been tried by the ad hoc tribunals. In fact, the biggest mistake of the ICTY was not that it has made mistakes, but rather that it has allowed no political or social space for mistakes. As the first ad hoc tribunal, the aims were high, and idealism was abundant in The Hague. Although it is understandable – to some extent inevitable – that there are difficulties and challenges, the ICTY has never taken the initiative to communicate these to the local population; frequently, it was only when the criticism came that it admitted its mistakes. It is only natural to expect frustrations and disappointments when the ICTY builds up an expectation that is so high that it cannot live up to it. Drawing on this painful lesson, the ICC, now standing as the one and only permanent symbol of international criminal justice, should be particularly careful in managing the rhetorical function of its trials and judgments. While *striving* to set a gold standard for the domestic jurisdictions to follow, the ICC is far too young to claim this credibility. Since international criminal law is still in its infancy, and mistakes are unavoidable, the ICC should let the people know what to expect from the very start, so that they do not experience undue disappointments later on. On the other hand, the ICC should be wary of an expectation which is too low. This could be especially so when the affected community has lost faith in the rule of law, and thus expects the ICC to offer nothing more than a political show. This sentiment could be further orchestrated by provincial media outlets which focus excessively on the drama of the trials or the gossip surrounding the accused. Furthermore, in recent years, there has been a worrying tendency for the mainstream media to go tabloid, as gossip sells better than the standard form of journalistic reporting. Even Radio Netherlands Worldwide (RNW) has reported on how detainees are tortured by the bland Dutch cuisine, featuring Seselj saying 'even pigs wouldn't go near it'.⁵³ In order to protect its professional image, the ICC should draw a firm line against this tabloid version of international criminal justice. Apart from adopting the ICTY's method of 'packaging' information during press releases, the ICC should, above all, present a holistic picture each time it conveys its messages: although the trials are the apex of the attention, international criminal law does not start or end in the courtroom. Its image will be less susceptible to political manipulation or media distortion if the ICC could build up a *fuller* image of justice by highlighting its other often overlooked tasks, such as the preliminary investigation and the witness protection scheme.

Yet despite the need to publicise its other endeavours, the ICC should, on the other hand, avoid doing everything itself. It should acknowledge its limitations in capacity: the Court itself, although it is the main player, is just part of the international criminal justice system that it is trying to build. It does not only cooperate closely with, but also depends heavily on the other institutions, such as the truth commissions and the various human rights NGOs. These institutions, with different missions, expertise and budgets, are often better suited to accomplish some other functions. Although both the ICTY and SCSL are concerned with establishing a comprehensive historical record of the atrocities committed, the SCSL has fared much better by outsourcing this task to the truth commission which also handles the victim compensation scheme. On the contrary, the ICTY confronts this task single-handedly by organizing myriads of conferences and seminars in the former Yugoslavia region. It thus takes up so

53 G. Verduijn, 'War crimes suspects "tortured" by Dutch prison food', *Radio Netherlands Worldwide*, 11 November 2011, <[http://www.rnw.nl/english/article/war-crimes-suspects-"tortured"-dutch-prison-food](http://www.rnw.nl/english/article/war-crimes-suspects-)> (last visited 22 December 2011).

much time and effort that the Tribunal fails to effectively communicate other key messages. Drawing on this lesson, the ICC should not only engage its partners, it should inform the public what to expect by explaining this division of tasks: the Court will and must stay focused on the core legal tasks, while its partners take care of the rest. As such, the ICC would be relieved of all-embracing expectations; it shares these expectations with the international criminal justice community it belongs to. By relying on its partners as its extension arms, the ICC could more effectively bring justice and reconciliation to the affected community without being unduly burdened.

