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**ENHANCING THE RECONCILIATORY POTENTIAL OF
INTERNATIONAL CRIMINAL COURTS' POST-CONVICTION
PRACTICES THROUGH ENGAGEMENT WITH CONFLICT-
AFFECTED SOCIETIES**

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ABSTRACT

There is increasing reliance on international criminal justice in the face of mass crimes, and a proliferation of international and hybrid courts have been established to try individuals for violations of international criminal law. Despite the trust that the international community places in these courts, the societies, communities and individuals most directly affected both by the crimes and the trials are much less convinced of the relevance of these courts to their reconstruction. Despite expectations that trying, convicting and sentencing individuals from the former Yugoslavia and Rwanda, for example, would bring peace, stability and reconciliation to these communities, there is little evidence thereof on the ground. Instead, the post-conviction practices - sentencing to imprisonment and enforcement of sentences - of the *ad hoc* tribunals remain contentious among conflict-affected societies, where the sentences are deemed incommensurate with the crimes and the treatment of offenders too comfortable to serve as punishment. The failure of ICTs to convince conflict-affected societies has a detrimental impact on these courts' ability to promote local peace and reconciliation, where the relevant societies do not trust them or their intentions. Yet we now have an international criminal court, whose post-conviction practices and intended impact on peace and reconciliation resembles that of its *ad hoc* predecessors. It is time to consider what can be done to further the impact of these courts' post-conviction practices for conflict-affected societies, to ensure that the vast amounts of money involved in establishing and maintaining these courts is not spent in vain but instead has a tangible impact for those communities it most affects.

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TABLE OF ABBREVIATIONS

CAR	Central African Republic
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DRC	Democratic Republic of the Congo
ICC, Court	International Criminal Court
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court (adopted by the Assembly of State Parties 3-10 September 2002) ICC-ASP/1/3 and Corr.1
ICJ	International Criminal Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR, Tribunal	International Criminal Tribunal for Rwanda <i>Ad hoc</i> tribunals, Tribunals
ICTR RPE	Rules of Procedure and Evidence of the International Tribunal for Rwanda (adopted 29 June 1995, as last amended on 13 May 2015)
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda UNSC Res 955 (adopted 8 November 1994 as last amended on 7 July 2009) UN Doc S/RES/955
ICTs	International criminal courts and tribunals
ICTY, Tribunal	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (adopted on 11 February 1994 and last amended on 8 July 2015) IT/32/Rev. 50
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia UNSC Res 827 (adopted 25 May 1993 as last amended on 7 July 2009) UN Doc S/RES/827
IJCJ	International Journal of Criminal Justice

IJTJ	International Journal of Transitional Justice
LJIL	Leiden Journal of International Law
Mechanism	International Residual Mechanism for Criminal Tribunals
Mechanism Statute	UNSC Res 1966 Statute of the International Residual Mechanism for Criminal Tribunals (22 December 2010) S/RES/1966
Para/paras	Paragraphs
Res	Resolution
Rome Statute	Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9
RTLMC	<i>Radio Télévision Libre Mille-Collines</i>
Security Council, UNSC	United Nations Security Council
UNGA	United Nations General Assembly

INTRODUCTION

Research questions

The aim of this thesis is to formulate a normative framework for international criminal courts and tribunals' (hereinafter 'ICTs') engagement with their local stakeholders specifically during ICTs' post-conviction practices in order to contribute to peace and reconciliation. The purpose of this normative engagement framework is to enhance ICTs' impact on local peace and reconciliation. In referring to post-conviction practices, reference is made to the following: the imposition of a sentence of imprisonment; designation of an Enforcement State where the sentence will be served; deciding on the prison regime applicable to the international offender; and, deciding whether to grant early release from imprisonment. Whilst international criminal justice (hereinafter 'ICJ') is retributive and therefore concerned with the prosecution and punishment of individuals found guilty by ICTs, it refers to the restoration of global peace and contributing to societal reconciliation for the courts' local stakeholders among its objectives (the conflict-affected society). However, theoretical and empirical research underscore the failure of international post-conviction practices to have such an impact. In response, I explore why this is the case and how these objectives could be achieved through greater engagement with conflict-affected societies, as those most directly affected by ICTs' work.

In order to suggest how post-conviction practices could enhance the ability of ICTs to contribute to peace and reconciliation for conflict-affected societies, I answer the following questions:

1. What is the current position of international criminal justice, as evidenced by modern international criminal courts and tribunals, as regards contributing to local peace and reconciliation?
2. What values should underpin international criminal justice's attempts to contribute to local peace and reconciliation?
3. How can these values be realised in the post-conviction practices of international criminal courts and tribunals, in order for these courts to contribute effectively to local peace and reconciliation?

To set the basis for my suggestion, I firstly discuss the current state of affairs with ICTs' attempts to have an impact on local peace and reconciliation through their imposition of punishment, whilst remaining classical courts of law, and therefore consider how these broader

societal objectives are reflected in ICTs' post-conviction objectives and practices. This enquiry includes setting out the objectives by which ICTs are judged, both for their existence and specifically related to their post-conviction practices and questioning who the stakeholders of these courts are. This answers the first question relating to the *status quo*. As I focus on ICJ and peace and reconciliation, the second research question delves into the meaning of peace and reconciliation, including the values underpinning these terms, in order to understand how ICTs can best contribute thereto and to guide them in their efforts. Finally, I consider the implications of these values specifically to contributing to local peace and reconciliation at the post-conviction stage and suggest how this impact should be enhanced during this final stage of ICTs' work.

The reason behind this thesis' focus on post-conviction objectives and practices is three-fold. Firstly, ICJ, much the same as domestic criminal justice, has a retributive ethos, meaning that individuals found guilty of violating international criminal law (hereinafter 'ICL') are punished by way of a sentence (whether it is a custodial sentence of imprisonment or otherwise). Secondly, international post-conviction practices are of great interest to victims and conflict-affected societies, whether they approve of them or not and impact on a court's legitimacy. Consequently, these practices have particular potential either to assist ICTs in achieving their macro-level objectives or hinder them. Thirdly, despite their importance to conflict-affected societies and the ICT (due to their significance for criminal justice's achievement of its self-imposed objectives), post-conviction practices' potential to contribute to local peace and reconciliation remains largely overlooked.

In order to situate this discussion and understand why my research questions have been formulated in this way, I turn to provide some brief context to the problematic.

Context

The conflicts of the early 1990s in the former Yugoslavia and Rwanda reawakened recourse to ICJ, which had laid dormant since the Nuremberg and Tokyo Tribunals in the aftermath of World War Two. Thus, in the early 1990s, the United Nations Security Council (hereinafter 'Security Council') created two *ad hoc* international criminal tribunals to try individuals accused of committing crimes in these two conflicts – the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (hereinafter 'ICTY,'

‘ICTR’, or ‘Tribunal’ and collectively ‘*ad hoc* tribunals’).¹ Since then, numerous internationalised or hybrid criminal tribunals have been established,² leading to the establishment of the International Criminal Court (hereinafter ‘ICC’), with 123 States Parties at the time of writing.³ Along with the various hybrid or internationalised courts, the *ad hoc* tribunals and ICC form the body of ICJ, with the mandate of enforcing ICL.

Established as they are in the wake of mass conflict replete with grave crimes that affect entire communities and even societies, ICTs espouse ambitious aims. These courts have linked their existence to ending the commission of international crimes;⁴ “bring[ing] to justice the persons who are responsible for them;”⁵ and “contribut[ing] to the process of national reconciliation and to the restoration and maintenance of peace.”⁶ This impact on the restoration of peace (and societal reconciliation in the case of the ICTR) would be achieved through their prosecution and punishment of individuals.

As courts of law developed by nation States, the *ad hoc* tribunals and the ICC largely mirror domestic criminal courts, *inter alia* in their attribution of guilt to an individual and punishment of the same individual through sentencing. Sentencing then is the ultimate result and legacy of criminal trials.⁷ At the *ad hoc* tribunals and ICC, sentences equate to serving a term of imprisonment, based on domestic criminal law and justice. The objectives of imposing such punishment and enforcing it are distinct from the purposes of establishing ICTs and are taken from domestic penology.

However, where domestic criminal law is understood as a way for the national society to affirm its identity by designating its opposite,⁸ a problem occurs for ICL, because it serves the international community (a number of like-minded States, together forming a diverse and a

¹ For the ICTY: UNSC Res 827 (25 May 1993) UN Doc S/RES/827. For the ICTR: UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

² For example, the Special Panels of the District Courts of Dili; the Special Court for Sierra Leone; the Extraordinary Chambers in the Courts of Cambodia; the Special Tribunal for Lebanon; the the War Crimes Chamber of the State Court of Bosnia-Herzegovina; and the Kosovo Specialist Chambers & Specialist Prosecutor’s Office.

³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute).

⁴ UNSC Res 827 (n 1); *ibid* Preamble.

⁵ *ibid* UNSC Res 827.

⁶ *ibid* and UNSC Res 955 (n 1).

⁷ Silvia D’Ascoli, *Sentencing in International Criminal Law: The Approach of the two ad hoc Tribunals and Future Perspectives for the International Criminal Court* (Hart Publishing 2011) 7; Diane Marie Amann, ‘Group Mentality, Expressivism and Genocide’ (2002) 2 ICLR 93, 120.

⁸ Frédéric Mégret, ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’ (2005) 38(3) Cornell International Law Journal 725, 742.

non-static community, whose composition and values uniting them can change over time) and several conflict-affected societies (whose values and/or expectations of justice will not necessarily coincide with those of the international community). The aspirations of ICJ thus relate not only to a single society but extend to a multitude of different societies. Thanks to its ambitious objectives and different stakeholders, ICJ has been described as “schizophrenic”⁹ Such criticism has been bolstered by the numerous empirical studies in conflict-affected societies, whether in the former Yugoslavia, Rwanda, or more recently the Democratic Republic of the Congo, Kenya and Uganda, which have repeatedly found that the communities in response to whose suffering ICTs were established remain unconvinced of ICJ and largely critical of ICTs’ work.¹⁰ In particular, the backlash against the ICC has been growing, with certain States withdrawing from the Rome Statute.¹¹ As well as a general discontentment with ICJ, there is a disconnect between what conflict-affected societies expect of punishment in terms of contributing to peace and reconciliation, and what the courts themselves see as their contribution to these aims.¹² The fact that the majority of empirical studies show that conflict-

⁹ Caroline Fournet, ‘Mass Atrocity: Theories and Concepts of Accountability – on the Schizophrenia of Accountability’ in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Routledge 2011) 27; Dana Shahram, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3(1) *Penn State Journal of Law and International Affairs* 30.

¹⁰ For example, *Facing the Past and Access to Justice from a Public Perspective: Special Report* (United Nations Development Programme 2010)

<<http://www.undp.ba/upload/publications/Facing0the%20Past%20and%20Access%20to%20Justice.pdf>> accessed 31 May 2021; Laurel E Fletcher and Harvey M Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24 (3) *Human Rights Quarterly* 573, 603; Janine Natalya Clark, ‘The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina’ (2009) 7(3) *JICJ* 463; Janine Natalya Clark, ‘The Impact Question: The ICTY and the Restoration and Maintenance of Peace’ in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011); Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005) 146-5; *International Criminal Tribunal for Rwanda: Justice Delayed* (International Crisis Group 2001) 26; Eric Stover and Harvey M Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004); Tim Murithi and Allan Ngari, *The ICC and Community-Level Reconciliation: In Country Perspectives* (Institute for Justice and Reconciliation 2011); ‘Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda’ (Human Rights Center, University of California Berkeley and International Center for Transitional Justice 2005); Stephen Cody, Eric Stove, Mychelle Balthazard, Alexa Koenig, *The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court* (Human Rights Center, University of California Berkeley 2015) 68.

¹¹ Burundi and the Philippines have withdrawn from the Rome Statute: ‘Statement of the President of the Assembly of State Parties on the Process of Withdrawal from the Rome Statute by Burundi’ (18 October 2016) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1244>>; ‘President of the Assembly of States Parties Regrets Withdrawal from the Rome Statute by the Philippines’ (18 March 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1443>> accessed 31 May 2021. South Africa revoked its intention to withdraw from the Rome Statute: ‘ASP President Welcomes the Revocation of South Africa’s Withdrawal from the Rome Statute’ (11 March 2017) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1285>> accessed 31 May 2021.

¹² For ICTY: Janine N Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014); Janine N Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (2012) 14(1) *Journal of Genocide Research* 55; Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Initiative 2010). For ICTR: Jean Marie Kamatali, ‘The Challenge of Linking International Criminal Justice and National Reconciliation: The

affected societies remain unconvinced of these courts' ability to positively impact upon their lives has led to doubts regarding the justification for resorting to such expensive courts. Doubts in particular have been raised regarding the self-proclaimed impact of ICTs on local peace and reconciliation and whether these objectives are compatible with the punishment of convicted individuals with which courts of law are concerned.¹³ ICTs themselves are unclear as to the appropriateness of considering peace and reconciliation when punishing an individual.¹⁴ Against this backdrop, this thesis answers the question: how can ICTs more effectively achieve their macro-level objectives of contributing to local peace and reconciliation through their post-conviction practices?

With the closure of the two *ad hoc* tribunals, over seven years since the Security Council established the International Residual Mechanism for Criminal Tribunals mandated to carry on these tribunals work,¹⁵ and some eight years into the creation of the ICC, it is the right time to conduct such an analysis, both as a stock-taking exercise and as lessons-learnt for the ICC or any future ICTs.

Methodology

This research is mainly doctrinal, exploring and analysing ICJ and post-conviction practices in theory and practice. As such, I use academic works on ICJ and the official documents and jurisprudence of ICTs. This approach will ensure that my research is applicable across different ICTs' and their post-conviction practices. The thesis also has a comparative component, in analysing the post-conviction practices of the two *ad hoc* international criminal tribunals and the International Criminal Court and their contribution to peace and reconciliation for conflict-affected societies, which provides the theoretical and practical context to my thesis. ICJ

Case of the ICTR' (2003) 16(1) LJIL 115; Jean Marie Kamatali, 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans' (2005) 12(1) New England Journal of International and Comparative Law 89. For ICC: Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' (2013) 34(5) Third World Quarterly 800; Jane E Stromseth, 'The International Criminal Court and Justice on the Ground' (2011) 43 Arizona State Law Journal 427.

¹³ Shahram Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' (2014) 3 Penn State Journal of Law & International Affairs 30, 49; Mirjan R Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 Chicago Kent Law Review 329, 364; Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21(4) LJIL 925, 939; Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2006) 43 SJIL 39, 82; Sergey Vasiliev, 'International Criminal Trials: A Normative Theory' (PhD thesis, Amsterdam Center for International Law 2014) 170.

¹⁴ See for example: *Prosecutor v Erdemović* (Trial Sentencing Judgment) IT-96-22-T bis (5 March 1998) para 21; *Prosecutor v Serushago* (Sentencing Judgment) IT-98-39-S (5 February 1999) para 19; *Prosecutor v Ruggiu* (Trial Judgment and Sentence) ICTR-97-32-I (1 June 2000) para 33. *Contra* see: *Prosecutor v Kunarac et al.* (Trial Sentencing) IT-96-23-T and IT-96-23/1-T (22 February 2001) para 824.

¹⁵ UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966.

scholarship has developed to such an extent that the disconnect between the aims of ICJ and their achievement on the ground is evident, with an abundance of empirical studies carried out in conflict-affected societies. Accordingly, I do not undertake empirical research as part of this thesis. Instead, I use already-existing empirical studies as a secondary source of information to contextualise my thesis and verify and support my doctrinal arguments. The already-existing empirical studies assist me in identifying issues with ICTs' attempts to contribute to local peace and reconciliation through their post-conviction practices and exploring the reasons behind this state of affairs. Ultimately, these empirical studies serve as a springboard for suggesting a solution to the legitimacy challenge; the studies lead me to formulate a normative framework for ICJ's engagement with conflict-affected societies, in order to bolster their legitimacy and ability to have an impact on local peace and reconciliation. Finally, I explore how this normative framework could enhance contributions to peace and reconciliation by applying it to existing sentences of the two *ad hoc* international criminal tribunals and the International Criminal Court, as case studies.

Throughout the thesis I refer to conflict-affected societies, post-conviction practices and international criminal courts, which might merit some introductory explanation. The reference to conflict-affected societies rather than the perhaps more commonly used term 'post-conflict societies' is intentional and chosen principally because the ICC has investigated a number of situations where the conflict remains ongoing, including in Mali, one of the States on which I focus in the final chapter of this thesis. Moreover, this thesis refers to punishment, sentencing and enforcement of sentences, as well as post-conviction practices. At times this thesis refers to justifications for punishment in order to understand the rationales most commonly relied on to explain international sentencing practices, particularly in Chapters I and II. As the justifications for imposing a sentence and enforcing it can differ, I discuss the two separately. However, as both sentencing and enforcement of sentences are important to understanding international punishment, have an impact on the conflict-affected society and on ICTs' legitimacy and ability to promote local peace and reconciliation, in the last two chapters in particular, I refer more broadly to post-conviction practices.

Finally, whilst there are a growing number of hybrid or internationalised criminal courts and tribunals, this thesis is only concerned with international criminal courts and tribunals: the *ad hoc* tribunals and the ICC. As they are truly international and, by definition, removed from the conflict-affected society geographically and often procedurally, these courts face the biggest challenge in attempting to have an impact on the ground and face the same types of issues,

compared to hybrid or internationalised courts which are more closely related to the conflict-affected society, whether due to the way they were created (i.e. by agreement between the conflict-affected society and the United Nations) procedurally (i.e. by applying the State's criminal law), and/or geographically (i.e. by employing local and international staff and being based in the State).¹⁶ Having set out the research questions and context behind my thesis, I next turn to consider the original contribution of this thesis to studies of ICTs.

Originality

Whilst my research fits within the broader discussion of ICJ and what it aims to and must achieve for conflict-affected societies, it is also an original contribution to the discussion in several aspects: the focus on how to make ICJ more effective, without questioning its ideals or means; the focus on post-conviction practices and their contribution to the broader objectives behind recourse to ICJ; and, by proposing a normative solution to the problematic faced by ICTs.

Firstly, the majority of existing research questions whether peace and reconciliation are compatible with retributive justice, whereas this thesis considers what can be done with the *status quo* of ICJ to enhance its contribution to peace and reconciliation (i.e. reform of the system from within). This is an original contribution because the majority of academic works that focus on the sociological legitimacy of ICTs question the use of ICJ in response to mass conflict, focusing instead on the wishes of conflict-affected societies, as they are discovered in empirical studies. Instead of asking what conflict-affected societies want of ICJ, this thesis starts from the premise of what ICTs promise to achieve and how to better achieve these objectives, by taking into account the needs of conflict-affected societies.

Secondly, this thesis focuses on one particular aspect of ICTs' work – their post-conviction practices – and whilst it is an area of work of ICTs that is gaining growing interest, it remains largely overlooked when compared to the abundance of academic research on the investigations and trials of ICTs, particularly as I link post-conviction practices to the macro-level objectives of ICTs, from which most studies shy away. Whilst there is an abundance of research on the objectives of ICJ, questioning how feasible and desirable these objectives are, there is much less focus on how to enhance ICJ's potential impact on the ground in general,

¹⁶ Elena Naughton, *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals* (International Center for Transitional Justice 2018) 6.

and even less in relation to international punishment. This makes my contribution a unique one for focusing on post-conviction practices from the lens of contributing to local peace and reconciliation, thereby linking the macro- level objectives of ICTs' existence to their micro-level objectives of imposing and enforcing punishment on an individual.

Thirdly, the originality of my thesis emanates from my proposed normative engagement framework as a solution to the legitimacy challenge of ICTs. This framework is the ultimate result of my research and my strongest original contribution as a detailed strategy for enhancing ICTs contribution to peace and reconciliation at the post-conviction stage has yet to be suggested. What is more, this normative framework is both a guidebook which requires further contextualisation and generalised enough to fit the ICTY, ICTR and ICC, meaning that it is applicable to different institutions of ICJ despite the differences in how they are created and their mandates.

Structure

This thesis is divided into two parts, the first laying the groundwork and outlining the problematic faced by ICTs, and the second providing solutions. Within these two parts, the thesis is divided into seven chapters, as follows.

Chapter I analyses the objectives and stakeholders of domestic criminal law and justice, before considering the specific aims behind punishing individuals for violations of the law. This forms the background against which I focus on the objectives, stakeholders and penal objectives of ICTs. Finally, the chapter considers the meaning of legitimacy of ICTs. This discussion leads me to consider, in Chapter II, the same questions as they relate to modern ICJ at the ICTY, ICTR and ICC. In particular, Chapter II considers the macro-and micro-level objectives of these courts, their stakeholders and how they have approached the legitimacy question raised in the first Chapter. Chapter III brings together the research in the previous two chapters, analysing the extent of sociological legitimacy enjoyed by the *ad hoc* tribunals and the ICC. Finding that there is a significant lack of sociological legitimacy in these ICTs, and that this consequently affects their effectiveness in achieving their macro-level objectives, the Chapter analyses the different reasons for this state of affairs. The discussion of the failure of the *ad hoc* tribunals and the ICC to promote local peace and reconciliation, leads me to consider in Chapter IV the different reactions to this problem. In this chapter I consider the different options which are usually expressed in rather binary terms as to the place of peace and reconciliation as objectives of ICJ.

Having presented ICJ, its objectives, stakeholders and challenges and the responses in scholarship to this problematic, Part Two of the thesis in Chapters V- VII suggests a solution. In response to the suggestions made in Chapter IV, Chapter V considers the meaning of peace and reconciliation in more detail, before suggesting the specific role that ICTs and international sentencing in particular can have in contributing thereto. The definitions established in Chapter V and the need for dialogue between communities and between the conflict-affected society and the relevant ICT leads me to suggest in Chapter VI a normative framework for post-conviction engagement with conflict-affected societies. The intention is to demonstrate how a change in the role of conflict-affected societies in the criminal justice process can better advance ICTs' objectives. The chapter emphasises the need to contextualise ICJ in order to make it relevant to conflict-affected societies and enhance the potential impact of these courts on peace and reconciliation on the ground. Having suggested a normative framework, Chapter VII tests this engagement framework by demonstrating how it could have been put into practice by the two *ad hoc* tribunals and the ICC. Having suggested the need for contextualisation, I discuss in this chapter what contextualisation by ICTs means in practice, and how this would look in the case of the ICTY, ICTR and the ICC. I then go on to discuss how the framework should have been applied to three specific cases before the ICTY, ICTR and the ICC, in order to demonstrate its possible application.

PART ONE

INTERNATIONAL CRIMINAL JUSTICE: OBJECTIVES, STAKEHOLDERS AND CHALLENGES

CHAPTER I – Origins of international criminal justice: aims, stakeholders and legitimacy

Introduction

In the 21st century, criminal trials of individuals accused of violating international law are relatively commonplace, both by ICTs and domestic courts around the world. However, the dawn of ICJ only came some 75 years ago with the Nuremberg and Tokyo Tribunals, the first successful trials of individuals for crimes committed during World War Two.¹ There would be no need for enforcing ICL through ICJ if States prosecuted individuals for such heinous crimes in their domestic courts; recourse to ICJ derives from the unwillingness or inability of States to do so in domestic courts.² As well as being built on the ineffectiveness of domestic criminal law and justice in certain situations, ICL and ICJ are based on their domestic counterpart, as a body of law and a system put in place by sovereign States. Accordingly, this chapter commences with a discussion of domestic criminal law and justice. Section 1.1 examines the overarching *raison d'être* of domestic criminal law and justice – what I refer to as macro-level objectives - and its stakeholders, before turning in section 1.2 to the objectives of criminal courts punishing an individual – what I refer to as micro-level objectives. Domestic justifications for punishment are a particularly important consideration, as they form the foundations of punishment in ICJ. In order to get a complete view, I consider the justifications for punishment and its enforcement: the post-conviction practices of domestic courts of law and justice systems.

Having laid the groundwork by looking at domestic criminal law and justice, section 2 turns to a discussion of ICL and ICJ, commencing in section 2.1 with a discussion of their macro-level objectives for being and stakeholders, and an examination of ICJ in early practice (with the Nuremberg and Tokyo Tribunals), before turning in section 2.2 to the micro-level objectives of international criminal courts and tribunals punishing individuals. Section 2 suggests that whilst based on domestic criminal law and justice, the broader objectives and stakeholders of

¹ Whilst these trials were not the first attempt at international prosecutions, previous attempts such as the prosecution of Kaiser Wilhelm II after World War One, for example, failed. Kaiser Wilhelm II was indicted by the Treaty of Peace with Germany (Treaty of Versailles) (entered into force 10 January 1920) Article 227; Danilo Zolo, *Victor's Justice: From Nuremberg to Baghdad* (Verso 2009) 23.

² Christopher Heath Wellman, 'Piercing Sovereignty: A Rationale for International Jurisdiction Over Crimes that Do Not Cross International Borders' in R A Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 462.

ICJ and international punishment make it *sui generis*. Finally, having identified objectives and stakeholders, I turn to the question of legitimacy of ICJ in section 3: how we ascertain whether ICTs have the right to pass judgment on individuals. Whilst the legitimacy of domestic courts is clear as they stem from an entire criminal justice system, such is not the case with ICTs. This discussion in sections 2 and 3 in turn form the basis for analysing modern ICTs and their legitimacy in the following chapter.

1. Domestic criminal law and justice

1.1 Macro-level objectives of criminal law and justice

Every State has a criminal law which specifies behaviour for which an individual may be prosecuted and punished; “a code of conduct that all in a society are expected to follow,”³ Whilst the substance of criminal law differs across States (as regards acts that constitute behaviour amounting to a violation of criminal law - a crime - and how the violation is punished, for example), its primary function is a common one: the “maintenance of social order” and “peaceful coexistence in a society,” so as to protect the national society and its shared values.⁴ Accordingly, domestic criminal law exists to protect these fundamental legal goods and prevent harm to society as a whole,⁵ which “supports the possibility of the rule of law - a collective life under stable public institutions.”⁶ Across different jurisdictions, there is a paradox in that the criminal law must be both a “local interpreter of common values” and “normative, formal, predictable and equal.”⁷ This requires the existence of a set of common values that it is the criminal law’s purpose to protect, which is a relative question dependent on the value system of any given society,⁸ meaning that each State’s criminal law and justice system reflects the society and explaining why each State’s law and how it is enforced differs. Nevertheless, regardless of the differences in values across jurisdictions, each State enforces its criminal law through law enforcement agencies (the police) and criminal courts of law

³ Craig Hemmens, ‘Criminal Law’ in MA DuPont-Morales, Michael K Hooper and Judy H Schmidt (eds), *Handbook of Criminal Justice Administration* (Marcel Dekker 2001) 167.

⁴ Elena Maculan and Alicia Gil Gil, ‘The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts’ (2020) 40(1) *Oxford Journal of Legal Studies* 132, 135; Kai Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part* (OUP 2013) 60-61.

⁵ Kai Ambos, ‘The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles’ (2015) 9 *Criminal Law and Philosophy* 301.

⁶ Vincent Chao, ‘What is the Criminal Law For?’ (2016) 35(2) *Law and Philosophy* 137, 138.

⁷ Immi Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (2002) 13(3) *EJIL* 561, 562.

⁸ Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part* (n 4) 60-61.

where individuals who violate criminal law are prosecuted - the criminal justice system -, the fundamental purpose of which is to render justice in order to protect society from offenders.⁹

There are two major forms of criminal justice: retributive and restorative. Retributive justice is “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs,” with a focus on individual offenders.¹⁰ Restorative justice is described as “a search for solutions which promote repair, reconciliation, and reassurance.”¹¹ In contrast to retributive justice, restorative justice is based on collaborative problem-solving as a response to crimes, involving a cross-section of the society including the victims and the offender and focusing on the needs of the victims and their reconciliation with the offender.¹²

Most criminal justice systems are based on retributive justice: the prosecution and punishment of individuals who violate the State’s criminal law. By imposing a form of punishment on the individual - sentencing them -, the State intends to protect society from the individual and, on behalf of the society, expresses its “formal condemnation” of the prohibited conduct.¹³ As criminal law serves to protect the shared values of a society, a violation thereof is “treated as an act against the state as well as against an individual victim,” meaning that in enforcing criminal law, the State speaks on behalf of the entire society.¹⁴ Whilst criminal prosecutions can often be an important mechanism for victims’ healing process,¹⁵ any such impact on the victim is largely incidental in many jurisdictions, where the focus is on rendering retributive justice that seeks to punish individuals for not respecting the society’s values. The criminal justice process

requires dependence upon proxy professionals who represent offender and the state
[...] This, in turn, removes the process of justice from the individuals and the

⁹ Hemmens (n 3) 167; Henry M Hart Jr, ‘The Aims of the Criminal Law’ (1958) 23 *Law and Contemporary Problems* 401, 437.

¹⁰ Report of the Secretary General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (23 August 2004) UN Doc S/2004/616, 4.

¹¹ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990) 181.

¹² Tony F Marshall, *Restorative Justice: An Overview* (Home Office Research Development and Statistics Directorate 1999) 5.

¹³ Hemmens (n 3) 167.

¹⁴ *ibid.*

¹⁵ Sergey Vasiliev, ‘Victim Participation Revisited – What the ICC is Learning about Itself’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 1195.

communities which are affected. Victim and offender become bystanders, nonparticipants in their own cases.¹⁶

Accordingly, in prosecuting the individual, the State is not concerned with reconciling the victim with the offender *per se*. It is not specifically the harm caused to the victims that drives criminal justice, but the harm to the society as a collective and a violation of its values. Nevertheless, despite its focus on the offender, the criminal justice process also “has regard for the interests of victims and for the well-being of society,” partly by giving victims specific participatory rights in criminal prosecutions.¹⁷ Together, the offenders, victims and broader society form the stakeholders of criminal law and justice in a State, to whom the system is accountable. Most criminal justice systems are complemented by restorative justice processes, whereby “the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters.”¹⁸ In a trial setting, the incorporation of restorative justice elements tends to be done by increasing the inclusivity towards victims and making punishment more responsive to these needs.

As the ultimate result of a conviction in a domestic court of law is punishment, I next turn to consider the justifications behind punishing an individual at the domestic level and how these objectives align with the objectives of the criminal law and justice system more broadly.

1.2 Micro-level objectives of punishment

Punishment is important as the ultimate legacy of criminal law, which is part of domestic criminal law with the most obvious and memorable impact upon offenders and the broader society, and which can advance the macro-level objectives of criminal law and justice.¹⁹

Each State has specific micro-level objectives for punishing individuals and enforcing punishment, including the need for the punishment imposed to “fit the crime (and) the criminal,” which guides the judiciary in deciding on the type and length of sentence.²⁰ The type of sentence imposed on an individual for a given crime differs from State to State and depends on

¹⁶ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3rd edn, Herald Press 2005) 79-82.

¹⁷ Report of the Secretary General (n 10) 4.

¹⁸ *Handbook on Restorative Justice Programmes* (United Nations Office of Drugs and Crime 2006) 6.

¹⁹ Tim Meijers and Marlies Glasius, ‘Trials as Messages of Justice: What Should be Expected of International Criminal Courts?’ (2016) 20(4) *Ethics and International Affairs* 434, 436; Silvia D’Ascoli, *Sentencing in International Criminal Law: The Approach of the two ad hoc Tribunals and Future Perspectives for the International Criminal Court* (Hart Publishing 2011) 10.

²⁰ Hart Jr (n 9) 426-7.

the type of crime committed, from a non-custodial sentence (such as fines or community service for example), to a custodial sentence (from a fixed-term sentence of imprisonment to indeterminate sentences of imprisonment) to capital sentences/ the death penalty. The most severe sentences are usually reserved for the gravest crimes, of the types prosecuted by international criminal tribunals, which equates either to a loss of life or a loss of liberty. In deciding how to sentence an individual, a court will take into consideration the purposes behind punishment.

Section 1.2.1 considers the purposes of sentencing, whilst section 1.2.2 focuses on the purposes behind the enforcement of such sentences.

1.2.1 Objectives of sentencing

There are two broad objectives behind punishing violations of criminal law: backward-looking and forward-looking (or consequentialist). When deciding on a sentence to impose, courts typically take into consideration two broad justifications for punishment: backward-looking justifications whereby punishment is inflicted on the offender because s/he so deserves; and forward-looking justifications whereby punishment is inflicted with a broader social utility in mind. Most modern criminal justice systems are based on a combination of the two.²¹

Retribution is the sole traditional backward-looking purpose of punishment, meaning that the individual deserves to be punished for the crime committed, regardless of the social good of the punishment; punishment is an end in itself and looks to the past wrongful act, rather than to the future.²² Retribution is the oldest justification for punishment, paradigmatically associated with *lex talionis*, the concept of justice as proportionate revenge for the crime committed. For retributivists, “there is a fundamental intuitive connection between crime and punishment” meaning that society has “a duty to punish” offenders.²³ Historically, retribution had a connection with vengeance because punishment was seen as serving as “an outlet, a kind of safety-valve, for the indignation of the community.”²⁴ However, this does not mean that retribution equates to ‘an eye for an eye’, or revenge; on the contrary, “retributivist punishment is an act of public justice within limits.”²⁵ Proportionality is fundamental to retribution,

²¹ D’Ascoli (n 19) 295.

²² Andrew Ashworth and Martin Wasik (eds), *Fundamental Sentencing Theory: Essays in Honour of Andrew von Hirsch* (OUP 1998) 251.

²³ Michael S Moore, ‘Justifying Retributivism’ (1993) 27 *Israel Law Review* 15, 16.

²⁴ Hastings Rashdall, ‘The Theory of Punishment’ (1891) 2(1) *International Journal of Ethics* 20, 26.

²⁵ Thom Brooks, *Punishment* (Routledge 2012) 17.

meaning punishment must be commensurate with the crime committed, with the offender receiving his/her “just deserts.”²⁶ Moreover, in deciding how to punish an offender, retributivists holds that punishment should redress the balance between the victims and the offender, who has gained an “unfair advantage” from his/her crime.²⁷ Part of redressing this balance involves “reasserting moral truth” and giving the victim their value back by punishing the offender.²⁸ In this regard, in order to respect the offender’s dignity, retribution focuses on the offender rather than on any impact the punishment might have on victims or society.²⁹

Nevertheless, despite its focus on the offender, retribution does have an impact on society. Retribution has a norm projection and expressive role in demonstrating the State’s and society’s condemnation of the crimes. Modern retributivists thus emphasise the potential of retribution to communicate to the individual official societal censure of his/her crimes, as well as to the victims and broader society.³⁰ Here, the offender is recognised as “a moral agent” with the capacity to understand the condemnation and has the opportunity to acknowledge his/her actions.³¹ Through communicating society’s condemnation, punishment is intended to “persuade offenders to repentance, self-reform and reconciliation.”³² This is closely linked to the educative role for punishment, as “the censure embodied in the prescribed sanction serves to appeal to people’s sense of the conduct’s wrongfulness, as a reason for desistance.”³³ It requires a common set of values and “norms” to be communicated to criminals as well as the wider society which criminal justice serves, in order to give censure meaning.³⁴ These norms must not diverge from societal expectations if they are to be respected, thereby giving the entire

²⁶ Andrew von Hirsch, *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration* (Hill and Wang 1976).

²⁷ For different views on the meaning of ‘unfair advantage’ see for example: Herbert Morris, ‘Persons and Punishment’ (1962) 52 *Monist* 475; Michael Davis, ‘Harm and Retribution’ (1986) 15(3) *Philosophy and Public Affairs* 263; Jeffrie G Murphy, ‘Marxism and Retribution’ (1973) 2 *Philosophy & Public Affairs* 217; Gerald V Bradley, ‘Retribution: The Central Aim of Punishment’ (2003) 27(1) *Harvard Journal of Law and Public Policy* 19.

²⁸ Jean Hampton, ‘The Retributive Idea’ in Jean Hampton and Jeffrie G Murphy (eds), *Forgiveness and Mercy* (CUP 1990) 133.

²⁹ Thom Brooks, ‘Corlett on Kant, Hegel and Retribution’ (2001) 76(4) *Philosophy* 561, 564; Immanuel Kant, *Metaphysics of Morals* (Mary J Gregor ed, CUP 1996) 105.

³⁰ Andrew von Hirsch, *Censure and Sanctions* (OUP 1996) 10-11; RA Duff, *Punishment, Communication and Community* (OUP 2013) xix; Jean Hampton, ‘The Moral Education Theory of Punishment’ (1984) 13 *Philosophy and Public Affairs* 208; Hart Jr (n 9) 437-8; Diane Marie Amann, ‘Group Mentality, Expressivism and Genocide’ (2002) 2 *ICLR* 93, 120; Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (4th edn, OUP 2016) 59; Brooks, *Punishment* (n 25) 101.

³¹ Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005) 18-19, 21; von Hirsch, *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration* (n 26).

³² Duff (n 31) xix.

³³ von Hirsch, *Censure and Sanctions* (n 30) 15.

³⁴ Amann (n 30) 120.

society a role, and linking retribution to ensuring peaceful coexistence between peoples in respect of societal norms. In such a way, retribution can have an important impact on society, and remains relevant in criminal law theory, but punishment theories are not mutually exclusive.³⁵

Along with retributive notions of justifying punishment, there are three forward-looking theories: deterrence; incapacitation and, rehabilitation. Forward-looking justifications for punishment are understood as pursuing “social protection,” by focusing on the impact of crime on the society, its future security and peaceful coexistence and linked to furthering the macro-level objectives of criminal law and justice.³⁶ In such a way, the impact of crime and how it is punished on broader society is explicitly recognised in these forward-looking justifications for punishment, thereby providing a link between the overall objectives of the criminal justice system to protect society and the objectives behind punishing an individual.

The most prominent forward-looking justification for punishment is deterrence, “often understood as the primary alternative to retributivism.”³⁷ Deterrence can be either special or specific, or general. Specific deterrence focuses on discouraging the specific offender from reoffending, whilst general deterrence focuses on discouraging others from committing such acts through the threat of punishment.³⁸ In contrast to the emphasis of just deserts and proportionality in retributivist theories of punishment, deterrence focuses on averting future criminal behaviour. Incidentally, modern conceptualisations of retribution such as its potential to demonstrate societal censure as discussed above, may also serve general deterrence by reinforcing societal norms.³⁹ Deterrence can discourage not only offenders (real or potential) but also victims and their communities, as it assures victims that the wrongs they have suffered will be vindicated, thereby taking away the desire for retaliation.⁴⁰ In such a way, deterrence may have a positive impact on reconciliation between parties and further the macro-level objectives of criminal law and justice.

³⁵ Brooks, ‘Corlett on Kant, Hegel and Retribution’ (n 29) 574.

³⁶ George P Fletcher, *Rethinking Criminal Law* (OUP 2000) 414.

³⁷ Brooks, *Punishment* (n 25) 35.

³⁸ Cesare Beccaria, *On Crimes and Punishments and Other Writings* (Aaron Thomas ed, University of Toronto Press 2008) 26; Plato, *Protagoras* (Benjamin Jowett ed, Serenity Publishers 2009) 43; Mike C Materni, ‘Criminal Punishment and the Pursuit of Justice’ (2013) 2(1) *British Journal of American Legal Studies* 263, 289.

³⁹ Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester University Press 1986) 52-53.

⁴⁰ Mitchell N Berman, ‘The Justification of Punishment’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 145.

Deterrence is closely linked to incapacitation. However, whereas deterrence relies on the fear of being punished should an individual (re)offend, incapacitation prevents the offender from reoffending by excluding him/her from society. It is certainly directly effective in preventing the offender from committing additional crimes, at least during his/her imprisonment and can be important in the immediate aftermath of a crime to protect society from an individual.⁴¹ The intended impact of incapacitation is to reduce the occurrence of crime, but it has been argued that instead of reducing crime, incapacitation can have the effect of “redistributing it” to the prison population.⁴²

The third forward-looking justification for punishment is rehabilitation; traditionally less relied upon than retribution and deterrence, although it has become a particularly important objective in European penology.⁴³ Rehabilitation focuses on the reintegration of the offender into society, based on the argument that “punishment should aim at the reformation of offenders and assist their transition from criminal to law abiding citizen.”⁴⁴ Much the same as retribution, rehabilitation can be construed in different ways,⁴⁵ including “deontological” or “consequentialist.” For deontological rehabilitation, punishment should reform the offender for his/her own good, whilst for consequentialist rehabilitation, punishment reforms the offender for the sake of the broader society to which s/he will return upon completion of their sentence.⁴⁶ However, rehabilitation is usually advanced during the enforcement of the sentence, rather than as a justification for its imposition.⁴⁷

Having discussed the typical justifications for punishment taken into consideration when sentencing an individual, I next turn to the objectives behind enforcing the sentence.

1.2.2 Objectives of enforcing sentences

Once a sentence is imposed, it is usually enforced. The justifications for enforcing sentences largely mirror those for their imposition, however the degree of emphasis on a particular penal

⁴¹ Fletcher (n 36).

⁴² Guyora Binder and Ben Notterman, ‘Penal Incapacitation: A Situationist Critique’ (2017) 54(1) *American Criminal Law Review* 1, 2.

⁴³ Jens David Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ (2009) 23 *Cornell Law Faculty Publications* 373, 376.

⁴⁴ Brooks, *Punishment* (n 25) 51; Robert Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’ (2006) 43 *SJIL* 39, 48.

⁴⁵ For a discussion on the different conceptualisations of rehabilitation see Fergus McNeill, ‘Four Forms of ‘Offender’ Rehabilitation: Towards an Interdisciplinary Perspective’ (2012) 17(1) *Legal and Criminological Psychology* 18.

⁴⁶ Brooks, *Punishment* (n 25) 52.

⁴⁷ Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ (n 43) 376-377.

justification may differ at the enforcement stage compared to when the sentence is being determined. Indeed, some penal justifications can be less effective where the sentence is not enforced.

Thus, for example, the societal censure of retribution would be less effective where the sentence imposed is not enforced.⁴⁸ Forward-looking justifications for punishment, in particular, are given meaning principally at the enforcement of the sentence, rather than at its imposition. Incapacitation cannot be deemed effective without enforcement; and, in order for deterrence to effectively discourage an individual from reoffending, the threat of punishment must be “credible.”⁴⁹ Similarly, as I have suggested above regarding rehabilitation, it is more the conditions of a sentence of imprisonment and the training provided to the offender that will have a rehabilitative impact than the imposition of a sentence in itself.⁵⁰

In the above subsection, I suggested that rehabilitation can be deontological or consequentialist. Whether deontological or consequentialist, rehabilitation includes some kind of “training” and might include providing the offender “with job-related skills,” for example, or ensuring that s/he retains contact with the outside world in order to facilitate reintegration.⁵¹ Under rehabilitation as an objective for continued enforcement of a sentence, if punishment is to have a wider impact on society and contribute to the macro-level objectives of criminal law and justice, the imprisonment of the offender must “ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.”⁵² To this end, most prisons provide offenders with rehabilitation opportunities.

Rehabilitation, although requiring that the sentence be lengthy enough to be able to treat or reform the offender, is mostly concerned with the shape of punishment – the conditions of punishment – and how they can change the offender, as well as being concerned with the offender’s relationship with society, to which s/he is to be reintegrated upon release. Rehabilitation is then also an important factor in considering whether to continue sentence enforcement, or whether to grant release where the punishment is a sentence of imprisonment.

⁴⁸ Amann (n 30) 120.

⁴⁹ Barrie Sander, ‘Justifying International Criminal Punishment: A Critical Perspective’ in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (TOAEP 2019) 185.

⁵⁰ Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ (n 43) 376-377.

⁵¹ Berman (n 40) 145.

⁵² United Nations, *Standard Minimum Rules for the Treatment of Prisoners* (30 August 1995); UNGA, *Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment* (9 December 1988) UN Doc. A/RES/43/173; UNGA, *Basic Principles for the Treatment of Prisoners* (14 December 1990) UN Doc. A/RES/45/111.

In aiming to “reform” the individual,⁵³ rehabilitation is also linked to morally educating the offender, although the moral education theory is more interested in sending a message to the convicted individual that their actions were morally reprehensible.⁵⁴ In treating the offender, rehabilitation is aimed at returning the criminal to society with “a new set of values and morals and a desire to contribute to society,” respecting its norms.⁵⁵ The focus is on the individual offender, for his/her own sake, as well as that of the society to which s/he will return; if successful, rehabilitation has an impact both on the offender and the society to which s/he returns, as s/he reintegrates society no longer posing a threat.⁵⁶ As such, rehabilitation is connected to the maintenance of security and peaceful coexistence in a society and, where appropriate, reconciliation between parties.

Overall, in sections 1.1 and 1.2, I have contended that criminal law and justice are based on common values of a particular society or polity and the protection of these values through the imposition and enforcement of punishment. Without these common values, many of the above-discussed justifications for punishment would lose their meaning. Thus, retribution as a justification for punishment, with its focus on official censure and communication is only effective if it is linked to a particular society or polity that share common values. Similarly, the meaning and significance of rehabilitation will depend on the society in question and implies there is a society to reintegrate into upon release. Moreover, I have argued that whilst there are different backward- and forward-looking justifications for punishment, both feed into the macro-level objectives of criminal law and justice to maintain peace and social order in a society, whether through norm projection role or rehabilitation efforts. Indeed, as punishment serves to assert the norms of a society and provide for a penalty to those disregarding them, where a society fails to punish an individual disrespecting the society’s norm can “breed disrespect for the law.”⁵⁷ Sentences, thus, are an important aspect of how criminal law and justice intend to achieve their macro-level objectives.

Having discussed the macro- and micro-level objectives of domestic criminal law and justice and sentences, on which ICL and ICJ are based, I next consider how these justifications can be directly applied to the international arena.

⁵³ Sloane (n 44) 48.

⁵⁴ Hampton, ‘The Moral Education Theory of Punishment’ (n 30).

⁵⁵ Joel Meyer, ‘Reflections on Some Theories of Punishment’ (1968) 59(4) *Journal of Criminal Law and Criminology* 595, 597.

⁵⁶ Hart Jr (n 9) 437.

⁵⁷ Berman (n 40) 146.

2. International criminal justice

Much the same as in domestic criminal law and justice, there are acts identified as international crimes, the suspected commission of which can lead to prosecution. Whilst domestic criminal courts can try individuals for international crimes, recourse is sometimes made to international criminal court or tribunal. However, where domestic criminal justice systems are largely self-reliant with their own police force and prisons, ICTs have to rely on States to apprehend individuals, transfer them to their custody. International judges then try the individual(s), and once they render a sentence, the ICT once again relies on sovereign States to enforce the sentence. Following the same organisation as in section 1, section 2.1 considers the macro-level objectives of ICJ, before considering in section 2.2, the specific objectives of punishing individuals for international crimes: the micro-level objectives of ICJ.

2.1 Macro-level objectives of ICJ

ICJ is triggered as “the response of the international community – and other communities – to mass atrocity,”⁵⁸ and whilst a response to conflict that is now largely taken for granted,⁵⁹ it is a relatively new concept. Until 1945, it was unthinkable that an individual could be prosecuted by an ICT; previously only States were recognised as subjects of international law.⁶⁰ The international community previously turned not to criminal trials in response to mass atrocity, instead relying instead on “political and military force, treaties and diplomacy” to resolve matters.⁶¹ Notions such as international criminal law and justice can be traced back to the creation of the Nuremberg and Tokyo Trials, where the crimes committed during World War Two were so shocking and “extraordinarily violative of universal norms and of concern to humanity as a whole,”⁶² that the Allied Powers, acting on behalf of the international community, conducted the first international criminal prosecutions of individuals.⁶³ The main incentive for

⁵⁸ Gideon Boas, ‘What is International Criminal Justice?’, in Gideon Boas, William A Schabas and Michael P Scharf (eds), *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar Publishing 2012) 1.

⁵⁹ José E Alvarez, ‘Crimes of States/Crimes of Hate: Lessons from Rwanda (1999) 24 Yale Journal of International Law 365, 365-366; Guénaël Mettraux, ‘Judicial Inheritance: The Value and Significance of the Nuremberg Trial to Contemporary War Crimes Tribunals’ in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008) 601.

⁶⁰ Zolo (n 1) 21.

⁶¹ *ibid* 22 and ix; M Cherif Bassiouni (ed), *International Criminal Law: Sources, Subjects and Content* (3rd edn, Martinus Nijhoff Publishers 2008) 41.

⁶² Mark A Drumbl, ‘A Hard Look at the Soft Theory of International Criminal Law’, in Leila Nadya Sadat and Michael P Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008) 3 citing Kenneth J Campbell, *Genocide and the Global Village* (Palgrave Macmillan 2001) 28.

⁶³ Nuremberg Military Tribunal: United Nations, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (8 August 1945) 82 United Nations Treaty Series 280; and United Nations,

these international tribunals was the fear that if it were left to sovereign States to prosecute these individuals, they would never be held accountable.⁶⁴ This is one of its biggest challenges because rather than being “created immanently as the realization of an ideal of justice,” ICJ is a reactive system triggered when there is no viable national alternative, developed to react to the failure of individual States to prosecute offenders.⁶⁵ Such recourse to ICJ can also be made to underscore condemnation of the crimes committed, not by a single State but a number of like-minded States that make up the international community, thereby enhancing the stigmatisation of the individuals concerned and their crimes on the world stage.

ICJ, like its domestic counterpart, relies on a set of norms (the criminal law) to give it substance; ICJ enforces ICL by rendering justice and punishing individuals for its breach. Although international tribunals such as the Nuremberg and Tokyo Tribunals for example, reflect the emergence of ICL as a discipline in its own right,⁶⁶ its origin and development is best explained as a fusion of two legal disciplines: domestic criminal law and public international law.⁶⁷ This state of affairs has given ICL “a split personality,”⁶⁸ which, along with the requirement to be both flexible (in terms of adaptability to different national contexts and developing/changing social values) and predictable creates a paradox. Added to this, ICL has the difficulty of lacking a common legislative body, which means that it has a strong reliance on the consent of sovereign States, to both delineate the norms that constitute ICL and decide whether ICJ is exercised.