4.3. Boosting judicial efficiency

As demonstrated by the success of the SCSL, judicial efficiency could stem from some healthy dose of financial pressure. Although the majority of the literature see the SCSL's responsibility for fund-raising as its 'major disadvantage',⁵⁴ few recognise how this financial pressure has boosted the overall efficiencies of the Court. Indeed, the Court was not set up for the purpose of fund-raising, and it is a waste of resources if the Court has to divert a considerable amount of energy to fund-raising. However, for the SCSL, pressure has resulted in courage and creativity. It was courageous enough to continue issuing indictments even when the Court had not secured the necessary funds for its trials. It fully utilised its creativity to shrink budgets, from employees' salaries to outreach expenses, in order to maximise the results with the minimum costs. On the other hand, when the Court proves that it is able to be a result-oriented organ rather than a bureaucratic machine, it becomes easier to attract funding; after all, no one is inclined to waste money on an institution that achieves nothing. Yet, the most extraordinary thing about the SCSL was that despite its financial thirst, it has never shrugged its priorities. Its Outreach was among the last sections to be trimmed down; even when it struggled with the funding for Charles Taylor's trial, it still went ahead to select 1,000 civil society representatives and flew them all the way to The Hague, covering all their expenses. No wonder the SCSL was praised as a 'people's court'. Although judicial efficiency is a by-product of the Court's lasting struggle with its unreliable 'income' – prosecutors and judges are forced to be efficient as trials cannot drag on indefinitely – it does end up significantly benefiting the Court's image. An image of frugality and efficiency is especially critical for a court operating in one of the World's poorest countries: any ICTY-style generosity is likely to backfire.

Although the ICC is not destined for one particular country, given its principle of complementarity, it will most likely operate in countries where the rule of law is weak. Hence, it is the best time for the Court to exemplify its rhetorical functions, setting a standard of judicial efficiency for the domestic courts to follow. This is especially important in countries where the ICC has an opportunity to influence the transformation of the legal system and thus to renew respect for the rule of law. Since efficiency is part of a fair judicial process — justice delayed is justice denied—the ICC should always seek to improve its efficiency, be it money-wise or time-wise.

4.3.1. Balancing the budget

The ICC is blessed with some generous State Parties, such as Germany and Japan. However, being spared from financial hardship like that of the SCSL does not mean that it can always have what it wants. There should be political pressure, through the Assembly of States; but most importantly, the ICC should absorb frugality as a mind-set. Also, for the ICC, it is more of a matter of balancing its budget through optimising its institutional structure. Drawing on the experience of the SCSL and the ICTY, the ICC should be clear as to what can be outsourced (such as the victim compensation scheme), and what cannot (such as Outreach). Arguably, the ICC has so far done both things correctly. First, the Assembly of States has agreed not to outsource Outreach. Currently about 3% of the budget is dedicated to the public information unit, at about € 3 to 3.5 million per year, for expenses ranging from the library, to staff salaries and to Outreach activities. No doubt, this budget is not generous, and the ICC needs to find a way to use this money more efficiently, especially when it gradually expands its operations to more and more countries. Second, the ICC has outsourced its victim compensation; the Trust Fund for Victims (TFV) was established independently of the Court, and it is based on voluntary contributions. Hence, it not only

⁵⁴ Clark, *supra* note 2, p. 112.

helps the ICC when defendants lack financial resources to make reparations; it also finances projects to help the affected countries in general, without an order from the Court. So far, the TFV has been involved in projects in Uganda, Democratic Republic of Congo and South Africa; it has thus successfully extended the impact of the Court without complicating the Court's structure.

4.3.2. Observing the timeframe

Although the ICC has scored high points on its budgetary management, it has not distinguished itself from the ICTY in terms of the speed of the trials. Indeed, as Fadi El Abdallah insisted, there is no basis for criticism, as there is no second international criminal court with which to compare.⁵⁵ However, the ICC should by no means abuse its monopoly position; it should still observe a politically and socially acceptable timeframe. It is understandable that there can be real logistical and political challenges, especially when there is an ongoing conflict on the ground, or the Court has real difficulties in finding suitable interpreters. If so, the ICC should take these issues into account when proposing the timeframe. Once a timeframe is communicated to the public – and the Outreach should do so as soon as possible once the Prosecutor starts preliminary investigations – the Court is expected to stick with what it promised. It is not sufficient to simply say 'a fair trial takes time', or 'we also need to consider the rights of the defence and the rights of the victims'. An experience of 'fairness' is always subjective, but it definitely loses its sheen with each additional day on which the trial drags on!