The concept of individual responsibility in ICL is derived from domestic criminal law (by which ICJ avoids assigning guilt to a community or society),⁶⁹ whilst the offences recognised as international crimes are drawn from the norms of public international law which express the key values of the international community of States.⁷⁰ However, where domestic criminal law

Charter of the International Military Tribunal for the Far East (19 January 1946) *Treaties and Other International Acts Series* 1589.

⁶⁴ Zolo (n 1) 153; Theodor Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’ (2006) 100(3) *AJIL* 551, 554; Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (CUP 2014) 29.

⁶⁵ Frédéric Mégret, ‘The Anxieties of International Criminal Justice’ (2016) 29(1) *LJIL* 197, 201-202.

⁶⁶ Christine EJ Schwobel, ‘The Comfort of International Criminal Law’ (2013) 24 *Law Critique* 169, 169-170.

⁶⁷ Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan and Christopher Gosnell, *Cassese’s International Criminal Law* (OUP 2013) 7; M Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code* (Sijthoff & Noordhoff International Publishers 1980) 2.

⁶⁸ *ibid* Bassiouni 19; M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1996) 90.

⁶⁹ Michael P Scharf and Paul R Williams, ‘Functions of Justice and Anti Justice in the Peace- Building Process’ (2003) 35(2) *Case Western Journal of International Law* 161, 170.

⁷⁰ Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part* (n 4) 55.

aims to manage crime in a particular State, ICL aims to tackle the commission of *international* crimes in one or more States, simultaneously making its subject matter narrower and its aims more ambitious.⁷¹ International crimes are described as “endangering or violating the values and interests of a macro-society,” which ICJ serves to protect.⁷² Much the same as with domestic criminal law, this means there must be shared values and interests which justify the duty to prosecute and punish criminals before an ICT.⁷³

The direct applicability of ICL to individuals (rather than States) and its basis on domestic criminal law and international law, puts the exercise of ICL in a difficult balancing position and makes it fundamental to its success to define who the law is intended to serve.⁷⁴ This is an important exercise for a body of law that is intended to reinforce social solidarity; whilst domestic criminal justice systems are accountable to the relevant society, to whom is ICJ accountable? Compared to a domestic criminal justice system, which has the advantage of serving a single society (albeit not necessarily a particularly unified one) or polity (where the law is intended to serve several societies), ICJ has to deal with a much more disparate community. As a body of law established and developed by the international community, the primarily stakeholder of ICJ is the international community.

The concept of an international community is not specific to ICJ, but it is a particularly contentious one in this area of the law, in view of a given society’s attempt to remedy common problems. The composition of the international community can change over time,⁷⁵ therefore making the concept inherently dynamic. Our understanding of the international community, and the term community is a culturally sensitive one. The term international community remains elusive and contentious,⁷⁶ and it is outside the scope of this chapter to delve into the many questions it raises. Nevertheless, there would be little point in denying the existence of some form of international community, particularly as ICTs depend normatively upon the assumption that an international community exists in order to claim legitimacy. Thus, examples of the group invoked by the ‘international community’ label might include the 193 Member

⁷¹ Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 LJIL 925, 944.

⁷² D’Ascoli (n 19) 61; Otto Triffterer, ‘The Preventive and Repressive Functions of the ICC’ in Mauro Politi and Giuseppe Nesi, *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot Ashgate 2001) 154.

⁷³ Thomas Margueritte, ‘International Criminal Law and Human Rights’ in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 435.

⁷⁴ Frédéric Mégret, ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’ (n 8) 742.

⁷⁵ Mégret, ‘The Anxieties of International Criminal Justice’ (n 65) 206.

⁷⁶ Immi Tallgren, ‘The Voice of the International: Who is Speaking?’ (2015) 13 JICJ 135, 146.

States of the United Nations⁷⁷ or the 123 members of the Assembly of States Parties to the International Criminal Court (which I discuss in Chapter II).⁷⁸

Where the United Nations is understood as representing the international community, the States composing it are united around the values enunciated in the Charter of the United Nations.⁷⁹

According to Article 1 of the Charter of the United Nations, the organisation's function is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁸⁰

It is thus the maintenance of global peace and security which mainly engages the international community and forms the values which guide the community in deciding whether to make recourse to ICJ. In contrast, I have argued above that domestic criminal justice's purpose is to maintain peace and security in a State. In the international arena, as ICJ is a response to mass conflict, it has the additional objectives of "telling of the history of a conflict, distinguishing individual from group responsibility, reconciling societies and capacity building in domestic judicial systems"⁸¹ and "giving victims a voice."⁸² Moreover, the concern with protecting the peace and security of nations and humanity itself through individual criminal responsibility and criminal trials⁸³ intricately links justice to reconciliation since both justice and

⁷⁷ Full list of United Nations Member States available on the United Nations website <<http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html>> accessed 31 May 2021.

⁷⁸ Full list of States Parties to the Rome Statute are available on the International Criminal Court's website <https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 31 May 2021.

⁷⁹ Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff Publishers 2009). Where the Assembly of States Parties to the International Criminal Court is understood as representing the international community, the values uniting the different States is in the Rome Statute of the International Criminal Court, which largely mirror those of the UN Charter and to which I turn in the following chapter.

⁸⁰ Charter of the United Nations (24 October 1945) 1 UNTS XVI.

⁸¹ Cryer, Friman, Robinson and Wilmschurst (n 64) 29, citing Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *Modern Law Review* 1, 6-7.

⁸² David Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law' in Besson S and Tasioulas J (eds), *The Philosophy of International Law* (OUP 2010) 575; Bert Swart, 'Damaška and the Faces of International Criminal Justice' (2008) 6 *JICJ* 87, 100; Sander (n 49) 236 and 265.

⁸³ D'Ascoli (n 19) 57.

reconciliation are essential to sustainable peace.⁸⁴ Accordingly, the values and objectives of ICL and ICJ both include those of domestic criminal law and justice, and exceed them.

Moreover, whilst ICJ's main objective is global peace and security, its existence is also closely connected to restoring peace and reconciliation for conflict-affected societies, as part of its aim of ensuring international peace and as it is a reactive system in response to mass conflict.⁸⁵ The emphasis on the international arena is thus on "fundamental individual and collective Rechtsgüter [legal goods],"⁸⁶ for humanity as a whole and conflict-affected societies⁸⁷ making its desired impact much broader than that of domestic criminal law. Thus, ICJ intends to have both an international and local impact, although the local impact is largely incidental and secondary to restoring and ensuring global peace and security. This is not dissimilar to domestic criminal law and justice, where the broader society and its values are the main concern of the State, and the direct victims and their reconciliatory needs a secondary preoccupation.

The existence of both international and local objectives for ICJ also has an impact on who its stakeholders are. Whilst the international community is a clear stakeholder, there would be no recourse to ICJ without harm to direct victims,⁸⁸ and local peace is essential to maintaining global peace, thereby making conflict-affected societies an important stakeholder group. Yet, much the same as domestic criminal justice incidentally might satisfy direct victims, without being directly concerned thereby, ICJ intends to have an incidental impact on victims and conflict-affected societies. The victims are not asked if they want ICJ in a given case and are not given an active role; instead, they are incidental beneficiaries or objects of justice as part of ICJ's aims for global peace and the fight against impunity. By extending international law to provide for the trial and punishment of individuals, the international community has made conflict-affected societies, victims and offenders *objects* rather than subjects. Nevertheless, where domestic criminal law and justice serve a specific society, ICJ serves the international community *and* conflict-affected societies; despite the lack of explicit recognition of conflict-

⁸⁴ I return to this argument in full in Chapter V. Donna Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace' (1999) 20 *Third World Quarterly* 239, 254.

⁸⁵ Stephanos Bibas and William W Burke-White, 'International Idealism Meets Domestic Criminal Procedure Realism' (2010) 59(4) *Duke Law Journal* 637, 652; Paul van Zyl, 'Promoting Transitional Justice in Post-Conflict Societies' in Alan Bryden and Heiner Hanggi (eds), *Security Governance in Post-conflict Peacebuilding* (Centre for the Democratic Control of Armed Forces 2005) 210-211.

⁸⁶ Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part* (n 4) 65-66.

⁸⁷ D'Ascoli (n 19) 57.

⁸⁸ Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 *Michigan Journal of International Law* 79, 85; D'Ascoli (n 19) 61 and 296.

affected societies, ICL and ICJ must also serve them in order to achieve their macro-level objectives. This poses a particular challenge for ICJ because, “justice must be rooted in a society and a culture, a need the international criminal tribunals do not appear to meet,” contrary to their domestic counterpart.⁸⁹ Accordingly, this makes it more difficult for ICJ to have an impact on a given society, from which it is inherently removed.

The multiplicity of objectives (global and local) and stakeholders of ICJ mean that whilst based on domestic criminal law and justice, ICJ is nonetheless distinct from its counterpart.⁹⁰ As well as the challenges inherent in serving two stakeholder groups, ICJ has the complex task of identifying victims. International crimes cause greater trauma than conventional domestic crimes for a much greater victim-group, with longer-lasting impact on individuals and the society, making the task of identification of victims both challenging and particularly important.⁹¹ Moreover, where domestic criminal law exists as “a product of continuity” of the society, “ICL is a product of discontinuity,” as it is resorted in response to mass conflict and upheaval.⁹² Its exogenous nature and reliance on State cooperation makes the exercise of ICJ a politically sensitive task, as well as one whose impact on the conflict-affected society(ies) is particularly important. In ICL, the expectations of victims and conflict-affected societies that justice will be rendered have to be balanced against those of the international community, as two distinct stakeholders. Having considered the theoretical values and stakeholders of ICJ, I next turn to consider the earliest examples of ICJ in practice, with the Nuremberg and Tokyo Tribunals, to see how these values were interpreted by the Tribunals.

⁸⁹ Mina Rauschenbach and Damien Scalia, ‘Victims and International Criminal Justice: A Vexed Question?’ (2008) 90(870) *International Review of the Red Cross* 441, 455 referring to Pierre Hazan, *La Justice Face à la Guerre: de Nuremberg à la Haye* (Stock Paris 2007).

⁹⁰ Bassiouni, *International Criminal Law: A Draft International Criminal Code* (n 67) 19.

⁹¹ Rauschenbach and Scalia (n 89) 450.

⁹² Luban (n 82) 574-575.

2.1.1 ICJ in practice: the Nuremberg and Tokyo Tribunals

Despite the significance of the theory of ICJ and ICL, it is irrelevant if not combined with an examination of ICJ in practice, to which the field primarily owes its growth.⁹³ In 1945, the United States of America, France, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics established an International Military Tribunal – the Nuremberg Tribunal.⁹⁴ Soon thereafter in 1946, the Supreme Commander for the Allied Powers, General Douglas MacArthur, proclaimed the establishment of the Military Tribunal for the Far East – the Tokyo Tribunal.⁹⁵

Nevertheless, the initial unwillingness to make individuals accountable under international criminal law, recognising them as subjects of ICL, was evident even in the aftermath of World War Two, with calls for those most responsible in the vanquished States be executed without trial.⁹⁶ In this respect, as these Tribunals “constituted the first legal foundation of international criminal responsibility,”⁹⁷ they were precursors to modern ICJ. It is only with the Nuremberg and Tokyo trials that the notion of individual criminal responsibility for international crimes successfully emerged, and with it ICL.⁹⁸ In focusing on individual criminal responsibility, the Nuremberg and Tokyo Tribunals avoided assigning collective responsibility for the crimes.⁹⁹ The reason behind the focus away from collective guilt is that collective responsibility of an entire society for the crimes of individuals feeds inter-group victimisation and blame, which is incompatible with peace and security as macro-level objectives of ICJ.¹⁰⁰ An important aspect of this is establishing a record of the past, which confronts and contradicts mass denial of the

⁹³ Sarah Nouwen, ‘International Criminal Law: Theory All Over the Place’ in Anne Orford and Florian Hoffmann, *The Oxford Handbook of the Theory of International Law* (OUP 2016) 738.

⁹⁴ United Nations, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (n 63).

⁹⁵ United Nations, *Charter of the International Military Tribunal for the Far East* (n 63) .

⁹⁶ Norman Silber and Geoffrey Miller, ‘Toward ‘Neutral Principles’ in the Law: Selections from the Oral History of Herbert Wechsler’ (1993) 93 *Columbia Law Review* 854, 895.

⁹⁷ Javier Dondé-Matute, ‘International Criminal Responsibility as a Founding Principle of International Criminal Law’ in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (TOAEP 2019) 140-141.

⁹⁸ Antonio Cassese, *International Law in a Divided World* (OUP 1986) 65; Meron (n 64) 552.

⁹⁹ Kerstin Carlson, ‘Challenging the International Criminal Justice Template: Failures in the Use of International Criminal Law as a Transitional Justice Mechanism’ (2016) *iCourts Working Paper* 42, 12; Elizabeth B Ludwin King, ‘Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures’ (2013) 45 *George Washington International Law Review* 85, 87.

¹⁰⁰ Yi Chao, ‘The Concept of International Criminal Responsibility for Individuals and the Foundational Transformation of International Law’ in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (TOAEP 2019) 100; André Nollkaemper, ‘Introduction’ in Harmen van der Wilt and André Nollkaemper (eds), *System Criminality in International Law* (CUP 2009) 11–12.

crimes committed, something that is often prevalent in the aftermath of mass violence.¹⁰¹ The “received wisdom” of the Nuremberg Trials is that a widely-accepted narrative of the conflict helps to reconcile and unify conflict-affected societies.¹⁰²

Nevertheless, the Tribunals were problematic for a number of reasons, including for trying individuals for violations of *ex post facto* law¹⁰³ and as a clear example of victor’s justice with only individuals of the losing side of the war being tried (the conduct of Allied forces was not questioned).¹⁰⁴ The Tribunals have not only been criticised for trying individuals from one side of the war and for acts which were not crimes at the time they were committed, but also for the manner in which trials were conducted.¹⁰⁵ The judiciary in these Tribunals consisted “exclusively of representatives of victorious States directly affected by the crimes” over which this tribunal had jurisdiction,” thereby making the victors “not only legislators but also judges in their own cause.”¹⁰⁶

Moreover, when establishing the Nuremberg and Tokyo Tribunals, and in conducting the trials, there was no “consultation with stakeholders”; the Tribunals were imposed, with limited inclusion of victims.¹⁰⁷ Many victims were precluded from participating in the trials and those establishing the Tribunals appropriated the harm as affecting all of humanity, as well as the victims, in much the same manner as domestic courts of law prosecute on behalf of the national society. As such, victims were objects or incidental beneficiaries rather than actors. In fact, victims were not considered even as witnesses, partly due to the existence of a “staggering volume of materials available to the prosecution” which meant witness testimony was largely unnecessary.¹⁰⁸ Whilst many victims shared the understanding that criminal justice was a “prerequisite to peace,” the views of the different victims and their expectations of justice compared with those establishing the Tribunals did not necessarily coincide.¹⁰⁹ Similarly, the

¹⁰¹ Galbraith (n 88) 88; Luban (n 82) 575.

¹⁰² Carlson (n 99) 13.

¹⁰³ Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (1947) 1 *International Law Quarterly* 153, 164.

¹⁰⁴ *ibid* 170; Mark A Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 111.

¹⁰⁵ Christoph Burchard, 'The Nuremberg Trial and its Impact on Germany' (2006) 4 *JICJ* 800.

¹⁰⁶ Kelsen (n 103) 170-171.

¹⁰⁷ Vasuki Nesiah, 'Local Ownership of Global Governance' (2016) 14 *JICJ* 985, 987; Sandra Wilson, 'The Sentence is Only Half the Story: from Stern Justice to Clemency for Japanese War Criminals 1945-1958' (2015) 13 *JICJ* 745, 748.

¹⁰⁸ Meron (n 64) 551-560; Furuya Shuichi, 'Victim Participation, Reparations and Reintegration as Historical Building Blocks of International Criminal Law' in Morten Bergsmo, Wui Ling Cheah, Tianying Song and Ping Yi (eds), *Historical Origins of International Criminal Law* (vol. 4) (TOAEP 2015) 839.

¹⁰⁹ Zolo (n 1) 153; Drumbl, *Atrocity, Punishment and International Law* (n 104) 3.

individual offenders were only recognised as objects of ICL because it was necessary to prosecute them in order to protect humanity's values.¹¹⁰

Imposing retributive justice on a specific side of the conflict as in the case of the Nuremberg and Tokyo Tribunals, without recognition of the societies to which the offenders belonged or including a wide range of victims, had a consequence on how the Tribunals' work was received. The Nuremberg Tribunal faced widespread criticism locally both at the time and subsequently, with a clear divide between how East and West Germany accepted its work.¹¹¹ In Japan, the individuals convicted and punished by the Tokyo Tribunal are commemorated by the Japanese Government to this day; there is no local recognition for the Tribunal's work because it was a foreign court with little understanding of justice on the ground. There was a complete lack of local ownership, which in turn means the Tribunals were not able to achieve their macro-level objectives of having a local impact. Accordingly, these Tribunals illustrate ICJ in early practice, with the States establishing the Tribunals motivated by objectives such as those discussed in section 2.1 above. These Tribunals also demonstrate the challenge of an international criminal court having a local impact, where it fails to consider all of its stakeholders. In order to learn a lesson from these tribunals for the future of ICJ, the international community has to recognise the conflict-affected society and victims, especially because global peace and security rely on healing inter-and intra-societal frictions: the eruption of violence locally endangers international peace and security.

Having considered the response of the international community to mass atrocities in theory and practice with the Nuremberg and Tokyo Tribunals, I turn to consider the purposes of ICL's "most obvious" function through which it hopes to achieve its macro-level objectives – the punishment of offenders.¹¹²

2.2 Micro-level objectives of international punishment

As ICJ is based on retributive justice and the punishment of offenders, the most important legacy of an ICT is the punishment it imposes – its sentences.¹¹³ Accordingly, this area of the

¹¹⁰ Alexander Orakhelashvili, 'The Position of the Individual in International Law' (2000) 31(2) California Western International Law Journal 241, 269.

¹¹¹ Burchard (n 105).

¹¹² Jens David Ohlin, 'Goals of International Criminal Justice and International Criminal Procedure' in Göran Sluiter, Hakan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappala (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 59.

¹¹³ D'Ascoli (n 19) 40.

work of ICTs has garnered increasing interest,¹¹⁴ in view of the importance of imposing and enforcing punishment for violations of ICL, to both the international community and conflict-affected societies.¹¹⁵ Section 2.2.1 below firstly considers the objectives behind international sentencing, before considering in section 2.2.2, the purposes behind enforcement thereof. In this regard, I also consider the sentences rendered at the Nuremberg and Tokyo Tribunals, as examples of international punishment in practice.

2.2.1 Objectives of international sentencing

Just as ICL is based on domestic criminal law, the justifications for punishing an individual and the types of sentences imposed are similarly based on domestic penology. As ICL is a reactive body of law, and in view of the underdeveloped nature of international penology, in order to understand the objectives of international sentencing, it is important to look at the types of sentences that have been rendered and the explanations given therefor. Accordingly, I consider the objectives behind the sentences of the Nuremberg and Tokyo Tribunals. These Tribunals rendered sentences ranging from one year of imprisonment to life imprisonment without possibility of release, as well as imposing the death penalty on offenders.¹¹⁶ Although the types of sentences imposed at the Nuremberg and Tokyo Tribunals mean that their sentencing practices are no longer as relevant to modern international penal practice,¹¹⁷ these judgments nevertheless demonstrated some penal objectives that are particularly germane to the international context.¹¹⁸

As the first of its kind, the Tribunals had no guiding principles for punishing the individuals they found guilty, instead leaving it entirely to the discretion of the judiciary. Unfortunately, the Tribunals rendered very few sentences for war crimes or crimes against humanity to be scrutinised, and these provided no penal justifications.¹¹⁹ The judgments span thousands of pages, but their sentencing provisions were characterised by vagueness;¹²⁰ with the judiciary

¹¹⁴ For example, see Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP 2003); Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals* (T.M.C. Asser Press 2012); Barbora Holá and Joris van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview' (2014) 12 JICJ 109.

¹¹⁵ Róisín Mulgrew, *Towards the Development of the International Penal System* (CUP 2013) 22.

¹¹⁶ Grant Niemann, 'International Criminal Law Sentencing Objectives' in Willem de Lint, Marinella Marmo and Nerida Chazal (eds), *Criminal Justice in International Society* (Routledge 2014) 136.

¹¹⁷ As Chapter 2 demonstrates, the international community has developed ICJ and ICL such that the rights of the offenders are respected, trials remain fair, and the death penalty is no longer an impossible sentence.

¹¹⁸ Luban (n 82) 575.

¹¹⁹ Jan Cristoph Nemitz, 'Jan Philipp Book, *Appeal and Sentence in International Criminal Law*' (2013) 11 (1) JICJ 282.

¹²⁰ D'Ascoli (n 19) 11.

handing out sentences “in terse one-line declarations, with little or no explanation of the bases for the distinctions between the various sentences.”¹²¹

The purposes of punishment proceeded from what was essentially a “retributivist impulse,”¹²² replacing the need for private revenge by direct victims with a process of individualised guilt.¹²³ The emphasis on retribution is unsurprising as the seriousness of international crimes and their effect on the communities in which they occur make it reasonable to think that the justification for punishing individuals responsible for these crimes is especially strong.¹²⁴ The scale of international crimes “calls for intuitive-moralistic answers” and the punishment of guilty individuals,¹²⁵ making retribution the most obvious justification for punishment at the international level. Nevertheless, this does not mean equating retribution to revenge (much the same as at the domestic level discussed in section 1.2 above). Retribution in the international arena is particularly significant in its potential to provide censure and stigmatisation and reinforce international norms.¹²⁶ The role of stigmatisation is particularly strong in ICJ because retribution as a punishment objective in the international arena expresses the outrage of a number of States, the international community,¹²⁷ thereby giving punishment a broader social value.¹²⁸ The punishment imposed at the Nuremberg and Tokyo Tribunals demonstrated international stigmatisation in practice, conveying a message that the acts of the convicted defendants were contrary to the values of humanity.¹²⁹

As suggested in the above subsection, the Nuremberg and Tokyo Tribunals were established to ensure that such crimes would happen “never again,”¹³⁰ thereby linking the Tribunals and the punishment they imposed to general deterrence. The Nuremberg and Tokyo Tribunals made no references to rehabilitation as a penal objective, perhaps because the Tribunals often made

¹²¹ Alison Marston Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 87 *Virginia Law Review* 415, 418.

¹²² Sloane (n 44) 67; William A Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’ (1997) 7 *Duke Journal of Comparative and International Law* 461, 500.

¹²³ Judith Shklar, *Legalism: Law, Morals and Political Trials* (Harvard University Press 1964) 158.

¹²⁴ Deirdre Golash, ‘The Justification of Punishment in the International Context’ in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (CUP 2009) 201-202.

¹²⁵ Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (n 7) 564; Mark J Osiel, ‘Why Prosecute? Critics of Punishment for Mass Atrocity’ (2000) 22(1) *HRQ* 118, 118.

¹²⁶ Luban (n 82) 576; Cryer, Friman, Robinson and Wilmschurst (n 64) 17.

¹²⁷ David Garland, *Punishment in Modern Society: A Study in Social Theory* (University of Chicago Press 1990) 232.

¹²⁸ D’Ascoli (n 19) 295; Meijers and Glasius (n 18); Sander (n 49) 235; Golash (n 124) 219.

¹²⁹ Amann (n 30) 121.

¹³⁰ Meron (n 64) 554; Tove Rose (ed), ‘The Influence of the Nuremberg Trial on International Criminal Law’ <<https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/>> accessed 31 May 2021.

recourse to the death penalty. Nevertheless, rehabilitation could be an important objective in ICJ as it aims to reform the offender and return them to society with new values that respect the norms of the society and do not undermine its peaceful coexistence and security (as I discussed in section 1.2 above), which is particularly germane in a conflict situation.¹³¹ Where an individual is rehabilitated, they return to society no longer posing a danger to its peace process.¹³² It could be an important micro-level objective of ICJ for the offender, the victim and the broader conflict-affected society, as returning a criminal who does not recognise and repent for their crimes potentially exacerbates the tensions present in a conflict-affected society. Rehabilitation then is significant in avoiding the resurgence of conflict. In this regard, since the Nuremberg and Tokyo Tribunals, the lack of reference to rehabilitation is no longer acceptable, in view of Article 10(3) of the International Covenant on Civil and Political Rights, which provides that “reformation and social rehabilitation” of the offender are to be understood as objectives of imprisonment.¹³³ As I discuss in Chapter II, rehabilitation has gained importance in ICJ, perhaps partly because of this international recognition of rehabilitation and the fact that ICJ and the punishment it imposes must be “exemplary” to serve as an example to nation States.¹³⁴

At the same time, each of these domestic justifications for punishment can be challenging when applied to international sentencing. Thus, despite its significance at the international level, retribution is not unproblematic when borrowed from the domestic context, because retribution “presuppose[s] a more coherent, univocal, and stable community than international law offers.”¹³⁵ Indeed, as ICJ has to serve both global and local interests, the international community and relevant conflict-affected societies as their key stakeholders, whose norms and values may well not coincide, making norm projection and stigmatisation a challenging endeavour. Similarly, applying deterrence as a domestic penal objective to international punishment can be problematic, because deterrence implies that the individual has a moral

¹³¹ Schabas (n 122) 503; Denis Abels, ‘Limiting the Objectives of the Enforcement of International Punishment’ in Róisín Mulgrew, *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016) 256.

¹³² William A Schabas, ‘Balancing the Rights of the Accused with the Imperatives of Accountability’ in Ramesh Thakur and Peter Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004) 161

<<https://collections.unu.edu/eserv/UNU:2447/pdf9789280811001.pdf>> accessed 31 May 2021.

¹³³ The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 10(3) provides that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

¹³⁴ Zolo (n 1) 154.

¹³⁵ Sloane (n 44) 77-78.

choice or freedom, which is either limited or even non-existent in the case of a state of war.¹³⁶ This is true despite the fact that ICJ is intended to be concerned primarily with the highest-ranking perpetrators, the so-called ‘big fish’. Few would be above receiving superior orders. The difficulty inherent in applying deterrence as a penal justification at the international level also extends to rehabilitation. In the case of most internationally convicted individuals, the same circumstances that led to the crimes (the conflict) are not likely to reoccur making it unlikely that the individual will reoffend whether rehabilitated or not.¹³⁷ Similarly, rehabilitation for the sake of reintegration into society implies having a society to return to,¹³⁸ and this may not be the case for international criminals who cannot return to their community.¹³⁹ Even in instances where they can, it is debatable to what extent ICJ can rehabilitate offenders who serve their sentence in different prisons across numerous States; prisons which may be ill-equipped to handle the type of criminals in question –usually successful members of society, sometimes overeducated and high-ranking in society, whose crimes are particularly atrocious and ideologically driven.

Nevertheless, despite the contentious nature of applying rehabilitation to international offenders in view of the unlikelihood of reoffending, rehabilitation can also be exemplified in other ways, including by denouncing war rhetoric, refraining from spreading the same ideologies that led to or exacerbated the conflict, and instead contributing to a peaceful conflict-affected society with a new set of ideals. Although beyond the parameters of this thesis, this does raise the question of how rehabilitation can be put into place in the context of mass atrocity; how can a *génocidaire* be rehabilitated?

Overall, from this discussion it is evident that the imposition of international sentences is justified on several grounds, relying heavily on domestic punishment objectives. Nevertheless, whilst domestic penal objectives are relevant to international sentences, I have outlined the inherent difficulties of aiming to deter and rehabilitate international offenders and provide

¹³⁶ Payam Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) 95 AJIL 7, 11.

¹³⁷ Niemann (116) 142.

¹³⁸ Pat Carlen, ‘Against Rehabilitation; For Reparative Justice’ in Kerry Carrington, Matthew Ball, Erin O’Brien and Juan Tauri (eds), *Crime, Justice and Social Democracy: International Perspectives* (Palgrave Macmillan 2013) 89-105.

¹³⁹ Gert Vermeulen and Eveline De Wree, *Offender Reintegration and Rehabilitation as a Component of International Criminal Justice? Execution of Sentences at the Level of International Tribunals and Courts: Moving Beyond the Mere Protection of Procedural Rights and Minimal Fundamental Interests?* (Maklu 2014) 89-90.

retribution for their victims. This discussion of rehabilitation in particular, connected as it is to the conditions of imprisonment, leads me to consider the objectives of enforcing sentences.

2.2.2 Objectives of enforcement of international sentences

I argued in section 1 above that domestic sentence would have little ability to stigmatise, deter, incapacitate or rehabilitate without enforcement thereof. This is even more so the case with ICJ, which deals with particularly heinous crimes that affect entire societies. Where international sentences are imposed but not enforced, the individual offender would return to the conflict-affected society or at least return to a society immediately upon conviction, having served no punishment.¹⁴⁰ The message sent by the international community would be that it does not take violations of ICL very seriously, making condemnation rhetorical. Yet, despite being an integral part of the punishment of international criminals, enforcement is a largely forgotten arena of an ICT's work.

In the case of the Nuremberg and Tokyo Tribunals, the enforcement of the sentence (including the conditions of a sentence of imprisonment and release) was often an afterthought.¹⁴¹ The persons convicted, if not hanged, served their sentences in the countries where the crimes were committed, in prison facilities that were not overseen by the Tribunals.¹⁴² Enforcement was not part of the Tribunals' mandate. Little is known of these criminals' imprisonment and the objectives thereof, except that it involved "long periods of confinement in total exclusion from society and devoid of any penal goal."¹⁴³ A number of those convicted at the Nuremberg Trials were released before having served the entirety of their sentence¹⁴⁴ and in the case of the Tokyo Trials, all those persons serving sentences of imprisonment handed down by the Tokyo Trials were released and pardoned within a few years.¹⁴⁵ In so doing, the countries in question did not take into consideration the effect of the release on the victims,¹⁴⁶ seeing enforcement of

¹⁴⁰ *Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda* (Human Rights Center, University of California Berkeley and International Center for Transitional Justice 2005); Stephen Cody, Eric Stove, Mychelle Balthazard, Alexa Koenig, *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court* (Human Rights Center, University of California Berkeley 2015) 68.

¹⁴¹ Vermeulen and De Wree (n 139) 11.

¹⁴² *ibid* 11-12.

¹⁴³ Edgardo Rotman, 'The Influence of International Criminal Law on the Advancement of Prisoners' Rights' in PJP Tak and M Jedly (eds), *Prison Policy and Prisoners' Rights* (Wolf Legal Publishers: Nijmegen 2008) 135.

¹⁴⁴ Mary M Penrose, 'Spandau Revisited: The Question of Detention for International War Crimes' (2000) 16 *New York Law School Journal of Human Rights* 553, 565.

¹⁴⁵ *ibid*; Wilson (n 107) 752.

¹⁴⁶ Shuichi (n 108) 839.

sentences of imprisonment as a political exercise.¹⁴⁷ This further demonstrates how ICJ historically treated offenders as objects rather than subjects and a means to an end (notably, there was no individualised review of offenders to consider their release).¹⁴⁸

The way in which offenders were released also feeds into a bigger argument that the international community did not envisage sentence enforcement as particularly important, believing that the prosecution of individuals would be enough to achieve its macro-level objectives.¹⁴⁹ Most importantly, the fact that all remaining individuals convicted by the Tokyo Tribunal were released, demonstrates the “wide gulf between the apparently dominant view in Japan [...] that war criminals should be released and that on the whole they had been unjustly treated in the first place, and the general Western view that trial verdicts had been fair or even lenient.”¹⁵⁰ Their lack of ownership and the fact that the Tribunal was forced upon the society meant that the message was not internalised and once given an opportunity to rebuke its work, Japan placed considerable pressure on other States to release the prisoners.¹⁵¹ Some of those released subsequently went on to have leading roles in Japanese government, which “suggests that public opinion saw the imprisoned men not so much as criminals as victims of the vindictive Allies.”¹⁵² This state of affairs means the condemnation of the Tribunal intended in punishing the individuals was not successful, as they were welcomed back and commemorated. Essentially, the communities to whom the offenders belonged did not accept the message intended to be sent by the Tribunal – its censure and condemnation. This underscores the need for the micro-level objectives of punishment and in particular the enforcement of sentences, to feed into the macro-level objectives of ICJ, if these ambitious objectives are to be achievable.

Overall, this section has also demonstrated that much the same as in domestic criminal law and justice, international justifications for punishment are given meaning when based on a society. Ignoring the need for ICJ to recognise having multiple stakeholders, including local communities as well as the international community fails to grasp the potential impact of ICJ

¹⁴⁷ Jonathan H Choi, ‘Early Release in International Criminal Law’ (2014) 123(6) *The Yale Law Journal* 1784, 1791.

¹⁴⁸ Wilson (n 107) 753.

¹⁴⁹ *ibid* 753-754.

¹⁵⁰ *ibid* 756-757.

¹⁵¹ Sandra Wilson, ‘Clemency for War Criminals Convicted in the Tokyo Trials’ in Marina Aksenova, Diane Marie Amann, David Cohen, Robert Cribb, David M. Crowe, Donald M. Ferencz, Narrelle Morris, Diane Orentlicher, Kuniko Ozaki, Christoph Safferling, Franziska Seraphim, Gerry Simpson, Kayoko Takeda, Yuma Totani, Beatrice Trefalt and Sandra Wilson (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (TOAEP 2020) 361.

¹⁵² Meron (n 64) 562; R John Pritchard, ‘The International Military Tribunal for the Far East and its Contemporary Resonance’ (1995) 149 *Military Law Review* 25, 35.

on the conflict-affected societies. In the case of the Nuremberg and Tokyo Tribunals, the offenders served their sentences in these countries and stayed there upon release, and as such had an impact on the longer-term peace and stability of the country and the society's reckoning with the past. Japan is an example of a country which although stable and peaceful, has not reckoned with its past. The experience of the Nuremberg and Tokyo Tribunals demonstrate well the importance of considering local expectations of justice and how ICJ would promote global peace and security. In this regard, failing to consider the conflict-affected society comes at a cost, because where the work of ICJ is not accepted locally, it cannot have the broader objective intended.¹⁵³ The issue of internalising the work of ICJ and the importance thereof for ICTs' ability to achieve their objectives is a discussion I turn to next.

3. The question of ICJ's legitimacy

The above discussion has put into evidence the existence of a "fundamental dilemma" for ICJ, as they have to aim to achieve both their macro- and micro-level objectives, contribute to both global and local peace, and serve both the international community and conflict-affected societies.¹⁵⁴ The result of this "dilemma" is questioning of ICJ's legitimacy, a concept which in the context of institutions such as ICTs, means the right to exist, govern and judge the actions of individuals,¹⁵⁵ and is closely linked to ICTs' ability to achieve their objectives.¹⁵⁶ Rather than being "a constant," international institutional legitimacy is a dynamic concept that is subject to change,¹⁵⁷ which means that courts can have their legitimacy questioned at any time,

¹⁵³ Kristin Xueqin Wu, 'Experiences that Count: A Comparative Study of the ICTY and SCSL in Shaping the Image of Justice' (2013) 9(1) Utrecht Law Review 60.

¹⁵⁴ Margaret M deGuzman, 'The Global-Local Dilemma and the ICC's Legitimacy' in Harlan Grant Cohen, Nienke Grossman, Andreas Follesdal, Geir Ulfstein (eds), *Legitimacy and International Courts* (CUP 2018) 62-83; Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman, Geir Ulfstein, 'Legitimacy and International Courts – A Framework' in Harlan Grant Cohen, Nienke Grossman, Andreas Follesdal, Geir Ulfstein (eds), *Legitimacy and International Courts* (CUP 2018) 1.

¹⁵⁵ *ibid* deGuzman 64; David Beetham, *The Legitimation of Power* (Macmillan 1991); Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics and International Affairs* 405, 406; Daniel Bogdansky, 'Legitimacy in International Law and International Relations' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 324.

¹⁵⁶ Yuval Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' in Harlan Grant Cohen, Nienke Grossman, Andreas Follesdal, Geir Ulfstein (eds), *Legitimacy and International Courts* (CUP 2018) 156.

¹⁵⁷ Dane Imerman, 'Contested Legitimacy and Institutional Change: Unpacking the Dynamics of Institutional Legitimacy' (2018) 20 *International Studies Review* 74, 75; Jonas Tallberg and Michael Zurn, 'The Legitimacy and Legitimation of International Organizations: Introduction and Framework' (2019) *The Review of International* 581, 586.

even when already functioning for some time.¹⁵⁸ Different types of legitimacy exist, broadly fitting under the umbrella terms of normative and sociological legitimacy.

Normative legitimacy refers to a court's procedural and legal right to rule, setting out the "justifications for authority derived from either moral ('moral legitimacy') or legal norms ('legal legitimacy')." ¹⁵⁹ Whether an institution has legal legitimacy is an objective question because it relates to a court's legal and procedural rules that justify both its existence and exercise of power.¹⁶⁰ The normative legitimacy of an ICT comes from the authorities that establish them and the ICT's subsequent rules and procedures, essentially meaning that as long as it applies the law, it has normative legitimacy. Accordingly, ICTs' normative legitimacy comes from how they are established, whether they apply the law as stipulated in their Statutes and Rules of Procedure and Evidence, whether they ensure proceedings are fair and the sentences imposed reflect the culpability of the offender.¹⁶¹

The second type of legitimacy is sociological, which refers to the social acceptance of a court's authority; "the extent to which relevant audiences perceive an institution's authority to be justified;" it is a question of trust in the court.¹⁶² It is an empirical, relational and subjective question as to whether a court's stakeholders accept its authority and the decisions it takes.¹⁶³ Rather than being a question of whether a court is following its own procedural rules, sociological legitimacy focuses on whether the court's stakeholders view it and its actions as legitimate, including in the face of "unpopular decisions."¹⁶⁴ This is an important question because in order for justice to be achieved, it must also be seen to be achieved, and this requires being grounded in a society and a culture, which gives justice its meaning; there must be a sense of local ownership of justice if the society in question is to accept it. Indeed, connected

¹⁵⁸ Friederike Mieth, *Acceptance of International Criminal Justice: A Review* (International Nuremberg Principles Academy 2016) 4 <<https://www.nurembergacademy.org/resources/acceptance-online-platform/publications/online-edited-volume/>> accessed 31 May 2021; Nicholas Tsagourias, 'Cosmopolitan legitimacy and UN collective security' in Roland Pierik and Wouter Werner, *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 130.

¹⁵⁹ deGuzman, 'The Global-Local Dilemma and the ICC's Legitimacy' (n 154) 64.

¹⁶⁰ Mark A Pollack, 'The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence' in Harlan Grant Cohen, Nienke Grossman, Andreas Follesdal, Geir Ulfstein (eds), *Legitimacy and International Courts* (CUP 2018) 145; Bogdansky (n 155) 326-7.

¹⁶¹ Luban (n 82) 579.

¹⁶² Buchanan and O Keohane (n 155) 405.

¹⁶³ Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53(2) *International Organization* 379, 381.

¹⁶⁴ Daniel Bogdansky (n 155) 326-7; Pollack (n 159) 145.

as courts are to society and its values, “no accountability mechanism can be described as valid and just unless it gains a reasonable level of approval and acceptance from [...] victims.”¹⁶⁵

In the international context, whole communities are victims and these communities must accept an ICT’s work. As such, the conflict-affected society must be satisfied with “the legal measures taken to respond to their victimization” if ICJ is to succeed in contributing to peace and reconciliation through justice.¹⁶⁶ In other words, as a response to mass violence at a societal level, ICJ should “take into account the prevalent attitudes of the local population and the masses of victims in particular if it wants to avoid failure in terms of transition and transformation;”¹⁶⁷ that is, if ICJ is to achieve their macro-level objectives.¹⁶⁸ Acceptance marks a break between the divisions that led to the conflict and the future of the conflict-affected society, and unless an ICT can convince the conflict-affected society of the truth it establishes, it cannot project new norms or values. Accordingly, these courts’ ability to achieve their macro-level objectives hinges on ensuring they have sociological legitimacy, particularly among conflict-affected societies. The Tokyo Tribunal, discussed above, is an example of a court that lacked sociological legitimacy, evident in the way offenders were released and welcomed back by Japanese society.

Ideally, an institution such as an ICT would enjoy both normative and sociological legitimacy and could thus be said to have perfectly legitimate. Certainly, the two conceptualisations of legitimacy are intrinsically linked,¹⁶⁹ either because courts gain some of their sociological legitimacy by being normatively legitimate, or conversely, because normative legitimacy means little if not set in a particular (sociological) context.¹⁷⁰ However, it is important not to conflate the two. Whilst normative legitimacy is a relatively constant concept, as a question of whether a court is following a predetermined set of rules, sociological legitimacy is a more dynamic and interactive process, because it requires dialogue between the court and its stakeholders. Accordingly, there are degrees of sociological legitimacy. Whilst it is relatively

¹⁶⁵ Sam Garkawe, ‘The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of Victims of Gross Violations of Human Rights?’ (2003) 27 (2) Melbourne University Law Review 334, 335.

¹⁶⁶ Rauschenbach and Scalia (n 89) 455.

¹⁶⁷ Ernesto Kiza, Corene Rathgeber and Holger C Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims’ Attitudes towards Addressing Atrocities* (Max Planck Institute for Foreign and International Criminal Law: Hamburg 2006) 50.

¹⁶⁸ *ibid* 50; Yuval Shany, *Assessing the Effectiveness of ICTs* (OUP 2014) 151.

¹⁶⁹ deGuzman, ‘The Global-Local Dilemma and the ICC’s Legitimacy’ (n 154) 64.

¹⁷⁰ Andrew Hurrell, ‘Legitimacy and the Use of Force: Can the Circle be Squared?’ (2005) 31(1) *Review of International Studies* 15, 29; Jens Steffek, ‘Legitimization of International Governance’ (2003) 9(2) *European Journal of International Relations* 249, 263.

straightforward to assess whether a court acts in accordance with the law, and therefore, whether it enjoys normative legitimacy, it is a much more nuanced question whether the same court enjoys stakeholder acceptance, namely sociological legitimacy. For example, a court might well have normative legitimacy, whilst lacking a degree of sociological legitimacy because one or more of its stakeholders believes the court illegitimate, and do not share the court's normative goals.¹⁷¹

Indeed, an ICT, as a foreign institution, will often lack a certain degree of sociological legitimacy at least in the short term because, in focusing on establishing the truth of what happened in a given situation it questions certain internal narratives about those events.¹⁷² Undoubtedly, there will always be certain individuals or communities who refuse to accept the facts of the conflict as established by the court and will not believe it to be legitimate. This is particularly the case where the local political elites are not supportive of the court, and disseminate propaganda against it, making the skepticism on the part of at least some sections of the conflict-affected society more likely to persist.¹⁷³ Whilst short-term sociological legitimacy is certainly to be sought, it does not necessarily negatively impact upon long-term reconciliation efforts, because, as I have said, ICTs play a norm-setting role, particularly through punishment. One way of looking at this short-term lack of sociological legitimacy is that "it is the price to be paid for trying to break down internal narratives that are hindering reconciliation between groups."¹⁷⁴ This price is worth paying because if an ICT can alter narratives about the conflict, this will in turn build the basis for the reconciliation process because individuals would start to see each other in a different, more positive light.¹⁷⁵

Alongside the importance of ensuring sociological legitimacy, are the dangers of focusing on this type of legitimacy. Strategies aimed at promoting sociological legitimacy must not impact a court's fairness or normative legitimacy (for example, not following its own Rules of Procedure and Evidence, in an effort to enhance acceptance of the court).¹⁷⁶ A court should not

¹⁷¹ deGuzman, 'The Global-Local Dilemma and the ICC's Legitimacy' (n 154) 64.

¹⁷² Stuart Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms' (2012) 45 *Vanderbilt Journal of Transnational Law* 405, 476.

¹⁷³ This is a particular issue for the ICTY, as discussed in Marko Milanović, 'Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences' (2016) 47 *Georgetown Journal of International Law* 1321, 1370. I return to this point in Chapter III.

¹⁷⁴ Ford (n 172) 411.

¹⁷⁵ *ibid* 465-476. This is discussed in more detail in Chapter V.

¹⁷⁶ For an argument on the importance of maintain fair proceedings, see for example Joanna Nicholson, "'Too High', 'Too Low', or 'Just Fair Enough'? Finding Legitimacy Through the Accused's Right to a Fair Trial' (2019)

make a decision that would enhance its sociological legitimacy at the expense of affecting its legality, for example by choosing to prosecute (or not) a particular individual, or in deciding on the type and length of a sentence to impose upon the individual. Respect for the law is rightly expected of all courts of law, but this is even more so the case with ICTs that try individuals charged with the most heinous crimes. To ensure they remain courts of law, they must respect their normative legitimacy. Thus, courts must not confirm or pander to “inaccurate internal narratives about victimhood” because its truth-establishing role must be respected in order to enhance its macro-level objectives.¹⁷⁷ Moreover, were it to cater to false narratives, it would be counterproductive and make reconciliation for the conflict-affected society less attainable by feeding local senses of collective victimisation.¹⁷⁸ Instead, ICTs must ensure they maintain sociological legitimacy by undertaking different initiatives to fit with the dynamic nature of sociological legitimacy, whilst not acting in a way which undermines their normative legitimacy. By ensuring they always have a degree of sociological legitimacy, ICTs would be maximising their ability to achieve their macro-level objectives.

Conclusion

ICJ began with the Nuremberg and Tokyo Tribunals. These tribunals and the theory of ICL more broadly, have borrowed greatly from domestic criminal law: from defining the purposes of ICL to justifying the imposition of international punishment through sentencing. ICL has a role similar to that of domestic criminal law, to render justice, protect the values of the society it serves and ensure peaceful coexistence. For domestic criminal law, the society in question is evident. In the international arena, criminal law and justice take on greater responsibilities with the important additional mandate to protect global peace and security, contribute to peace and reconciliation for the conflict-affected society and provide victims with retribution. This in turn requires ICJ to recognise two stakeholders: the international community and conflict-affected societies.¹⁷⁹ The Nuremberg and Tokyo Tribunals failed in this regard, by failing to recognise conflict-affected societies or even a wide range of victims.

17 JICJ 351; Mirjan R Damaška, ‘What is the Point of International Criminal Justice?’ (2008) 83 Chicago Kent Law Review 329.

¹⁷⁷ Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori and Ayelet Gundar, ‘A sense of self perceived collective victimhood in intractable conflicts’ (2009) 91(874) International Review of the Red Cross 229, 230; Ford (n 172) 465-466.

¹⁷⁸ *ibid*; Shany, ‘Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions’ (n 156) 371.

¹⁷⁹ Cassese, ‘Reflections on International Criminal Justice’ (n 81); D’Ascoli (n 19) 57.

I have contended that domestic penal objectives – retribution, deterrence, incapacitation and rehabilitation - form the basis for international sentences, albeit posing specific challenges when transferred to the international arena. Nevertheless, penal objectives intend to contribute to the broader macro-level objectives of both domestic and international criminal law and justice, by expressing society’s outrage and condemnation, norm projection, restoring peace and stability through incapacitation and reforming offenders so they return to society with new values. Many of these penal objectives underscore the need for recognition of conflict-affected societies in order to give punishment and its objectives meaning. It is the values of society (whether a single society in domestic criminal law and justice or the international community and conflict-affected societies in ICL and ICJ) that shape the type and length of sentence, and the meaning of censure for example. At the international level, this means that ICTs must consider a multiplicity of peoples in its sentencing practices as well, serving both domestic and international audiences.¹⁸⁰ The Nuremberg and Tokyo Tribunals have demonstrated the negative consequences of ignoring the conflict-affected society: lack of acceptance of the criminal justice process and punishment in particular and with it, a lack of impact on the ground. Accordingly, section 3 of this chapter considered the meaning of legitimacy of an ICT, which can be both normative and sociological. In particular, I have emphasised the significance of sociological legitimacy for ICTs, evident in the existence of local acceptance of ICTs and their sentences even where they make unpopular decisions, which is crucial to ensuring ICTs achieve their macro-level objectives relating to local peace and security.

After the Nuremberg and Tokyo Tribunals, ICL stalled, only to “resurface”¹⁸¹ with the creation of more modern examples of ICJ, to which discussion turns in the following chapter.

¹⁸⁰ Shany, *Assessing the Effectiveness of ICTs* (n 168) 240; Mégret, ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’ (n 8) 742.

¹⁸¹ Robert Cryer, ‘The Philosophy of International Criminal Law’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing 2011) 238.

CHAPTER II - Modern international criminal justice: aims, stakeholders and legitimacy

Introduction

ICJ has developed exponentially since the first international criminal trials discussed in Chapter I, starting with the establishment of two *ad hoc* international criminal tribunals in the 1990s and subsequently the adoption of a treaty to create a permanent international criminal court. This chapter builds on the preceding discussion and considers how modern ICTs have interpreted the theoretical values underpinning ICJ and its early practice following World War Two. Specifically, I examine whether modern ICTs have learnt the lessons of their predecessors by acknowledging conflict-affected societies among their stakeholders and the impact that they must have on local peace and reconciliation, as part of their aim to restore global peace and security.