5. Summary and conclusion

To sum up, the SCSL has not just done everything right; it has done so at the right time, subject to the right conditions. The Outreach Programme of the ICTY only started six years after the Tribunal's establishment. By that time, the negative image of the Tribunal had been so entrenched that people simply refused to listen, despite the amount of work done by Outreach later on. Compared with the ICTY, the success of the SCSL seems inevitable. The Outreach started even before the Court was properly staffed, and the expectations of the people were carefully monitored and managed from the very beginning. In other words, when the foundation of justice is laid, the experience of justice comes naturally. Furthermore, the SCSL started swiftly after the end of the civil war, against the backdrop of the symbolic burning of the disarmed weapons. It was a time when the memories were still alive, and there was no space for denial. On the other hand, many ICTY trials have dragged on for too long to achieve any really effect: when the accused dies, all previous efforts are in vain.

There is much the ICC can learn from the successes and mistakes of the ICTY and SCSL. Fortunately, it has taken most of the right steps so far. It has budgeted for its Outreach and outsourced its victim compensation programme. It has also tailored its Outreach to the unique circumstance of each country; it deploys a variety of tools, from museums to town-hall meetings. Most notably, the Court has come up with its own innovations: in order to give a voice to the victims, for the first time the victims are allowed to be present under their own names; they are no longer just numbers. Undoubtedly, the Court has been serious about building a credible image, and it has serious reasons to do so: as the one and only permanent face of international criminal justice, it is a court that cannot afford to fail. Moreover, it is responsible for maturing the entire system, from jurisprudence to victim compensation; any negative image will hinder this development process. Most importantly, it is, after all, a court that has been established for people around the world. If it is not even understood or appreciated by its intended beneficiaries, its legitimacy is in jeopardy. Also, there can be no deterrence if the people do not go after their leaders, and they would not do so unless they support the work of the Court.

Although its Outreach has only touched upon the communities affected by crimes, the ICC, as an international court, should adopt a global approach. Its 'international' brand is blemished by the absence of big players, such as China, India and the United States. Hence, it is not sufficient that the ICC reaches out to the people in the affected community; it should, moreover, reach out to the people whose countries are not States Parties to the Rome Statute. Only when the people hear of the Court and understand it, are

55 See author's interview, *supra* note 52.

they likely to lobby their leaders; political will cannot stem from an informational vacuum. Currently, the countries that have not joined, or even withdrawn from the Rome Statute, are predominantly concerned with their sovereignty. Therefore, the ICC should do more to explain its complementarity principle. A lack of information breeds misinformation, misinformation breeds mistrust. Hence, in these countries the main issue for the ICC is to build trust. Nevertheless, it should be emphasized that the Court has achieved great progress in such a short time. Within 10 years of its existence, its Member States have doubled from 60 to 120. Also, the general attitude is already changing. For example, it was a unanimous decision regarding the Security Council referral of the Libya case: even Non-States Parties such as China voted 'yes' rather than abstaining. The Libya case marked a good starting point; if the Court could continue to solidify its brand of justice, more and more trust is yet to come.

At the same time, the ICC should still work harder on improving its efficiency. Although 'efficiency' is subjective and there is no second court for any comparison, the ICC should, for its own sake, strive to deliver justice within an expected timeframe. It has not secured a conviction in its nine-year existence and public patience is running out. If this is mainly due to the states' reluctance to cooperate, or the logistic challenges on the ground, expectation management becomes especially pertinent. There would be no disappointment without expectation. However, if the ICC establishes an expectation that it later fails to meet, it risks losing the hearts and souls of the people.