Accordingly, in section 1 of this chapter I firstly consider the macro-level objectives and stakeholders of the two *ad hoc* international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda,¹ and the International Criminal Court. Section 1 posits that modern ICTs have acknowledged the need to contribute to local peace and reconciliation, and, in this respect, have recognised the relevant conflict-affected societies as a stakeholder of ICJ to whom they are accountable, compared to their predecessors in Nuremberg and Tokyo. Section 2 focuses on these courts' micro-level objectives specifically in punishing convicted individuals. In particular, this section analyses whether modern ICTs have recognised that their micro-level objectives of imposing sentences and enforcement thereof must align with the macro-level objectives of these courts. Finally, as I argued in the previous chapter that acceptance of a court's work is primordial if it is to achieve its macro-level objectives, section 3 considers how ICTs have tackled the question of sociological legitimacy, and the efforts they have made to enhance this type of legitimacy. This talk of sociological legitimacy will set the basis for an empirical assessment thereof in Chapter III.

¹ Where appropriate, reference is made to the International Residual Mechanism for Criminal Tribunals (hereinafter 'the Mechanism'), which is mandated to continue the work of the ICTR and ICTY from 1 July 2012 and 1 July 2013, respectively.

1. Macro-level objectives of the *ad hoc* tribunals and the ICC

Despite the belief that resorting to ICJ in the aftermath of World War Two would ensure such crimes were never committed again, the early 1990s have been called “the age of genocide.”² This caused the reawakening of ICL and the proliferation of criminal justice as a response, at the international, hybrid and domestic levels. The turn to ICTs since the early 1990s has led to questions about what the international community is trying to achieve with these courts; what lessons they have learnt from the Nuremberg and Tokyo Tribunals; and whether they are more successful than their predecessors. In this section, I discuss the macro-level objectives of modern ICTs. As the *ad hoc* tribunals and the ICC were established using different mechanisms, I discuss them separately, with section 1.1 focusing on the *ad hoc* tribunals and section 1.2 turning to the objectives of establishing the International Criminal Court.

1.1 *The ad hoc international criminal tribunals*

On 25 May 1993, the Security Council used its authority under Chapter VII of the United Nations Charter for the first time - “to maintain and restore international peace and security”³ - and passed Resolution 827 establishing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Just over a year later, acting under the same authority, the Security Council passed Resolution 955 establishing the “International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.”⁴

According to Resolution 827, the ICTY was established to prosecute individuals responsible for violations of international humanitarian law in the former Yugoslavia, between 1991 and “a date to be determined by the Security Council upon the restoration of peace.”⁵ In establishing the ICTY, the Security Council noted that the situation at the time in the former Yugoslavia “continues to constitute a threat to international peace and security” and

² Theodor Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’ (2006) 100(3) AJIL 551, 577 referring to Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books 2002).

³ Charter of the United Nations (24 October 1945) 1 UNTS XVI Chapter VII.

⁴ UNSC Res 955 (8 November 1994) UN Doc S/RES/955 page 9.

⁵ UNSC Res 827 (25 May 1993) UN Doc S/RES/827 para 2.

emphasised its determination to “put an end to such crimes and to take effective measure to bring to justice the persons who are responsible for them.”⁶ Resolution 827 thus instantly linked the ICTY’s existence to the fight against impunity, specific deterrence and retribution, which in turn would “contribute to the restoration and maintenance of peace.”⁷ The Security Council’s actions in establishing the ICTY whilst the war in the former Yugoslavia was raging (and before the conflict reached its apex with the genocide in Srebrenica) had an impact on the Tribunal’s objectives, and justified an open-ended mandate: the primary intention of the Security Council was to ensure that violence came to an end.⁸ Whilst it was too early to talk of reconciliation when the ICTY was established, the Tribunal recognised that societal reconciliation is linked to the maintenance of peace in the region, as part of its work very early on.⁹

The second *ad hoc* tribunal, the ICTR, was established on largely the same rationale. Thus, the Security Council believed that establishing the ICTR would “ensur[e] that such violations are halted and effectively redressed.”¹⁰ In contrast to the Resolution establishing the ICTY, Resolution 955 also made a specific reference to reconciliation, declaring that the ICTR’s prosecutions “would contribute to the process of national reconciliation.”¹¹ The explicit reference to societal reconciliation is can be attributed to the fact that the ICTR was created *after* the genocide in Rwanda.¹² Such early references to the ICTR’s contribution to reconciliation were subsequently repeated by Tribunal officials, who linked ICJ with breaking “the vicious circle of violence, thus helping to promote national reconciliation in Rwanda and ultimately leading to renewed and lasting peace.”¹³ As a result, local expectations were high as to the Tribunal’s contribution to reconciliation.¹⁴

⁶ *ibid.*

⁷ *ibid.*

⁸ Janine Natalya Clark, ‘Judging the ICTY: Has it Achieved its Objectives?’ (2009) 9 *Southeast European and Black Sea Studies* 123, 132.

⁹ *Prosecutor v Erdemović* (Trial Sentencing Judgment) ICTY-96-22-T (29 November 1996) para 58.

¹⁰ UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

¹¹ *ibid.*

¹² Clark, ‘Judging the ICTY: Has it Achieved its Objectives?’ (n 8) 132.

¹³ Statement by ICTR President to the UNGA: UNGA ‘Statements on the occasion of Human Rights Day’ (10 December 1996) 51st session A/51/PV.78.

¹⁴ Phil Clark, ‘The Challenges of International Criminal Law in Addressing Mass Atrocity’ in Bruce A Arrigo and Heather Y Bersot, *The Routledge Handbook of International Crime and Justice Studies* (Routledge 2014) 149; Thomas Hauschildt, ‘ICTR: Contribution to Reconciliation or Victor’s Justice?’ (2014) 2(3) *Global Governance* <<http://www.hscentre.org/wp-content/uploads/2014/05/GG-2014-Issue-2-No.-3.-T.Hauschildt-ICTR-Reconciliation-or-Victor-Justice.pdf>> accessed 31 May 2021.

Accordingly, whilst Chapter VII of the UN Charter is concerned with international peace, both *ad hoc* tribunals recognised that as part of their concern for global peace and security, they needed to have an impact on peace and security on the ground for the relevant conflict-affected societies.¹⁵ The recognition is significant, because conflicts often transcend State boundaries and affect others outside of the State, making global peace unattainable without also intending to restore peace on the ground for the conflict-affected society.¹⁶ It is for this reason that the international community invested in restoring and maintaining peace for the conflict-affected society; not only for the good of the particular societies but for the sake of ensuring global peace.

In acknowledging the significance of local peace and reconciliation as macro-level objectives of ICJ, the *ad hoc* tribunals recognised conflict-affected societies and victims as their stakeholders, thereby extending beyond the Nuremberg and Tokyo Tribunals' precedent. This is one of the *ad hoc* tribunals' greatest development of ICJ: the recognition of conflict-affected societies as a stakeholder group referred to as their local stakeholders, which meant that they were accountable to two stakeholder groups: local and international. As part of this recognition of local stakeholders, the Tribunals focused on establishing the truth of the conflicts, which both the ICTY and ICTR understood as the means by which they would contribute to local peace and reconciliation.¹⁷ However, it remained unclear how the Tribunals would convince their local stakeholders of the truth they established, in order to be able to achieve their macro-level objectives of contributing to local peace and reconciliation. Thus ICTR officials, for example, have acknowledged that although "created to serve the people of Rwanda [...] unfortunately the Rwandan society is not actively involved in the activity of the Tribunal."¹⁸ Notwithstanding references to local peace, security and reconciliation, and recognition of conflict-affected societies among their stakeholders, the local impact of the ICTs was understood as an "incidental" consequence of their work, rather than something to strive for

¹⁵ Michael Humphrey, 'International Intervention, Justice and National Reconciliation: the Role of the ICTY and ICTR in Bosnia and Rwanda' (2003) 2(4) *Journal of Human Rights* 495; Graham Blewitt, 'The International Criminal Tribunal for the former Yugoslavia and Rwanda' in Mark Lattimer, Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003) 146.

¹⁶ Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers 2008) 12.

¹⁷ Payam Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A commentary on the United Nations War Crimes Tribunal' (1998) 20 *Human Rights Quarterly* 737, 756; Jean Marie Kamatali, 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans' (2005) 12(1) *New England Journal of International and Comparative Law* 89, 93; Bert Swart, 'Damaška and the Faces of International Criminal Justice' (2008) 6 *JICJ* 87, 100.

¹⁸ Bernard A Muna, 'The Early Challenges of Conducting Investigations and Prosecutions Before International Criminal Tribunals' (Colloquium of Prosecutors of International Criminal Tribunals 25-27 November 2004).

specifically.¹⁹ Instead, the *ad hoc* tribunals focused on making individuals accountable for crimes committed within their jurisdiction, and gave centre stage to retribution and deterring additional crimes.

As the first two examples of ICJ since the Nuremberg and Tokyo Tribunals, the *ad hoc* tribunals exemplify the macro-level objectives of modern enforcement of ICL, and the groups to whom they are accountable. In creating the Tribunals, the Security Council had no modern precedent on which to rely. The Tribunals were established hastily in an unprecedented manner in response to specific conflicts, which might explain the lack of clarity as to their objectives and how they would be achieved, as well as the role of local stakeholders in achieving them. Having discussed *ad hoc* examples of ICJ, the discussion turns to a more thought-through recourse to ICJ in the form of a long-negotiated treaty leading to the International Criminal Court.

1.2 The International Criminal Court

In 2002, what were to date *ad hoc* efforts at ICJ culminated in the establishment of the first permanent international criminal court. The Rome Statute of the International Criminal Court took many years to draft and was the result of long negotiations between a majority of the world's States, resulting in the creation of a court with a broad mandate to prosecute individuals from different parts of the world.²⁰ Yet, despite the slower way in which the ICC was established compared to the *ad hoc* tribunals, the international community provided no clear guidance as to the Court's objectives in its foundational documents. The Preamble of the Rome Statute establishing the Court referred to the gravity of international crimes, which "threaten the peace, security and well-being of the world," and the need to end impunity therefor, which they hoped would prove to be a deterrence,²¹ thereby mirroring the broad objectives of the Security Council in establishing its *ad hoc* predecessors.

While the ICC has proven lacking in providing clear objectives in its founding documents, the United Nation's overview of the Rome Statute states that as well as to render justice and deter, the Court was also established to: "help end conflicts; to remedy the deficiencies of the *ad hoc*

¹⁹ On the ICTY: Dejana Radisavljević, 'The ICTY and the Balancing Act: Reconciliation as Rehabilitation' in Juan Pablo Perez-Leon-Acevedo and Joanna Nicholson (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing their Rights* (Routledge 2020) 125. On the ICTR: Kamatali (n 17) 99.

²⁰ Adama Dieng, 'International Criminal Justice from Paper to Practice-A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court' (2001) 25(3) *Fordham International Law Journal* 688, 695.

²¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute) Preamble.

tribunals;” and, “to take over when national criminal justice institutions are unwilling or unable to act.”²² Additional objectives assigned to the ICC include bringing justice to victims and their communities,²³ contributing to peace for the conflict-affected societies, “creating a historical record” of the crimes and the domestic criminal justice objectives of punishing those found guilty.²⁴ Such a number of aspirational objectives, especially of a permanent court that deals with many different conflict situations, has the potential to pull the Court in many different directions, which is not helpful to the attainment of any aims.²⁵ The lack of clarity from the Court as to the priority between the different objectives and how they would be achieved is unfortunate, and underscores the fact that, much the same as for the Nuremberg and Tokyo Tribunals, modern ICJ has maintained its “reactive development” in response to violence.²⁶

In comparison to the *ad hoc* tribunals, the ICC does not refer to reconciliation in its founding documents, partly explained by the fact that the Rome Statute signatories intended the Court to be “complementary to national criminal jurisdictions.”²⁷ As well as emphasising its deference to domestic criminal prosecutions,²⁸ the ICC’s officials have emphasised the responsibility of domestic mechanisms and local communities to contribute to reconciliation.²⁹ However, this does not mean that the ICC does not intend to contribute to reconciliation through its international prosecution of individuals, once it is seized of a case. The link between rendering justice, contributing to peace and reconciliation on the ground has been iterated by several ICC

²² United Nations, *Establishment of an International Criminal Court: Overview* (United Nations 1998-1999) <<http://legal.un.org/icc/general/overview.htm>> accessed 31 May 2021.

²³ Nerida Chazal, *The International Criminal Court and Global Social Control: International Justice in Late Modernity* (Routledge 2016) 2.

²⁴ Alexander Heinze, ‘The Statute of the International Criminal Court as a Kantian Constitution’ in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (TOAEP 2019) 401-402; Catherine Gegout, ‘The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace’ (2013) 34(5) *Third World Quarterly* 800.

²⁵ Willem de Lint, Marinella Marmo and Nerida Chazal (eds), *Criminal Justice in International Society* (Routledge 2014) 131; Shannon E Fyfe, ‘Truth, Testimony, and Epistemic Injustice in International Criminal Law’ in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (TOAEP 2019), 297.

²⁶ *ibid* Niemann 131.

²⁷ Rome Statute Preamble (n 21).

²⁸ Dieng (n 20) 697.

²⁹ Luis Moreno-Ocampo, speech in panel on ‘Peace, Justice and the International Criminal Court in Africa’ reported in meeting report of Nicholas Waddell and Phil Clark, *Peace, Justice and the ICC in Africa* (Royal African Society 2007) 8 <<https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrb-background-papers/Peace-Justice-and-the-ICC-series-report.pdf>> accessed 31 May 2021.

officials, including the President,³⁰ first Prosecutor³¹ and his successor, who has stated that “[s]ustainable peace and reconciliation are built on the stabilizing pillar of justice.”³² Thus, the ICC has echoed the belief of the Security Council and ICTY and ICTR officials regarding the contribution of justice to peace and reconciliation.

In recognising the restoration of local peace as its macro-level objective, the ICC has also acknowledged conflict-affected societies as its local stakeholders, much the same as its *ad hoc* predecessors, and has furthered ICJ’s commitment to direct victims in particular. The ICC’s first Prosecutor confirmed the Court’s commitment to victim communities, in his declaration that the ICC is “guided by the interests of the victims,”³³ a sentiment which is reinforced through its victim participation and reparation practices which are the first of its kind.³⁴ At the same time, in limiting the relevant conflict-affected society’s participation to that of the direct victims, the ICC has ensured that the local stakeholder group’s interests are only pursued in a manner that does not undermine the Court’s other macro-level objectives; the ICC is victim-oriented (rather than victim-centred), as it is “responsive as far as possible to victims in light of balancing competing interests.”³⁵ Thereby, the Court has exemplified its approach to local stakeholders as one where this group’s needs must be balanced against the Court’s mandate to end impunity and prevent the commission of crimes.

³⁰ Sang-Hyun Song, ‘The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law’ <<https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>>; Press Release: ‘ICC President addresses United Nations General Assembly, calls for enhanced cooperation and support’ (30 October 2017) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1341>> accessed 31 May 2021.

³¹ Ocampo (n 29); Statement by Luis Moreno-Ocampo, ‘Statement by the Chief Prosecutor of the Uganda Arrest Warrants’ (14 October 2005) <[icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf](https://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf)>; Statement by Luis Moreno-Ocampo, ‘Informal meeting of Legal Advisors of Ministries of Foreign Affairs’ (24 October 2005) <https://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf> accessed 31 May 2021.

³² Statement by Fatou Bensouda, “‘There is an urgent need for justice in Sudan. Sustainable peace and reconciliation are built on the stabilizing pillar of justice’” (Khartoum, Sudan 20 October 2020) <<https://www.icc-cpi.int/Pages/item.aspx?name=201020-otp-statement-sudan>>; Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, at the conclusion of her visit to the Central African Republic on Friday (27 March 2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=180327-otp-stat-car>> accessed 31 May 2021.

³³ Statement by Luis Moreno-Ocampo, ‘Statement by the Chief Prosecutor of the Uganda Arrest Warrants’ (14 October 2005) 6 <[icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf](https://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf)> accessed 31 May 2021.

³⁴ Articles 68(3) and 75 of the Rome Statute.

³⁵ Luke Moffett, ‘Realising Justice for Victims before the International Criminal Court’ (2014) International Crimes Database Brief 6, 4.

The approach of the ICC echoes that of its predecessors, whereby ICTs view themselves as important to local peace and “facilitators of reconciliation,”³⁶ whilst nevertheless reflecting the international community’s interests rather than those of the conflict-affected societies. This is further confirmed by references to “peace, security and well-being *of the world*” in the Preamble of the Rome Statute. Therefore, in order to restore local peace ICTs have recognised local stakeholders, at least insofar as they resonate with international notions of criminal justice. This discussion of the macro-level objectives and stakeholders of modern ICTs leads onto a discussion of *the means by which* the two *ad hoc* tribunals and the ICC attempt to promote global and local peace and security, and, with it, societal reconciliation for conflict-affected societies. As discussed in Chapter I, the ultimate outcome of prosecution by an ICT is conviction and sentencing of those found guilty by the court. It is through enactment of retributive justice that ICJ has both historically and in modern times sought to restore and maintain peace and security, to which I turn to next: the micro-level objectives of ICTs in punishing individuals found guilty of violations of ICL.

2. Micro-level objectives of punishment at the *ad hoc* tribunals and ICC

At the ICTY, ICTR and ICC, punishment takes the form of a sentence of imprisonment, whether for a fixed-term period or for life. Compared to the Nuremberg and Tokyo Tribunals, the death penalty is no longer an imposable sentence by an ICT, in view of widespread condemnation and the international trend towards its abolition.³⁷ Whilst the ICC can impose on the convicted individual a fine and/or a forfeiture of the “proceeds, property and assets derived directly or indirectly from that crime,” this is a sentence imposable only “in addition to imprisonment.”³⁸ Accordingly, section 2.1 focuses on only one type of sentence : a sentence of imprisonment, and examines the objectives of such sentences at the *ad hoc* tribunals and the ICC, and how they are intended to contribute to these courts’ macro-level objectives. Section 2.2 considers the objectives behind enforcing these sentences, which, contrary to the

³⁶ Sara Parker, ‘The International Criminal Tribunal for the Former Yugoslavia: The Promise and Reality of Reconciliation in Croatia’ (2009) 15 (2) *Peace and Conflict Studies* 80, 85.

³⁷ Several instruments either abolish or limit the use of the death penalty, which is no longer an option for ICTs. See: Second Optional Protocol to the International Covenant on Civil and Political Rights (entered into force 11 July 1991); Protocol number 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1 March 1985); Protocol number 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; International Covenant on Civil and Political Rights Article 6; Protocol to the American Convention on Human Rights to Abolish the Death Penalty the American Convention on Human Rights (28 August 1991); and Arab Charter on Human Rights (15 September 1994). For additional information, William Schabas, *The Abolition of the Death Penalty in International Law* (CUP 2002) is instructive.

³⁸ Rome Statute (n 21) Article 77(2).

Nuremberg and Tokyo Tribunals, remains the mandate of modern ICTs. As part of this discussion, I examine the extent to which local stakeholders and local peace and reconciliation have been deemed relevant considerations in the sentencing and enforcement of sentences of the *ad hoc* tribunals and the ICC: their post-conviction practices.

2.1 Objectives of sentencing

Despite the proliferation of ICTs since the Nuremberg and Tokyo Tribunals, a challenge remains in asserting the objectives of punishment as a sentence of imprisonment at the international level. The objectives of a sentence of imprisonment are not mentioned in any of the foundational documents of the *ad hoc* tribunals or the ICC, leading to a lack of guidance as to the purposes behind such a practice.³⁹ Whilst this does not bring into question the act of sentencing individuals found guilty of international crimes, as sentencing to imprisonment is a widely relied on form of punishment for violations of domestic criminal law for the same or similar crimes, it is nevertheless problematic. A lack of clarity as to the objectives of punishing an international offender can lead to mistaken and/or high expectations as to the purposes behind sentencing an individual. Much the same as in the Nuremberg and Tokyo Tribunals and in domestic criminal law and justice, *lex talionis* remains an implicit rationale of punishment, as part of the retributive theories of criminal justice.

Although the Security Council Resolutions establishing the two *ad hoc* tribunals and the Preamble to the Rome Statute link these courts to retribution, deterrence and the restoration of peace and reconciliation, these are not specifically in reference to the purposes of punishing an individual through a sentence of imprisonment, but their macro-level objectives. The Statute of the Mechanism similarly provides no guidance for judges when determining a sentence of imprisonment, which only states that “in imposing the sentences, the Single Judge or Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”⁴⁰ The lack of guidance in the foundational documents of these courts means that their sentencing jurisprudence provides the clearest guidance as to the objectives pursued through international sentencing. Thus, one of the first sentencing decisions of the ICTY is a good indication of the objectives intended by the judiciary of the

³⁹ Silvia D’Ascoli, *Sentencing in International Criminal Law: The Approach of the two ad hoc Tribunals and Future Perspectives for the International Criminal Court* (Hart Publishing 2011) 135 and 279; Ralph Henham, *Punishment and Process in International Criminal Trials* (Ashgate Publishing 2005) 16.

⁴⁰ UNSC Res 1966 Statute of the International Residual Mechanism for Criminal Tribunals (22 December 2010) S/RES/1966 (Mechanism Statute) Article 22.

Tribunal, where retribution and deterrence were considered to be of key importance.⁴¹ At the same time, the ICTY has also emphasised that to consider only retribution would be “counter-productive and disruptive of the entire purpose of the Security Council.”⁴² Rather than as vengeance, retribution is understood as “expressing the outrage of the international community”⁴³ - its condemnation and “stigmatisation”⁴⁴ of the crimes committed, with the underlying assertion that no-one is above the law.⁴⁵ The approach of the ICTR was very similar to that of the ICTY, with its first sentencing decision focusing on retribution and deterrence as justifications.⁴⁶

Since, retribution and deterrence have been established as the dominant objectives of punishment by the Tribunals.⁴⁷ However, despite placing particular importance on deterrence, the Tribunals have also at times cautioned against placing “undue prominence” on this sentencing objective, noting that special deterrence is irrelevant, whilst unfair to punish an individual for the sake of deterring others.⁴⁸ The lack of prominence on special deterrence is in recognition of the types of individuals convicted and sentenced by international courts, as usually law-abiding individuals who committed their crimes in specific circumstances, making them unlikely to commit similar crimes again.⁴⁹

Although the Tribunals’ jurisprudence demonstrates that retribution and deterrence are particularly important justifications for international imprisonment,⁵⁰ there has been growing

⁴¹ *Prosecutor v Erdemović* (Trial Sentencing Judgment) (n 9) paras 28-29.

⁴² *Prosecutor v Delalić et al.* (Judgment) IT-96-21-T (16 November 1998) para 1231; for the role of retributivist aims see *Prosecutor v Erdemović* (Trial Sentencing Judgment) (n 9) para 21.

⁴³ *Prosecutor v Aleksovski* (Appeals Judgment) IT-95-14/1-A (24 March 2000) para 185.

⁴⁴ *ibid* paras 64-65.

⁴⁵ *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004).

⁴⁶ *Prosecutor v Kambanda* (Trial Judgment and Sentence) ICTR-97-23-S (4 September 1998) para 28; *Prosecutor v Rutaganda* (Trial Sentencing and Judgment) ICTR-96-3-T (6 December 1999) para 456.

⁴⁷ Sam Szoke-Burke, ‘Avoiding Belittlement of Human Suffering: A Retributivist Critique of ICTR Sentencing Practices’ (2012) 10 JICJ 561, 563-564; Mirjan Damaška, ‘What is the Point of International Criminal Justice?’ (2008) Paper 1573 Faculty Scholarship Series 329, 331-339; Shahram Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 Penn State Journal of Law & International Affairs 30, 63; Róisín Mulgrew, ‘The International Movement of Prisoners’ (2011) 22 Criminal Law Forum 103, 104; *Prosecutor v Furundžija* (Judgment) IT-95-17/I-T (10 December 1998) para 290; *Prosecutor v Ruggiu* (Trial Judgment and Sentence) ICTR-97-32-I (1 June 2000) para 32.

⁴⁸ *Prosecutor v Babić* (Trial Sentencing Judgment) IT-03-72-S (29 June 2004) para 45; *Prosecutor v Tadić* (Appeals Sentencing Judgment) IT-94-1-A and IT-94-1-A bis 2 (6 January 2000) para 48; *Prosecutor v Nikolić* (Appeals Sentencing Appeal) IT-94-2-A (4 February 2005) para 46.

⁴⁹ *Prosecutor v Mladić* (Trial Judgment) IT-09-92-T (22 November 2017) para 5181; For a discussion on the challenges faced by international offenders, specifically those of the ICTY, Martin Petrov and Dejana Radisavljević, ‘Post-Conviction Issues: Enforcement of Sentences and other Residual Responsibilities in Colleen Rohan and Gentian Zyberi (eds), *The Role of the Defence in International Criminal Justice*’ (CUP 2017) 374.

⁵⁰ Reiterated in the last two trials of the ICTY, the trials of Ratko Mladić and Radovan Karadžić: *ibid* *Prosecutor v Mladić* para 5181; *Prosecutor v Karadžić* (Trial Judgment) IT-95-5/18-T (24 March 2016) para 6025.

evidence of recognition that punishment as imprisonment can also contribute to societal reconciliation. Compared to the largely retributive focus of sentencing at the Nuremberg and Tokyo Tribunals,⁵¹ rehabilitation has been recognised as a sentencing objective, and indeed, the *ad hoc* tribunals have referred to reconciliation and the establishment of the truth as objectives of punishment as sentences of imprisonment.⁵² Rehabilitation is the third most-cited sentencing objective at the *ad hoc* tribunals,⁵³ subsidiary to reliance on retribution, stigmatisation in particular and deterrence.⁵⁴ The lack of emphasis on rehabilitation is due to the specific profile of international criminals which distinguishes them from other criminals.⁵⁵ Due to the fact that such crimes are ideologically driven and the individuals concerned are often not acting in defiance of the social norms in their country at the time, it can be particularly challenging to talk of rehabilitation in the absence of recognition of crimes and an ideological shift in the individual offender.⁵⁶ Nevertheless, rehabilitation remains significant as it is connected to reconciliation in the aftermath of conflict.⁵⁷ This is where sentencing decisions refer back to the broader aims of these courts to fight impunity, ensure the restoration of international peace and security and promote local peace and reconciliation.⁵⁸ Moreover, whilst rehabilitation was not referred to in the *ad hoc* tribunals' early sentencing decisions, judges have emphasised its importance more recently, on the principle that sentences must facilitate the macro-level objectives of ICTs relating to peace and reconciliation, and in recognition of the contribution of the offender's successful reintegration into the conflict-affected society to these macro-level objectives.⁵⁹

⁵¹ Mark B Harmon and Fergal Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) 5 JICJ 683, 684.

⁵² *Prosecutor v Erdemović* (Trial Sentencing Judgment) IT-96-22-T bis (5 March 1998), para 21; *Prosecutor v Tadić* (Sentencing Judgment) IT-94-1-Tbis-R7 (11 November 1999) paras 7-9; *Prosecutor v Serushago* (Sentencing Judgment) IT-98-39-S (5 February 1999) para 19; Stuart Beresford, 'Unshackling the Paper Tiger - the Sentencing Practices of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda' (2001) 1 International Criminal Law Review 33, 44.

⁵³ Barbora Holá, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) 4(4) Amsterdam Law Forum 3, 7.

⁵⁴ *Prosecutor v Kunarac et al.* (Trial Sentencing) IT-96-23-T and IT-96-23/1-T (22 February 2001) para 844; Henham (n 39) 21; *Prosecutor v Erdemović* (Trial Sentencing Judgment) (n 9) para 66; *Prosecutor v Kupreškić et al.* (Trial Judgment) IT-95-16-T (14 January 2000) para 16; *Prosecutor v Mucić et al.* (Appeals Judgment) IT-96-21-A (20 February 2001) para 806.

⁵⁵ For a discussion on this, see section 2.2.1 of Chapter I. For example, see Niemann (n 25) 142; *ibid* *Prosecutor v Kunarac et al.* (Trial Sentencing).

⁵⁶ I made this argument in section 2.2.1 of Chapter I. For a discussion thereon regarding the ICTY specifically, see Radisavljević (n 19) 137-138.

⁵⁷ William Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) 7 Duke Journal of Comparative and International Law 461, 503.

⁵⁸ Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 509-510.

⁵⁹ *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004); James Meernik, 'Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals' (2011) 92(3) Social Science Quarterly 588, 594.

The *ad hoc* tribunals have been inconsistent in their references to their broader macro-level objectives when determining the sentence to be rendered against an individual. Thus, in one ICTR case, the Chamber referred back to the macro-level objectives of establishing the Tribunal,⁶⁰ whilst in a case at the ICTY, the Chamber deemed it “inappropriate to have recourse to [UNSC Resolution 827] for guidance on what the general sentencing factors of the International Tribunal should be.”⁶¹ Moreover, where the judiciary has referred to the restoration of peace and reconciliation, it has not done so in a comprehensive or convincing manner. There is a notable lack of explanation as to how a sentence of imprisonment can contribute to peace and reconciliation to a conflict-affected society.⁶² Linked to this is an overall failure on behalf of the judiciary to consider whether and to what extent sentences can achieve any of their stated aims.⁶³

Generally, retribution (and its potential to censure and stigmatise) and deterrence are identified as important sentencing purposes but the priority given to any one objective depends on the composition of the chamber rendering the sentence, where in some instances retribution is emphasised whilst in others only deterrence is referred to.⁶⁴ The fact that the *ad hoc* tribunals have referred to different combinations of purposes in their jurisprudence has led to considerable confusion. There is no uniform approach to the purposes of imprisonment or the weight to be ascribed to a particular objective.⁶⁵ Added to this is the fact that often the objectives do not complement each other, so one must be prioritised over the other. Although a difficult task, failing to prioritise between conflicting objectives means that it is unclear what rationale a particular sentence is based on and makes it impossible to judge the extent to which the objective can be or has been met.⁶⁶ Moreover, the *ad hoc* tribunals have failed to establish the role that sentencing objectives play in their determination of a particular sentence.⁶⁷ In fact, in several cases, no objectives were mentioned at the sentencing stage.⁶⁸ A failure to engage

⁶⁰ *Prosecutor v Ruggiu* (Trial Judgment and Sentence) (n 47) para 33.

⁶¹ *Prosecutor v Kunarac et al.* (Trial Sentencing) (n 54) para 824.

⁶² James Meernik and Kimi King, ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’ (2003) 16 LJIL 717, 723.

⁶³ Mirko Bagaric and John Morss, ‘International Sentencing Law: In Search of a Justification and Coherent Framework’ (2006) 6 International Criminal Law Review 191, 207; Mark Drumbl, *Atrocity, Punishment and International Law* (CUP 2007), 65.

⁶⁴ Holá, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ (n 53), 7; Meernik and King (n 62) 722-723.

⁶⁵ Holá (n 53) 6.

⁶⁶ Bagaric and Morss (n 63) 208.

⁶⁷ Holá (n 53) 6.

⁶⁸ *Prosecutor v Ntagura, Bagambiki, Imanishimwe* (Trial Judgment) ICTR-99-46-T (25 February 2004); *Prosecutor v Rugambarara* (Trial Judgment) ICTR-0059-T (16 November 2007); *Prosecutor v Sikirica et al.* (Trial Judgment) IT-95-8-S (13 November 2001); *Prosecutor v Krstić* (Trial Judgment) IT-98-33 (2 August 2001);

with sentencing rationale in a convincing and consistent manner has fed high expectations on the part of local stakeholders.⁶⁹

In contrast to the *ad hoc* tribunals, the ICC's Rules of Procedure and Evidence provide some guidance, with Rule 145 stating that the Court should consider, *inter alia*, "the extent of the damage caused, in particular the harm caused to the victims and their families."⁷⁰ Nevertheless, the wording of both the core texts of the *ad hoc* tribunals and the ICC leave these courts' judges significant discretion in deciding on a particular sentence. Notably, no mention is made as to which crime carries more gravity, namely which sentence would be more appropriate for which crime enumerated in the courts' statutes. Despite the fact that the crimes in the courts' statutes have the same gravity,⁷¹ local stakeholders often view genocide as a particularly reprehensible crime.⁷²

In practice, the ICC has not handed down as many sentences as its *ad hoc* predecessors, having only convicted six and sentenced five individuals at the time of writing.⁷³ Despite having the precedent of the *ad hoc* tribunals and its challenges to learn from, the ICC has thus far failed to move beyond their rhetoric as regards sentencing objectives. In its first sentencing judgment,

Prosecutor v Rukundo (Trial Judgment) ICTR-2001-70-T (27 February 2009); *Prosecutor v Kvočka et al.* (Trial Judgment) IT-98-30/1-T (2 November 2001).

⁶⁹ Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia* (Routledge 2014) 12, 59 and 197.

⁷⁰ Rules of Procedure and Evidence of the International Criminal Court (adopted by the Assembly of State Parties 3-10 September 2002) ICC-ASP/1/3 and Corr.1.

⁷¹ William A Schabas, 'Genocide, Crimes against Humanity and Darfur: The Commission of Inquiry's Findings on Genocide' (2006) 27(4) *Cardozo Law Review* 1703, 1716.

⁷² Evident for example in the most recent conviction at the Mechanism, that of Ratko Mladić, where although he was sentenced to life imprisonment, many victim groups were dissatisfied with the failure of the Court to rule that genocide had been committed in other municipalities in Bosnia and Herzegovina. see 'Srebrenica Survivors React to Mladic Life Sentence' *Radio Free Europe Radio Liberty* (22 November 2017) <https://www.rferl.org/a/icty-bosnia-mladic-srebrenica/28870232.html>; 'Bosnians Divided over Ratko Mladic Guilty Verdict for War Crimes, *The Guardian* (22 November 2017) <https://www.theguardian.com/world/2017/nov/22/bosnians-divided-over-ratko-mladic-guilty-verdict-for-war-crimes>; 'Ratko Mladic Sentenced to Life in Prison for Genocide' *Al Jazeera* (22 November 2017) <<https://www.aljazeera.com/news/2017/11/22/ratko-mladic-sentenced-to-life-in-prison-for-genocide>> accessed 31 May 2021.

⁷³ Thomas Lubanga Dyilo: *Prosecutor v Lubanga Dyilo* (Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against "Decision on Sentence pursuant to Article 76 of the Statute") ICC-01/04-01/06 A 4 A 6 (1 December 2014); Germain Katanga: *Prosecutor v Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07 (23 May 2014); Jean-Pierre Bemba Gombo: *Prosecutor v Bemba Gombo* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08 (21 June 2016); Ahmad al-Faqi al-Mahdi: *Prosecutor v Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016); Bosco Ntaganda: *Prosecutor v Ntaganda* (Sentencing Judgment) ICC-01/04-02/06 (7 November 2019); and Dominic Ongwen: *Prosecutor v Ongwen* (Trial Judgment) ICC-02/04-01/15 (4 February 2021). The Appeals Chamber subsequently reversed Bemba Gombo's conviction, acquitting him, and Ntaganda's conviction and sentence are subject to appeal: *Prosecutor v Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08 A (8 June 2018). Despite his subsequent acquittal, the decision on Bemba Gombo's sentence is important in expanding on the rationale behind international sentencing at the ICC.

the ICC Trial Chamber restricted itself to repeating the macro-level objectives of the Court, as enunciated in the Preamble of the Rome Statute; no sentencing justifications were discussed.⁷⁴ The ICC has subsequently followed the example of the ICTR in linking the macro-level objectives of the Court with its sentencing objectives, stating that the reference to the fight against impunity in the Preamble of the Rome Statute means that “the Preamble establishes retribution and deterrence as the primary objectives of punishment at the ICC.”⁷⁵

In its second sentencing decision, the Chamber placed particular significance on the sentence expressing the condemnation of the international community and acting as a deterrent.⁷⁶ The Chamber similarly determined that the sentence must be commensurate with “the degree of culpability [of the individual] while contributing to the restoration of peace and reconciliation in the communities concerned,” and in this regard referred to the reintegration of the individual into the conflict-affected society upon release.⁷⁷ The Court in subsequent sentencing judgments has reiterated this link between its sentences of imprisonment and macro-level objectives.⁷⁸ At the same time, and despite the previously discussed pertinence of rehabilitation to peace and reconciliation, reference has only been made to rehabilitation in three sentencing decisions. In these instances, the Chamber reiterated the *ad hoc* tribunals’ conclusion that rehabilitation and reintegration of the individual cannot be considered primordial.⁷⁹ Interestingly, the latest sentencing decision of the ICC omits any reference to rehabilitation or reintegration as objectives, demonstrating a move away from such objectives.

Much the same as at the *ad hoc* tribunals, retribution and deterrence (specific and general) have been referred to in all sentencing judgments at the ICC. Retribution is interpreted as the international community’s condemnation, which thereby “acknowledges the harm to the victims and promotes the restoration of peace and reconciliation.”⁸⁰ These words resonate with the objectives asserted in the jurisprudence of the *ad hoc* tribunals. Both the *ad hoc* tribunals and the ICC rely on the same combination of aims for justifying punishment, through which they intend to have an impact on both the conflict-affected society and the wider international

⁷⁴ *ibid* *Prosecutor v Lubanga Dyilo* (Decision on Sentence Pursuant to Article 76 of the Statute) para 16.

⁷⁵ *Prosecutor v Bemba Gombo* (Decision on Sentence pursuant to Article 76 of the Statute) (n 73) para 10.

⁷⁶ *Prosecutor v Katanga* (Decision on Sentence pursuant to Article 76 of the Statute) (n 73) para 38.

⁷⁷ *ibid*.

⁷⁸ *ibid*; *Prosecutor v Bemba Gombo* (Decision on Sentence pursuant to Article 76 of the Statute) (n 73) para 11; *Prosecutor v Al Mahdi* (n 73) para 67; *Prosecutor v Ntaganda* (n 73) para 12.

⁷⁹ *ibid* *Prosecutor v Bemba Gombo* para 11; *Prosecutor v Katanga* (n 73) paras 38 and 144; *Prosecutor v Ntaganda* (n 73) para 10.

⁸⁰ *Prosecutor v Bemba Gombo* (Decision on Sentence pursuant to Article 76 of the Statute) (n 73) para 101; *Prosecutor v Katanga* (n 73) para 38; *Prosecutor v Al Mahdi* (n 73) paras 66-67.

community, by fighting impunity. The references to the victims and the conflict-affected societies emphasises their recognition as stakeholders, however this is without explaining the import to be given victims' needs and reconciliation for conflict-affected societies.

Instead, the sentencing judgments of the Court tend to mirror each other, repeating the same justifications often *verbatim*, whilst similarly failing to explain how the sentence rendered would contribute to peace and reconciliation. Where there is interaction with the rationale for imprisonment, the Chambers have devoted at most three short paragraphs, with little explanation, to the discussion. Admittedly, unlike the *ad hoc* tribunals, the ICC is still in its infancy. Whether it will take the opportunity to clarify the purposes of international imprisonment and the precise role of conflict-affected societies therein remains to be seen.

Overall, this discussion has demonstrated that, whilst there is recognition that the micro-level sentencing objectives of the two *ad hoc* tribunals and the ICC should feed into these courts' macro-level objectives of peace and reconciliation,⁸¹ there is no explanation as to how. The closest that these courts come to explaining the link between sentencing and peace and reconciliation is through references to deterrence and rehabilitation, which I have argued is more difficult to envisage for ideologically driven internationally convicted individuals than criminals at the national level. Accordingly, clarity as to how these penal objectives are to be interpreted at the international level and how they further the macro-level objectives of ICTs regarding peace and reconciliation would be welcome. Furthermore, the emphasis on retribution and deterrence in sentencing has meant that ICTs tend to focus on international rather than local peace and reconciliation, with a lack of emphasis on "restoring the past," for example by considering the root causes of the conflict.⁸² This puts the emphasis on the international community as a stakeholder group and its understanding of the needs of reconciliation rather than on the expectations of local stakeholders, who may well understandably be stuck in the past, focusing on the highly traumatic crimes, and on the local impact of crimes rather than world security.⁸³

⁸¹ Róisín Mulgrew, *Towards the Development of the International Penal System* (CUP 2013) 215; Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Hart Publishing 2011) 36 and 303.

⁸² Kamatali (n 17) 99.

⁸³ Radisavljević (n 19) 125.

Having examined the objectives of imposing sentences of imprisonment at the ICTY, ICTR and ICC, I next consider the purposes of enforcing these sentences, as the logical conclusion to their imposition.

2.2 Objectives of enforcing sentences

In sections 1.2.2 and 2.2.2 of Chapter, I argued that in order to understand the post-conviction practices of a criminal court (domestic or international) it is important to look at the enforcement of sentences as well as their imposition. For ICJ, the enforcement of sentences is the backbone of ICTs,⁸⁴ Yet, the enforcement of sentences has continued to be of less interest for ICTs than the trial and sentencing of individuals, so much so that the *ad hoc* tribunals and ICC have failed to specify the objectives behind sentence enforcement.⁸⁵ Rather than being based on a set of objectives, the *ad hoc* tribunals and the ICC have carried out their responsibilities with regard to the enforcement of sentences in a “pragmatic” manner.⁸⁶ The founding documents of the *ad hoc* tribunals neglect almost entirely this area of the Tribunals’ work. This largely mirrors earlier examples of ICJ in the Nuremberg and Tokyo Tribunals.

In the international arena, the enforcement of sentences entails the designation of an Enforcement State where the sentence will be served; deciding on the prison regime applicable to the offender; and, deciding whether to grant early release from imprisonment. The first enforcement practice - the designation of the Enforcement State – is primarily based on the willingness of States to enforce the sentence. With no guidance in the *ad hoc* tribunals’ founding documents, policy papers issued by their Presidents elaborate on the procedure for deciding on an Enforcement State in which the persons convicted by these courts will serve their sentences.⁸⁷ The *ad hoc* tribunals’ successor, the Mechanism, has not changed the procedure, with the Registrar being responsible for approaching potential Enforcement States and recommending a particular State to the President, who ultimately decides on the

⁸⁴ Claus Kress and Göran Sluiter, ‘Enforcement: Preliminary Remarks’ in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1753.

⁸⁵ Gert Vermeulen and Eveline De Wree, *Offender Reintegration and Rehabilitation as a Component of International Criminal Justice? Execution of Sentences at the Level of International Tribunals and Courts: Moving Beyond the Mere Protection of Procedural Rights and Minimal Fundamental Interests?* (Maklu 2014) 79-80.

⁸⁶ Mulgrew (n 47) 128; *ibid* Vermeulen and De Wree.

⁸⁷ ICTY: Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment (IT/137/Rev.1) 1 September 2009. ICTR: Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to serve his/her Sentence of Imprisonment 23 September 2008. Mechanism: Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to serve his or her Sentence of Imprisonment (MICT 2/Rev.1) 24 April 2014.

Enforcement State. There are a number of factors to be taken into consideration when designating an Enforcement State, including the national laws regarding early release and commutation of the sentence and ability to enforce the sentence in its entirety; “equitable distribution of convicted persons among all the States;” the conditions of imprisonment in the State; the convicted individual’s linguistic skills; and, the proximity of the State to the convicted individual’s relations and their ability to visit him/her in prison.⁸⁸ The fact that consideration is given to the proximity of the convicted person’s family is indicative of a move towards furthering rehabilitation as a penal objective. Where an offender is sent to an Enforcement State which is close to his/her relatives, s/he is more likely to maintain ties during imprisonment, which will facilitate his/her reintegration into society upon release.⁸⁹

In his report to the Mechanism’s President, the Registrar is to include information on “any relevant views expressed by the convicted person to the Registrar prior to the transmission of the report,”⁹⁰ which does not equate to “a right to be heard in this respect,” and leaves unclear the significance to be given to any views received by the Registrar.⁹¹ Notably, there is no mention of the views of the victims or conflict-affected society on this enforcement stage, and the lack of clarity and openness in such decisions make them difficult for local stakeholders to comprehend. This is particularly the case since sentences cannot be enforced in the States of the former Yugoslavia,⁹² and whilst theoretically possible in Rwanda, no convicted persons have been sent to serve their sentence there in practice. Much like the sentencing decisions of the Tribunals, their designation decisions have the potential to further explain the rationale behind a particular decision. However, such decisions are often very short and do not engage fully with the reasons behind the designation of a particular State.⁹³ As the prison conditions and possibilities for participating in rehabilitation programmes for example will differ between States, it would be important to understand why a particular State was chosen and whether rehabilitation is a factor.

⁸⁸ *ibid* Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to serve his or her Sentence of Imprisonment (MICT 2/Rev.1) para 4.

⁸⁹ Mulgrew, ‘The International Movement of Prisoners’ (n 47) 142.

⁹⁰ Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to serve his or her Sentence of Imprisonment (MICT 2/Rev.1) (n 87) para 4(i).

⁹¹ Petrov and Radisavljević (n 49) 353.

⁹² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 UN Doc. S/25704 (3 May 1993) para 121; Barbora Holá and Joris van Wijk, ‘Life after Conviction at International Criminal Tribunals: An Empirical Overview’ (2014) 12 JICJ 109, 113.

⁹³ Vermeulen and De Wree (n 85) 81.

The practice of the ICC at this post-conviction stage was until recently even more nascent than its sentencing practice. The enforcement of sentences is included in the foundational documents of the Court,⁹⁴ and in practice, its enforcement system is similar to that of the Mechanism, but importantly provides that:

The Presidency shall give notice in writing to the sentenced person that it is addressing the designation of a State of enforcement. The sentenced person shall, within such time limit as the Presidency shall prescribe, submit in writing his or her views on the question to the Presidency.⁹⁵

Furthermore, the convicted individual must be “granted adequate time and facilities necessary to prepare for the presentation of his or her views,”⁹⁶ thereby showing more understanding of the importance of this post-conviction decision on the convicted individual and giving them a role. However, much the same as the Mechanism, no provision is made for victims’ views or those of the wider conflict-affected society on designation. The ICC has made three such decisions, two of which are publicly available and are only three to four pages long, providing no insight into the objectives of enforcement or the considerations that were taken into account when making the designation decision.⁹⁷ In these two Decisions, the President took into consideration the convicted persons’ wishes to serve their sentences in their State of nationality, the Democratic Republic of the Congo.⁹⁸ Such a practice contradicts the practice of the *ad hoc* tribunals, and could encourage rehabilitation of the offenders.

The second enforcement practice - deciding on the conditions of imprisonment - is governed by the national law of the Enforcement State, subject to the supervision of the ICT, meaning that the applicable prison regime will in practice differ depending on the State.⁹⁹ It is in the purview of the Enforcement State to decide on the prison regime for the convicted individual, including whether they will keep the individual in isolation, allow them visitation rights, whether they are in a particularly closed prison facility and whether they will be able to work, join classes or rehabilitation programmes, for example. As it is not for the ICT to decide on the

⁹⁴ ICC RPE (n 70) Chapter 12 and Rome Statute (n 21) Part 10.

⁹⁵ ICC RPE (n 70) Rule 2013(1).

⁹⁶ *ibid* Rule 2013(3)(b).

⁹⁷ *Prosecutor v Lubanga Dyilo* (Decision Designating a State of Enforcement) ICC-01/04-01/06 (8 December 2015); *Prosecutor v Katanga* (Decision Designating a State of Enforcement) ICC-01/04-01/07 (8 December 2015); and, *Prosecutor v Al Mahdi* (Decision Designating a State of Enforcement) ICC-01/12-01/15 (29 August 2018).

⁹⁸ *ibid*.

⁹⁹ André Klip, ‘Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the former Yugoslavia’ (1997) 5(2) *European Journal of Crime, Criminal Law and Criminal Justice* 144, 145.

prison regime, it is logical that the ICT itself does not have particular objectives related thereto; the practice is a purely pragmatic one where a State or indeed several States are asked if they are willing to enforce a sentence, with ICTs entirely reliant on State cooperation. This means that whilst international standards for imprisonment must be respected, there are vast differences between prison conditions across countries.¹⁰⁰ There are differences in prison systems within Europe alone, with Scandinavian States, for example, demonstrating particularly open and liberal prison conditions, whilst other European countries (for example, France and Italy, as two States that have accepted a considerable number of ICTY convicted persons) “are characterized by overcrowded prisons, shared prison cells and less focus on rehabilitation.”¹⁰¹ Along with the differences in treatment among European States, the ICTR and now some Mechanism-convicted individuals serve their sentences in Benin and Mali. Given that they are poorer States, it is unsurprising that conditions in prisons in these two countries are generally worse than those in the European prisons housing ICTY or the Mechanism convicts (relating to the war in the former Yugoslavia), as well as a few ICTR convicts.¹⁰²

This disparity is problematic for ICTs, in that some prisoners have the opportunity to work outside the prison grounds and benefit from weekend breaks, for example, whilst others are in solitary confinement.¹⁰³ The discrepancy in treatment between convicted individuals underlines the lack of an overall set of objectives sought in their imprisonment and is

¹⁰⁰ Barbora Holá and Joris van Wijk, ‘Rehabilitating international prisoners’ in Róisín Mulgrew and Denis Abels (eds), *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016) 281.

¹⁰¹ Holá and van Wijk (n 92) 119.

¹⁰² Denis Abels, ‘Limiting the Objectives of the Enforcement of International Punishment’ in Róisín Mulgrew and Denis Abels (eds), *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016) 238; Holá and van Wijk (n 94) 118; Richard Culp, ‘Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?’ (Human Rights Seminar Series, John Jay College of Criminal Justice 2010-2011) <<http://www.jjay.cuny.edu/Culp.MonitoringTribunalPunishment.rev.9Apr11.1.pdf>> accessed 31 May 2021; Ines Monica Weinberg de Roca and Cristopher M Rassi, ‘Sentencing and Incarceration in the Ad Hoc Tribunals’ (2008) 44 *Stanford Journal of International Law* 1, 42.

¹⁰³ Sonja Snacken and Nik Kiefer, ‘Oversight of International Punishment: The Committee for the Prevention of Torture’ in Róisín Mulgrew and Denis Abels (eds), *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016) 354. Thus, for example, there is a clear contrast in rather strict prison conditions in Central or Eastern Europe and a more lenient, resocialisation-orientated approach in Scandinavian countries. See for example, Tapio Lappi-Seppälä, ‘Penal Policy in Scandinavia’ (2007) 36(1) *Crime and Justice* 217; Vincenzo Ruggiero, ‘Houses for the Poor: Continental European Prisons’ in Yvonne Jewkes, Ben Crewe and Jamie Bennett (eds), *Handbook on Prisons* (Routledge 2016) 375-385; Annette Olesen, ‘Released to the “Battlefield” of the Danish Welfare State: A Battle between Support and Personal Responsibility’ in Peter Scharff Smith and Thomas Ugelvik (eds), *Scandinavian Penal History, Culture and Prison Practice: Embraced by the Welfare State* (Palgrave Macmillan 2017) 272; John Pratt, ‘Explaining Penal Contrasts. Scandinavia V. The Anglophone Countries’ (2011) Straus Institute for the Advanced Study of Law and Justice Straus Working Paper 01/11; John Pratt, ‘Scandinavian Exceptionalism in an Era of Penal Excess: The Nature and Roots of Scandinavian Exceptionalism’ (2008) 48 *British Journal of Criminology* 119.

problematic considering that both ICTY and ICTR were established by the same body, the Security Council. The problem is compounded now that the Mechanism has taken over supervision of the sentences of both *ad hoc* tribunals, who remain subjected to very different prison regimes depending on whether they were convicted and sentenced by the ICTY or the ICTR.

For both the *ad hoc* tribunals and the ICC, the President is charged with the responsibility of supervising the enforcement of the sentence, in which s/he is most often assisted by the International Committee of the Red Cross (hereinafter “ICRC”) or the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter “CPT”), who carry out regular inspections of the prisons in question.¹⁰⁴ These inspections are intended to assess the material conditions of imprisonment and to report any issues brought up by the offender (whether legal, medical or other). Reports on the inspections are submitted to the President of the ICT and the authorities of the Enforcement State. These inspection reports reveal that most convicts encounter similar difficulties related to their conditions of imprisonment, mostly relating to the fact that they differ from the rest of the prison population, encounter a “language barrier” and will not stay in the Enforcement State once released, meaning they often do not benefit from rehabilitation programmes.¹⁰⁵ The failure to allow international offenders to participate in rehabilitation programmes is either because national prisons do not know how to approach rehabilitation with such individuals (whether it is because their crimes are of a distinctly different nature to the rest of the prison population or because they don’t speak the language), or because they privilege national prisoners who will have to be reintegrated into society.¹⁰⁶ This has an impact not only on the convicted individual, who does not have the opportunity to reassess his/her behaviour and prepare for resocialisation, but on the society to which s/he she will return because the release of an individual who has not rehabilitated has the potential to affect the peace and reconciliation process of a fragile conflict-affected or recently post-conflict State. More than this, releasing such individuals where they are not rehabilitated, and continue to deny responsibility for their crimes, could mean

¹⁰⁴ Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (adopted on 11 February 1994 and last amended on 8 July 2015) IT/32/Rev. 50 (ICTY RPE) Rule 104; Rules of Procedure and Evidence of the International Tribunal for Rwanda (adopted 29 June 1995, as last amended on 13 May 2015) (ICTR RPE) Rule 104; ‘Agreement between the ICC and the ICRC on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the ICC’ (13 April 2006) ICC-PRES/02-01-06.

¹⁰⁵ Information not publicly available but obtained while at the Mechanism in 2013-2015. For a discussion on the challenges faced by international offenders, specifically those of the ICTY, Petrov and Radisavljević (n 49) 347.

¹⁰⁶ Mulgrew (n 81) 97.

endangering the peace process in the conflict-affected State because the individual might return to the conflict-affected area to propagate hate-mongering rhetoric, and even return to public life.¹⁰⁷

This discussion of rehabilitation is linked to the third enforcement practice – release from imprisonment, from which many internationally convicted individuals benefit before having served the entirety of their sentence. Early release at ICTs is *sui generis* because contrary to their national counterparts, the *ad hoc* tribunals and the ICC do not and cannot monitor the behaviour of an offender once they are released. There is no international parole: early release is definitive,¹⁰⁸ which make evaluations of rehabilitation particularly significant.

The Mechanism's Statute and Rules of Procedure and Evidence provide for the pardon, commutation of sentence and early release of ICTY, ICTR or Mechanism-convicted individuals.¹⁰⁹ In practice, commutation of sentences has only been considered where it is a practice in the Enforcement State and pardon has received no attention. The Mechanism's Practice Direction on early release provides the eligibility threshold.¹¹⁰ ICTY, ICTR and Mechanism-convicted individuals are considered eligible for early release once they have served two-thirds of their sentence.¹¹¹ Before the Mechanism succeeded the two *ad hoc* tribunals, convicted individuals were treated differently depending on the tribunal that had convicted them: the early release threshold for the ICTY was upon having served two-thirds of the sentence, whilst at the ICTR it was at three-fourths of the sentence. Accordingly, the new provisions under the Mechanism consolidated eligibility for early release, finally providing for fair treatment of offenders and clarity to all those who were convicted by the two *ad hoc* tribunals.¹¹² In the case of life imprisonment, at its inception, the Mechanism had no eligibility threshold for early release, despite having twenty-two individuals serving life sentences, with no tangible hope of reintegration into society. The matter was finally addressed by the President

¹⁰⁷ One such example is Momčilo Krajišnik who presided over a controversial, Government-backed War Veterans Association upon release, see Danijel Kovačević, 'Momčilo Krajišnik: Bosnian Serb Leader Denied War Crimes to the End' *Balkan Insight* (15 September 2020) <<https://balkaninsight.com/2020/09/15/momcilo-krajisnik-bosnian-serb-leader-denied-war-crimes-to-the-end/>> accessed 1 December 2020.

¹⁰⁸ André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia 2001-2002* (Intersentia 2005), 1091.

¹⁰⁹ Mechanism Statute (n 40) Article 36; and, Mechanism Rules of Procedure and Evidence (18 December 2019) MICT/1/Rev.6 (Mechanism RPE) Part 9.

¹¹⁰ Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence or Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism (MICT/3/Rev.3) 15 May 2020.

¹¹¹ *Prosecutor v Bisengimana* (MICT-12-07) Decision of the President on Early Release of Paul Bisengimana and Motion to File a Public Redacted Application (11 December 2012).

¹¹² Petrov and Radisavljević (n 49) 378.

in his Decision on the Early Release of Stanislav Galić, where it was established that such individuals become eligible upon having served 30 years of their sentence.¹¹³

In making his/her decision on early release, the President is guided by Rule 151 of the Rules of Procedure and Evidence, which provides that the President must consider:

the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.¹¹⁴

The President's assessment of the convicted person's rehabilitation is made without clarifying what this concept means in the international context, thus creating considerable confusion as to its meaning and failing to delineate clear assessment criteria.¹¹⁵ The factor is assessed based on the reports provided by the Enforcement State, which are often missing because Enforcement States are not obliged to conduct psychological assessments of convicted persons. In practice, the President has considered the prisoner's good behaviour in prison, ability to function in prison and maintain relations with the prison guards and other prisoners, his or her willingness to participate in activities such as language classes, as well as recognition of the crimes and any words of remorse.¹¹⁶ However, it is neither evident how many of these factors demonstrate rehabilitation, nor how they help prepare the prisoner for a return to the conflict-affected society.¹¹⁷

This links to a greater omission in the list of factors the President is to consider when deciding whether to grant early release: the opinion of the victims and the situation in the conflict-affected society to which the prisoner might return. Instead, the "assessment of prisoners"

¹¹³ (Public Redacted Decision on the Early Release of Stanislav Galić) MICT-14-83-ES (26 June 2019).

¹¹⁴ Mechanism Rules of Procedure and Evidence (18 December 2019) MICT/1/Rev.6 (Mechanism RPE) Rule 151.

¹¹⁵ Holá and van Wijk (n 92) 126.

¹¹⁶ For example, *Prosecutor v Bala* (Public Redacted Version of the 28 June 2012 Decision of the President on the Early Release of Haradin Bala) IT-03-66-ES (9 January 2013) para 25; *Prosecutor v Naletilić* (Public Redacted Version of the 29 November 2012 Decision of the President on the Early Release of Mladen Naletilić) IT-98-34-ES (26 March 2013) para 26; *Prosecutor v Šljivančanin* (Decision of the President on the Early Release of Veselin Šljivančanin) IT-95-13/1-ES (5 July 2011) para 26; *Prosecutor v Simić* (Decision of the President on the Early Release of Blagoje Simić) IT-95-9-ES (15 February 2011) para 29; *Prosecutor v Sikirica* (Decision of the President on the Early Release of Duško Sikirica) IT-95-8-ES (21 June 2010) para 20; *Prosecutor v Plavšić* (Public Redacted Version of Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić) IT-00-39 & 40/1-ES (14 September 2009) para 8; *Prosecutor v Banović* (Decision of the President on the Commutation of Sentence of Predrag Banović) IT-02-65/1-ES (3 September 2008) para 13. I have previously referred to these specific cases in Petrov and Radisavljević (n 49) 363.

¹¹⁷ Holá and van Wijk (n 92) 126; Mulgrew (n 81) 66-67.

rehabilitation efforts and future reintegration opportunities are [...] only focused on the convicts' individual position" rather than on the society.¹¹⁸ This is problematic because the convicted person will usually return to the conflict-affected society upon his/her release. The conflict-affected State is more often than not fragile and divided, and the early release might have detrimental consequences for the peace and reconciliation process in that State where the offender is not rehabilitated.¹¹⁹

In the same vein, it is important to consider how rehabilitation of an individual in a prison far removed from the conflict-affected society relates to other sentencing objectives (in view of the lack of explicit objectives for continuing enforcement of a sentence), in particular its relation to retribution and deterrence.¹²⁰ Whilst the chances of reoffending will most likely not be high in the case of international offenders, as the conflict situation in which the crimes were committed will no longer be the same,¹²¹ the potential risk of harm as a result of reoffending in the rare cases where it might reoccur would be particularly detrimental. Yet, despite general statements that international sentences are intended to have a positive impact on the relevant conflict-affected societies, the Tribunals have not taken the wider context into consideration. In practice, the great majority of ICTY and ICTR convicts have been released by the *ad hoc* tribunals or the Mechanism upon reaching the eligibility threshold, leading to a presumption of release.

In a recent development, the Mechanism has granted conditional early release, whereby should the released individual not respect the conditions of release, s/he will be returned to the custody of the Mechanism. In the case of Aloys Simba, the defendant signed a declaration that he will "have no contact whatsoever [...] with victims or witnesses;" will behave "honourably and peacefully in the community;" "shall not engage in secret meetings intended to plan civil unrest or engage in any political activities;" will neither discuss nor deny the Rwandan genocide; "shall not purchase, possess, use or handle any weapons;" and, will not reoffend.¹²² Placing conditions such as acting "peacefully" and forbidding denial of the crimes for which the

¹¹⁸ Jessica M Kelder, Barbora Holá and Joris van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR' (2014) 14 International Criminal Law Review 1177, 1199.

¹¹⁹ *ibid* 1199; I have argued this point, and the importance of rehabilitation, with regard to the ICTY in particular in Radisavljević (n 19) 136.

¹²⁰ *ibid* 1199.

¹²¹ Jonathan H Choi, 'Early Release in International Criminal Law' (2014) 123(6) The Yale Law Journal 1784, 1812.

¹²² *Prosecutor v Simba* (Public Redacted Version of the President's 7 January 2019 Decision on the Early Release of Aloys Simba) MICT-14-62.ES.1 (7 January 2019) Annex A.

individual was convicted, reinforce the argument that the Mechanism understands the impact of release on the conflict-affected society and the Tribunal's ability to achieve its macro-level objectives. The effectiveness of the new practice of conditional release remains to be seen – reliant as it is on State-cooperation.

Much the same as its predecessors, the ICC allows for early release of its convicted individuals upon having served two-thirds of their sentence or after serving 25 years of life imprisonment.¹²³ This further underscores the relevance of rehabilitation at the enforcement stage, as it provides even those convicted to life imprisonment with an opportunity for release from prison. Compared to the *ad hoc* tribunals, such decisions are made not by the President but in a hearing of three Appeals Chamber judges,¹²⁴ And clarity is provided by stating that where denied, early release will be reconsidered “every three years.”¹²⁵ Most importantly, the ICC provides criteria for deciding on the suitability of early release, including:

the conduct of the sentenced person [...] which shows a genuine dissociation from his or her crime; the prospect of the resocialization and successful resettlement of the sentenced person; whether the early release [...] would give rise to significant social instability; any significant action taken by the sentenced for the benefit of the victims as well as any impact on the victims and their families as a result of the release.¹²⁶

These criteria indicate the Court's realisation that the situation in the conflict-affected society is an important consideration when deciding whether to grant early release; indicating an understanding of the link between post-conviction practices and the achievement of the Court's macro-level objectives.¹²⁷ However, it is interesting that the social instability factor is worded in negative terms. Judges deciding on an early release are not called upon to consider whether granting early release could be beneficial to social stability or even whether it would cause *any* but *significant* social instability, which suggests that local peace and reconciliation are not given primary concern.

As the ICC has made explicit its inclusion of victims, they are given the opportunity to participate in sentence review proceedings and make submissions on the potential release of

¹²³ Rome Statute (n 21) Article 110(3).

¹²⁴ ICC RPE (n 70) Rules 223 and 224.

¹²⁵ Rome Statute (n 21) Article 103(5).

¹²⁶ ICC RPE (n 70) Rule 223.

¹²⁷ Kelder, Holá and van Wijk (n 118) 1202; Choi (n 121) 1821.

the convicted person.¹²⁸ In deciding against its first early release, the ICC noted the victims' submission that Lubanga's reinsertion into the community was not possible "in a spirit of peace and reconciliation."¹²⁹ Here, the judges further noted Lubanga's lack of recognition of his crimes, but found that the fact that he had regular contact with family in the Democratic Republic of the Congo and his intention to enroll in a postgraduate course were he to be released as evidence of his potential "resocialization and successful resettlement."¹³⁰ Moreover, although the judges determined that Lubanga's release would cause some social instability but not significantly so, they also noted "the potential detrimental effect that Lubanga's early release could have on the victims and on their families," and "the absence of any other factors in favour of reduction," in deciding against his early release.¹³¹ In a subsequent review of Lubanga's sentence, the panel of judges determined that mere proposals to apologise to victims publicly were insufficient to be deemed recognition of his crimes or acts for the "benefit of the victims," thereby denying his request for release,¹³² further entrenching the Court's commitment to victims.

In granting its first early release,¹³³ the Court found that the convicted individual had disassociated himself from his crimes, "repeatedly and publicly taken responsibility" and "expressed regret for the harm caused to the victims by his actions."¹³⁴ The judges found evidence of Katanga's prospects for "resocialization and successful resettlement" in his strong family ties, intentions to continue his military career or undertake studies, noting that his resettlement plans were supported by his family and the communities to which he would return.¹³⁵ Although there was no evidence that Katanga's reintegration received the support of the communities most affected by his crimes, the judges placed emphasis on the evidence of support from those communities to which Katanga would return upon release.¹³⁶ As regards the instability that his release might cause, the judges decided that the factor weighed neither in favour nor against release, as there was no evidence that the release would be significantly

¹²⁸ Mulgrew (n 81) 222.

¹²⁹ *Prosecutor v Lubanga Dyilo* (Decision on the Review Concerning Reduction of Sentence of Mr Thomas Lubanga Dyilo) ICC-01/04-01/06 (22 September 2015) para 51.

¹³⁰ *ibid* paras 53 and 77.

¹³¹ *ibid* paras 70-77.

¹³² *Prosecutor v Lubanga Dyilo* (Second Decision on the Review Concerning Reduction of Sentence of Mr Thomas Lubanga Dyilo) ICC-01/04-01/06 (3 November 2017).

¹³³ *Prosecutor v Katanga* (Decision on the Review Concerning Reduction of Sentence of Mr Germain Katanga) ICC-01/04-01/07-3484 (13 November 2015).

¹³⁴ *ibid* para 50.

¹³⁵ *ibid* para 58.

¹³⁶ *ibid* para 59.

detrimental or beneficial to social stability.¹³⁷ Nevertheless, the judges considered relevant the victims' submissions concerning the potential traumatising effect of Katanga's release¹³⁸ in deciding that his release could have a negative impact on the victims and their families. This recognition of the victims' opinions on release and the potential instability that could be caused as a result of granting release, underscores that although international sentencing and enforcement must pursue their own objectives, sentences should also align with the broader objectives of ICTs of maintaining peace and reconciliation.¹³⁹ Moreover, it reinforces the recognition of conflict-affected societies as a stakeholder group to whom the ICC is accountable, although the ICC has repeatedly focused on victims.

In sum, this section has considered the different objectives of sentencing individuals to imprisonment and the enforcement thereof, and how these micro-level objectives have been interpreted as feeding into the macro-level objectives of ICTs. Whilst the enforcement practices of the *ad hoc* tribunals and ICC are particularly problematic in their lack of explicit objectives, there has been some recognition of the local impact of enforcement of sentences. Similarly recognised is the need to consider local stakeholders in decision-making, and the need for these micro-level objectives to feed into accomplishing the macro-level objectives, if ICTs are to contribute to peace and reconciliation.¹⁴⁰ This recognition of local stakeholders and local peace and reconciliation as macro-level objectives is linked to the question of acceptance of ICTs' work: sociological legitimacy, to which I turn next.

3. The question of legitimacy at the ICTY, ICTR and ICC

The abundance of objectives and the lack of clarity from ICTs has led many academics and stakeholders to question their legitimacy.¹⁴¹ In section 3 of Chapter, I introduced this notion of

¹³⁷ *ibid* para 79.

¹³⁸ *ibid* para 104.

¹³⁹ Mulgrew (n 81) 25.

¹⁴⁰ *ibid* 215.

¹⁴¹ See for example, Juan Pablo Perez-Leon-Acevedo, 'The Legitimacy of International Criminal Tribunals' (2017) 35(2) *Nordic Journal of Human Rights* 164; André P Nollkaemper, 'The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia' in Thomas AJA Vandamme and Jan-Herman Reestman (eds), *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems* (Europa Law Publishing 2001); Larry May and Shannon E Fyfe, 'The Legitimacy of International Criminal Tribunals' in Nobuo Hayashi and Cecilia M Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (CUP 2017); Hitomi Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) 4(2) *Amsterdam Law Forum* 3; Michael J Struett, *Politics of Constructing the International Criminal Court: NGOs, Discourse and Agency* (Palgrave Macmillan 2008); Margaret M deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32(5) *Fordham International Law Journal* 1400; Mandiaye Niang, 'Africa and the Legitimacy of the ICC in Question' in Joanna Nicholson (ed), *Strengthening the Validity of International Criminal Tribunals* (Brill Nijhoff 2018).

legitimacy of ICTs: normative and sociological. The second type of legitimacy is particularly important where the ICT is imposed on conflict-affected societies using unprecedented means, as was the case with the *ad hoc* tribunals. The normative legitimacy of the *ad hoc* tribunals comes from the Security Council resolutions that established them and their Statutes and Rules of Procedure and Evidence, by which they had to abide in order to ensure they remained legally and procedurally legitimate.¹⁴² Similarly, the ICC's normative legitimacy comes from the Assembly of States Parties, the Rome Statute of the ICC and the Court's Rules of Procedure and Evidence.¹⁴³ As long as ICTs act in accordance with these documents, their normative legitimacy is largely uncontested, although the power of the Security Council to establish *ad hoc* tribunals has been questioned.¹⁴⁴ Their sociological legitimacy comes from being accepted by their stakeholders. Much the same as the Nuremberg and Tokyo Tribunals, modern ICTs initially tended to underestimate the significance of sociological legitimacy, arguing that it is not the role of a court of law to convince others of its work.¹⁴⁵ Instead, they have ensured that their normative legitimacy is intact by focusing on the offender as a traditional court of law, seeing their international stakeholders as their key constituency, at the expense of local stakeholders. Nevertheless, in recognition of the importance of sociological legitimacy to ICTs' ability to achieve their macro-level objectives of contributing to peace and reconciliation, they have made some additional efforts to convince their local stakeholders of their work. Along with the activities of any court of law, ICTs have also made extra-judicial efforts to ensure their work will be internalised by local stakeholders.

In the case of all three ICTs, this has translated into an outreach programme, although established some years after the commencement of their work.¹⁴⁶ The role of these outreach programmes has been to communicate the work of the ICTs to local stakeholders and encourage dialogue on the ground, thereby contributing to local peace and reconciliation.¹⁴⁷

¹⁴² For the ICTY: UNSC Res 827 (n 3) and ICTY RPE (n 104). For the ICTR: UNSC Res 955 (n 8) and ICTR RPE (n 104).

¹⁴³ Rome Statute (n 21) and ICC RPE (n 70).

¹⁴⁴ See for example Jeffrey W Davis, 'The Two Wrongs Do Make a Right: The International Criminal Tribunal for the Former Yugoslavia was Established Illegally - But it Was the Right Thing to Do...So Who Cares' (2002) 28(2) North Carolina Journal of International Law and Commercial Regulation 395.

¹⁴⁵ Dana (n 47) 49; Damaška (n 47) 364; Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 JICJ 950, 953; Frédéric Mégret, 'The Legacy of the ICTY as Seen Through Some of its Actors and Observers' (2011) 3 Goettingen Journal of International Law 1011, 1037.

¹⁴⁶ The ICTY and ICTR outreach programmes were established in 1999 and 1998, respectively.

¹⁴⁷ Panel discussion with Head of Victims Participation and Reparations Section, ICC, entitled 'The ICC, local legitimacy and victims' concerns' reported in Nicholas Waddell and Phil Clark, *Peace, Justice and the ICC in Africa* (Royal African Society 2007) 33 <<https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-background-papers/Peace-Justice-and-the-ICC-series-report.pdf>> accessed 31 May 2021.

Since the early days of their Outreach Programmes, both *ad hoc* tribunals greatly bolstered their communication efforts. The ICTY disseminated information from its three information centres in the field, organising visits of legal professionals, the media, students and schoolchildren, as well as events held in the former Yugoslavia.¹⁴⁸ Such events included “Bridging the Gap between the ICTY and Communities in Bosnia and Herzegovina” conferences, where Tribunal staff organised and attended tailored meetings with civil society after specific convictions.¹⁴⁹

The ICTR’s outreach started in Kigali with a centre entitled ‘Umusanzu mu Bwiyunge’, which stands for ‘Contribution to Reconciliation’ in Kinyarwanda. As a centre located in Rwanda’s capital, it remained inaccessible to 92% of Rwandans living rurally.¹⁵⁰ Although subsequently accompanied by ten smaller information centres spread out across the country, the information remained at most accessible only to the minority of the population who could read and had an interest in reading court documents that they had to search out in order to find.¹⁵¹ Admittedly, efforts were made to provide succinct information in the form of brochures, but these included basic information on the ICTR rather than recent up to date information on cases, as well as organising poster and photograph exhibitions.¹⁵² The ICTR also organised versatile outreach activities, which included organising visits to the Tribunal and collaborating with local organisations to give it wider access to local stakeholders, in particular with a media organisation that covered ICTR trials and made documentaries thereon, which they presented to rural communities in the presence of ICTR officials.¹⁵³ However, it is notable that, in preparing this chapter it was much harder to find information on the ICTR website than on the

¹⁴⁸ See ‘Outreach Programme’ <<https://www.icty.org/en/outreach/outreach-programme>> accessed 31 May 2021.

¹⁴⁹ ‘Bridging the Gap’ <<https://www.icty.org/en/outreach/bridging-the-gap-with-local-communities>> accessed 31 May 2021; Daqun Liu, ‘Contribution of the United Nations *Ad Hoc* Tribunals to the Development of International Criminal Law’ in Morten Bergsmo, Wui Ling Cheah, Tianying Song and Ping Yi (eds), *Historical Origins of International Criminal Law* (vol. 4) (TOAEP 2015) 156-157; Rebecca Devitt, ‘Justice and Peace: The Role of International Tribunals in Transitional Justice’ *E-international Relations* (2012) <<http://www.e-ir.info/2012/01/24/justice-and-peace-the-role-of-international-tribunals-in-transitional-justice>> accessed 31 May 2021.

¹⁵⁰ Herman Nusahara, ‘Improving Tenure Security for the Rural Poor: Rwanda case study’ (2006) Food and Agriculture Organization of the United Nations Working Paper 7, 2. See also Alison Des Forges and Timothy Longman, ‘Legal Responses to the Genocide in Rwanda’ in Eric Stover and Harvey M Weinstein (eds), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 56; Peskin (n 145) 956.

¹⁵¹ Philip Schulz, ‘Outreach and the ICTR: Assessing the Impact of Outreach Activities by the International Criminal Tribunal for Rwanda’ (2014) Holocaust and Genocide Studies Working Papers Series 2, 25; Wendy Lambourne, ‘Outreach, Inreach and Civil Society Participation in Transitional Justice’ in Nicola Palmer, Phil Clark, Danielle Granville (eds), *Critical Perspectives in Transitional Justice* (Intersentia 2012) 241.

¹⁵² Tim Gallimore, ‘The ICTR Outreach Program: Integrating Justice and Reconciliation’ (Conference on Challenging Impunity 7-8 November 2006).

¹⁵³ Peskin (n 145) 960.

ICTY's, suggesting that local stakeholders would likely have had the same problem, should they turn to the website for information.

However, whilst the Tribunals have made innovative outreach efforts and despite the positive institutional view thereof,¹⁵⁴ their extra-judicial activities were largely an afterthought. An example of the way in which outreach was understood is evident in the way it was funded by both *ad hoc* tribunals– through voluntary contributions – and the fact that their outreach strategy changed each time a new President was elected, making it sporadic and dependent on whether the President understood outreach as a necessary component of their work.¹⁵⁵ They lacked a comprehensive and contextualised outreach strategy,¹⁵⁶ with the ICTY's outreach efforts being described as “very superficial,” meaning it could only ever have a limited impact.¹⁵⁷ In fact, the first outreach programme to be initiated, that of the ICTY, was only acknowledged as a necessary component of the court in response to the negative perceptions and denial among the local stakeholders following the Duško Tadić judgment. The Tribunal realised that “something had to be done” if it was to achieve its broader mandate of contributing to peace and reconciliation.¹⁵⁸ Unfortunately, these efforts came too late as opinions had already formed on the Tribunal.¹⁵⁹

Despite the lessons that could have been learnt from the two *ad hoc* tribunals, the ICC was similarly late in developing an effective outreach programme. Outreach work at the ICC did not commence immediately upon its creation, and at the outset was severely lacking in personnel and funding.¹⁶⁰ In fact, the ICC initially expected to rely on local and international non-governmental organisations to promote its work, with the work of the Court being limited

¹⁵⁴ Parker (n 36) 85; UNICTR webpage <<http://unictr.unmict.org/>> accessed 31 May 2021; Tom A Adami, ‘Who will be left to tell the tale?’ Recordkeeping and international criminal jurisprudence’ (2007) 7 Archival Science 213, 214; Theodor Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’ (2006) 100(3) AJIL 551, 577-578; UNSC Res 1503 (28 August 2003) UN Doc S/RES/1503 <http://www.unmict.org/specials/icttr-remembers/docs/res1503-2003_en.pdf>; Secretary-General’s Remarks at the Commemoration of the 20th Anniversary of the Rwandan Genocide (7 April 2004) <<https://www.un.org/sg/en/content/sg/statement/2014-04-07/remarks-commemoration-20th-anniversary-rwandan-genocide-english-and>> accessed 31 May 2021.

¹⁵⁵ Mégret (n 145) 1040; Dejana Radisavljević and Martin Petrov, ‘Srebrenica and genocide denial in the former Yugoslavia: What has the ICTY done to address it?’ in Paul Behrens, Olaf Jensen, Nicholas Terry (eds), *Holocaust and Genocide Denial: A Contextual Perspective* (Routledge 2017) 153.

¹⁵⁶ Rachel Kerr, ‘Peace through Justice? The International Criminal Tribunal for the Former Yugoslavia’ (2007) 7 (3) Southeast European and Black Sea Studies 373, 379; Parker (n 36) 95.

¹⁵⁷ Mégret (n 145) 1038; Nesiah (n 107) 1003.

¹⁵⁸ *ibid* Mégret 1037.

¹⁵⁹ Paul B Miller, ‘Contested Memories: The Bosnian Genocide in Serb and Bosnian Minds’, (2006) 8(3) Journal of Genocide Research 311, 313.

¹⁶⁰ *Courting History: The Landmark International Criminal Court’s First Years* (Human Rights Review 11 July 2008) 118-119 <<https://www.hrw.org/reports/2008/icc0708/8.htm>> accessed 31 May 2021.

to the role of coordinator.¹⁶¹ It was not until 2007, thanks to NGO pressure, that the Assembly of States Parties adopted an outreach budget, created an Outreach Unit with provision for staff both in The Hague and in the field offices, and developed outreach strategies.¹⁶² From this point on, the ICC has conducted diverse outreach activities, aimed at reaching the public and youth, in particular, and encouraging dialogue.¹⁶³ The ICC, compared to the *ad hoc* tribunals, have a communication strategy, describing its outreach as “two-way communication” with the conflict-affected societies.¹⁶⁴ The regular outreach reports of the Court demonstrate that outreach usually commences at the trial phase.¹⁶⁵ Thus far, the ICC has undertaken outreach activities in the Central African Republic (hereinafter ‘CAR’), Côte d’Ivoire, the Democratic Republic of the Congo (hereinafter ‘DRC’), Kenya and Uganda. However, it appears that that outreach activities have yet to begin in Mali, despite the ICC rendering a conviction and establishing a field office in Mali. A dedicated webpage on the Court’s website provides general information on the Court’s outreach activities, including links to reports from 2007 to 2010, although, no such reports have been published on the website for the last 10 years.

The ICC has emphasised the importance of outreach, viewing it as “critical to delivering public and transparent justice, securing necessary support for the Court, and ensuring the effective impact of the Court.”¹⁶⁶ In its first Outreach Report, the ICC reported “remarkable” results of outreach efforts in Uganda and the DRC, claiming success in informing the public about its work, fostering “realistic expectations” and augmenting trust in the Court.¹⁶⁷ Such words are repeated in subsequent Outreach Reports, all of which praise the ICC’s exciting progress and the satisfaction of those having participated in outreach activities.¹⁶⁸ Meanwhile, only five

¹⁶¹ *ibid* 119.

¹⁶² Nicholas Waddell and Phil Clark, *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal Africa Society 2008) 67.

¹⁶³ Nesiiah (n 107) 1004.

¹⁶⁴ ‘Integrated Strategy for External Relations’ (Public Information and Outreach) 3 <https://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf> accessed 31 May 2021.

¹⁶⁵ *Public Information and Outreach Engaging with Communities: Report of activities in the situation related countries Period: From January 2011 - October 2014* <https://iccforum.com/media/background/outreach/2014-11-17_Public_Information_and_Outreach-Engaging_with_Communities-Advance_Copy.pdf> accessed 31 May 2021.

¹⁶⁶ International Criminal Court Assembly of States Parties, ‘Report on the Activities of the Court’ ICC-ASP/4/16 (16 September 2005) para 17.

¹⁶⁷ International Criminal Court, ‘Outreach Report’ (Public Information and Documentation Section, Outreach Unit 2007) 41 <<https://www.icc-cpi.int/iccdocs/PIDS/publications/OUR2007Eng.pdf>> accessed 31 May 2021.

¹⁶⁸ International Criminal Court, ‘Outreach Report’ (Public Information and Documentation Section, Outreach Unit 2010) 81-82 <<https://www.icc-cpi.int/iccdocs/PIDS/publications/OUR2010Eng.pdf>>; International Criminal Court, ‘Public Information and Outreach: Engaging with Communities’ (ICC Registry, 17 November 2014) 4 <http://iccforum.com/media/background/outreach/2014-11-17_Public_Information_and_Outreach-Engaging_with_Communities-Advance_Copy.pdf> accessed 31 May 2021.

years into its creation, the outreach programme began to face increasing financial constraints and pressure, rather than gaining support from the Assembly of States Parties.¹⁶⁹ The budget of the ICC organ tasked with undertaking outreach has not changed since 2016, despite the growing number of situation countries and therefore, of outreach activities required.¹⁷⁰ Along with an inadequate budget, and despite the publication of a communication strategy, the Court's intention in conducting outreach is unclear, including whether the strategy is aimed at enhancing the impact of the Court for local stakeholders or whether it is primarily aimed at other audiences.¹⁷¹ Despite references to two-way communication, there is no discussion of how this is envisaged as the activities enumerated in the strategy take the form more of educating local stakeholders than giving them a sense of ownership. Similarly, there is no information as to whether the opinions of local stakeholders will be considered, or if local stakeholders are given such an opportunity to voice them in the townhall meetings specifically referred to in the strategy, for example.

Overall, this section has discussed the extra-judicial efforts of modern ICTs to enhance their sociological legitimacy by ensuring local stakeholders accept their work, and the largely positive institutional view of these efforts. The next chapter considers the extent to which ICTs have been successful in garnering sociological legitimacy from the relevant conflict-affected societies, thereby putting the extra-judicial efforts of these courts to the test and questioning the impact they really have on the ground.

Conclusion

This chapter has examined how the aims elucidated in the previous chapter have been put into practice by three modern international criminal courts: the *ad hoc* tribunals and the ICC. This chapter has argued that modern ICTs have included contributing to peace and reconciliation for the conflict-affected societies among their macro-level objectives, as part of their intended

¹⁶⁹ A quote by Alison Smith from *No Peace Without Justice*, reported in 'Mali Case Throws Spotlight on ICC Budget Constraints' *Institute for War and Peace Reporting* (6 August 2012) <<https://iwpr.net/global-voices/mali-case-throws-spotlight-icc-budget-constraints>> accessed 31 May 2021.

¹⁷⁰ Budget Resolutions ICC-ASP/16/Res.1 (2016); ICC-ASP/16/Res.1 (2017); ICC-ASP/17/Res.1 (2018); ICC-ASP/18/Res.1 (2019) <https://asp.icc-cpi.int/en_menus/asp/bureau/WorkingGroups/budget/Pages/default.aspx> accessed 31 May 2021.

¹⁷¹ Section 5, para 3 of the 'Integrated Strategy for External Relations, Public Information and Outreach' (International Criminal Court) names States Parties as the Court's first key partners and audience, followed by "States directly related to a situation; non-State parties;" intergovernmental and non-governmental organisations; and victims and "affected populations." Accordingly, it could be interpreted as meaning that local stakeholders are not necessarily regarded as particularly important partners in outreach. This is something the Court could clarify to resolve misunderstandings of the importance of local stakeholders.

impact on global peace and security. This addition of local peace and reconciliation to the macro-level objectives of ICTs has led the courts to recognise the conflict-affected society as an explicit stakeholder in the ICJ process and outcome, alongside the international community. The recognition of the conflict-affected society is significant because without their recognition and involvement in efforts to contribute to peace and reconciliation, these objectives are unattainable on the ground.

This chapter then focused on the objectives of post-conviction practices of the ICTs, from the imposition of a sentence upon an individual to the enforcement of the sentence. The foundational documents of the three ICTs provide little insight into the justifications for sentencing, leaving this to the discretion of the judiciary. The jurisprudence of all three ICTs shows a preference for retribution and deterrence at the sentencing stage, and a secondary role for the rehabilitation and reintegration of the convicted person. The enforcement of sentences remains a largely pragmatic practice, devoid of specific objectives. References are made to rehabilitation but the disparity in treatment of similar offenders convicted by the same court (i.e. the Mechanism and the ICC) and presumption of release despite continuing denial, raise doubts as to how the macro-level objectives of the *ad hoc* tribunals (and now the Mechanism) are advanced in their post-conviction practices. The ICC's approach has been somewhat more open than that of its predecessors and the decisions on early release more vocal as to the broader societal impact of release on the conflict-affected society. Although the two sets of objectives – the macro-level objectives of ICTs and the micro-level objectives of sentencing and enforcement of sentences – are distinct, the micro-level objectives must not thwart the macro-level objectives of ICTs. This means that, where possible, post-conviction practices must fit within the broader aims pursued in creating these courts. The ICC has realised this but has tended to focus on a sub-group of local stakeholders – the victims.

Finally, having discussed objectives and stakeholders of modern ICTs, I returned to the question of the legitimacy of ICTs first discussed in Chapter I. In this chapter, I focused on sociological legitimacy of modern ICTs, as these courts' ability to promote local peace and reconciliation is ultimately dependent on local acceptance. The *ad hoc* tribunals and ICC have recognised that local stakeholders must be informed and convinced of their work if they are to achieve their macro-level objectives, and to this end have made outreach efforts alongside their usual activities as courts of law. The institutional view of these extra-judicial activities is predominantly positive, lauding these courts' contribution to local peace and reconciliation.

The next chapter uses the efforts of the ICTs as a basis for considering how successful they have been in garnering sociological legitimacy from their local stakeholders.

CHAPTER III - Assessing the sociological legitimacy of ICTs and the impact on achieving their macro-level objectives

Introduction

This chapter builds on the discussion of the previous chapter on the *ad hoc* tribunals and the ICC. The previous chapter established that these modern ICTs have included local peace and reconciliation among their macro-level objectives and to this end recognised conflict-affected societies as their local stakeholders. Moreover, modern ICTs have acknowledged that the micro-level objectives specific to their post-conviction practices must fit within their macro-level objectives if they are not to thwart their achievement. In this regard, I argued that legitimacy, I argued, is crucial. Chapter I introduced the concept of legitimacy, and Chapter II focused on the legitimacy of modern ICTs, arguing that these courts' ability to achieve their macro-level objectives hinges on possessing sociological legitimacy from local stakeholders. Section 3 of the previous chapter suggested that the *ad hoc* tribunals and the ICC tend to have a positive view of the success of their extra-judicial efforts to garner acceptance and support from their local stakeholders. This chapter tests these views against those of the local stakeholders, to ascertain to what extent ICTs enjoy sociological legitimacy and endeavours to explain the reasons behind the state of affairs.

Section 1 examines local stakeholders' views of ICTs' work, firstly with regard to their contribution to local peace and reconciliation, and secondly regarding their post-conviction practices, as this thesis is primarily concerned with this aspect of ICTs' work. As this is an empirical question, I look at the many empirical studies undertaken over the years in the former Yugoslavia, Rwanda and many situation countries of the ICC (countries in which the ICC has undertaken investigations). The section demonstrates a lack of sociological legitimacy of ICTs locally, evident in mistrust of the courts and the persistent questioning of their fairness and relevance to the conflict-affected society. Accordingly, in section 2, I examine the reasons behind the ICTs' lack of sociological legitimacy, which I argue is explained both by shortcomings of the ICTs and is a consequence of the local context in the conflict-affected society. These different factors explaining the lack of sociological legitimacy will guide me in suggesting solutions thereto in Part Two of the thesis.

1. Testing ICTs' sociological legitimacy locally

As ICTs intend to have an impact on *local* peace and reconciliation, they must convince *local* stakeholders. Accordingly, this section tests the institutional view of the ICT's work and outreach efforts, discussed in section 3 of Chapter I against that of their local stakeholders. In section 1.1, I consider whether local stakeholders consider the relevant ICT to have contributed to peace and reconciliation on the ground, and in particular whether they believe the facts as established by these courts. Thereafter, in sections 1.2 and 1.3, I consider local views of ICTs' post-conviction practices: how do local stakeholders accept sentences and their enforcement, and what are the consequences thereof?

1.1 Local stakeholder view on ICTs' contribution to peace and reconciliation

Despite the desire for retributive justice expressed by victims in the former Yugoslavia,¹ Rwanda,² the DRC, the CAR and Mali,³ many empirical studies have found that an overall negative impression of ICTs persists in local public opinion. Empirical studies relating to the ICTY have found that communities in the former Yugoslavia appear to have “three competing versions of truth” relating to the war.⁴ Thus, polls have found that whilst 35.3% of Bosnian Croats and 42.1% of Bosnian Muslims “believe that the relevant facts about the war in BiH have been established” by the ICTY, this is only the case with “15.6% of Bosnian Serb respondents.”⁵ This echoes earlier findings that “rather than conform their views to the Tribunal's verdicts, bystanders point to divergences between the ‘truth’ as they ‘know’ it and

¹ Janine Natalya Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (2012) 14 (1) *Journal of Genocide Research* 55, 69.

² Jean Baptiste Kayigamba, ‘Without Justice, No Reconciliation: A Survivor's Experience of Genocide’, in Phil Clark and Zachary D Kaufman (eds), *After Genocide Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Columbia University Press 2008) 33 - 42; William A Schabas, ‘Post-Genocide Justice in Rwanda: A Spectrum of Options’ in Phil Clark and Zachary D Kaufman (eds), *After Genocide Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Columbia University Press 2008) 227.

³ This support is evident in the fact that the ICC started investigating the situations in these countries following a referral to the ICC.

⁴ Janine Natalya Clark, ‘The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina’ (2009) 7(3) *JICJ* 463, 476; Janine Natalya Clark, ‘The Impact Question: The ICTY and the Restoration and Maintenance of Peace’ in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 73; Janine Natalya Clark, ‘Transitional Justice in Bosnia: The International Criminal Tribunal for the Former Yugoslavia’ in Lilian Barria and Steven Roper (eds), *The Development of Institutions of Human Rights* (Palgrave Macmillan 2010) 88; Janine Natalya Clark, ‘From Negative to Positive Peace: The Case of Bosnia and Herzegovina’ (2009) 8 *Journal of Human Rights* 360, 369.

⁵ Clark (n 1) 62; *Facing the Past and Access to Justice from a Public Perspective: Special Report* (United Nations Development Programme 2010) <<http://www.undp.ba/upload/publications/Facing0the%20Past%20and%20Access%20to%20Justice.pdf>> accessed 31 May 2021.

as reflected in the ICTY record;” there is a lack of trust in the truth established by the Tribunal as well as mistrust between communities.⁶ Such a state of affairs as regards the ‘truth’ reinforces division in the society and influences the local stakeholders’ reception of the Tribunal’s work. Even where respondents reported inter-ethnic interaction and dialogue, they nevertheless said that they were pressured to “accept [a] vision of reconciliation” for which they were not ready, including reconciling with individuals who were not prepared to acknowledge the facts.⁷

More recent polls in Bosnia and Herzegovina reiterate these views, such that over 25 years after the end of the conflict in the former Yugoslavia, there is continued disparity along ethnic lines not only regarding an understanding of the war, but also views of the reconciliation process in the country, the extent to which it has already been achieved and its feasibility.⁸ The majority of these respondents stated that the ICTY in particular did not have a positive impact on reconciliation: 90% of Bosnian Serbs said that the “ICTY did not contribute to the reconciliation process in the former Yugoslavia, compared with [...] 62% of Bosnian Muslims and 74% of (Bosnian) Croats.”⁹

It is not uncommon for empirical studies to find that a cross-section of the population in Bosnia do not believe that reconciliation is currently possible, with interviewees often referring to minimal communication as the closest indicator of reconciliation thus far.¹⁰ Negative perceptions are also not restricted to the older generations who might harbour hatred and resentment due to their victimisation during the war, but are shared by school children and young adults.¹¹ The situation is cause for concern when individuals who did not live through the war continue to feel animosity towards their community’s ‘war enemies’ as it demonstrates a clear failure to move beyond the war rhetoric and towards a shared and peaceful future. Conversely, one empirical study has found that the ICTY, for all of its limitations, has made a significant contribution to peace, with interviewees convinced “that the region was better off

⁶ Laurel E Fletcher and Harvey M Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24 (3) *Human Rights Quarterly* 573, 603; Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005) 115-116.

⁷ Lara J Nettlefield, *Courting Democracy in Bosnia and Herzegovina* (CUP 2010) 277.

⁸ *Public Opinion Poll Results* (United Nations Resident Coordinator Office in Bosnia and Herzegovina 2015) 36-37

<https://www.undp.org/content/dam/unct/bih/PDFs/Prism%20Research%20for%20UN%20RCO_Statistical%20Report.pdf> accessed 31 May 2021.

⁹ *ibid* 44.

¹⁰ Clark, ‘From Negative to Positive Peace: The Case of Bosnia and Herzegovina’ (n 4) 363.

¹¹ *ibid* 146.

with the tribunal than without it,”¹² and one interviewee responding that there was evidence of reconciliation in Bosnia.¹³ However, this person, much the same as other Bosnian interviewees, understood reconciliation as meaning merely a cessation of violence, rather than a restoration of relations.

Similarly, studies on the perceptions of the ICTR’s impact on peace and reconciliation often find that the Tribunal has had little success in the eyes of its local stakeholders, sometimes described as having had no impact on reconciliation.¹⁴ Field research has found that only one-third of those asked agreed that the Tribunal was promoting societal reconciliation, with only around 4% “strongly in accord;” and, a second set of results finding that only 15.5% of interviewees believed that the ICTR would “contribute significantly to the reconciliation process.”¹⁵ In a poll of over one and a half thousand Rwandans taken several years later, nearly half of the respondents thought that the ICTR would not have an impact on societal reconciliation.¹⁶ Indeed, very few Rwandans “really believe or acknowledge the role of the ICTR in promoting reconciliation,”¹⁷ and some interviewees make statements to the effect that not only is there no reconciliation but that “animosity” exists between communities.¹⁸

Indeed, a sort of “selective amnesia” exists in Rwanda, where aspects of the past are not discussed, allowing for peaceful “coexistence” without trust between communities.¹⁹ Combined with this differing view of the genocide is a clear lack of trust in the ICTR, particularly where its work does not confirm the community’s understanding of the genocide.²⁰ At the same time, governmental polls in Rwanda have found that 92% reportedly believe that

¹² Frédéric Mégret, ‘The Legacy of the ICTY as Seen Through Some of its Actors and Observers’ (2011) 3 *Goettingen Journal of International Law* 1011, 1050.

¹³ Clark, ‘From Negative to Positive Peace: The Case of Bosnia and Herzegovina’ (n 4) 363.

¹⁴ *International Criminal Tribunal for Rwanda: Justice Delayed* (International Crisis Group 2001) 26.

¹⁵ Timothy Longman, Phuong Pham and Harvey M Weinstein, ‘Connecting Justice to Human Experience: Attitudes towards Accountability and Reconciliation in Rwanda’ in Eric Stover and Harvey M Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 214-222.

¹⁶ Klaus Bachmann and Aleksandar Fatić, *The UN International Criminal Tribunals: Transition Without Justice?* (Routledge 2015) 94.

¹⁷ Philipp Schulz, ‘Justice seen is Justice done? - Assessing the Impact of Outreach Activities by the International Criminal Tribunal for Rwanda’ (2015) 21(74) *Croatian International Relations Review* 63, 76.

¹⁸ Max Rettig, ‘Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?’ (2008) 51(3) *African Studies Review* 25, 43; Maya Sosnov, ‘The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda’ (2008) 36(2) *Denver Journal of International Law and Policy* 125, 143; Mark Amstutz, ‘Is Reconciliation Possible After Genocide? The Case of Rwanda’ (2005) 48 *Journal of Church and State* 541, 549.

¹⁹ Susanne Buckley-Zistel, ‘Remembering to Forget: Chosen Amnesia as a Strategy for Local Coexistence in Post-Genocide Rwanda’ (2006) 76(2) *Journal of International African Institute* 131; Susanne Buckley-Zistel, ‘We Are Pretending Peace: Local Memory and the Absence of Social Transformation and Reconciliation in Rwanda’ in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction, Reconciliation in Rwanda and Beyond* (Columbia University Press 2009) 138.

²⁰ Longman, Pham and Weinstein (n 15) 214.

reconciliation has been achieved.²¹ In reading such findings, it is important to note the Government's prohibition to discuss ethnicity, which makes it difficult to truly understand local attitudes towards inter-ethnic reconciliation,²² as well as the general lack of freedom in Rwanda to speak openly about reconciliation. In a State-funded opinion poll in 2010, for example, the great majority of respondents refused to answer questions about their personal healing or reconciliation.²³ As such, where positive views on the existence of reconciliation are reported in Rwanda, they are not necessarily illustrative of the actual situation on the ground.²⁴

As regards the ICC, there is considerable debate in situation countries partly because, compared to the work of the *ad hoc* tribunals, the ICC sometimes commences investigations into a situation whilst the conflict is ongoing, which for some respondents to empirical studies raises questions of whether justice can promote or hinder peace.²⁵ Many empirical studies have been carried out in situation countries of the ICC, prior to and after convictions have been rendered.²⁶ They have found that local stakeholders view on the role of accountability and the ICC in particular to the promotion of local peace and reconciliation is divided, including in the same

²¹ *Rwanda Reconciliation Barometer 2010* (National Unity and Reconciliation Commission 2010) <http://www.nurc.gov.rw/fileadmin/Documents/RWANDA_RECONCILIATION_BAROMETER.pdf>; *Rwanda Reconciliation Barometer 2015* (National Unity and Reconciliation Commission 2015) <http://www.nurc.gov.rw/index.php?id=70&no_cache=1&tx_drblob_pi1%5BdownloadUid%5D=55>; Rodrigue Rwirahira, 'At least 92% of Rwandans reconciled, says new survey' *The New Times* (28 January 2016) <<https://www.newtimes.co.rw/section/read/196536>> accessed 31 May 2021.

²² Rettig (n 18) 27.

²³ *ibid*; *Rwanda Reconciliation Barometer 2010* (n 21).

²⁴ Sara Kendall and Sarah Nouwen, 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda' (2016) University of Cambridge Legal Studies Research Paper Series Paper 20, 34.

²⁵ Eugène Bakama Bope, 'The ICC and Reconciliation in the DRC' (2015) FICHL Policy Brief Series No. 41, 2; Kenneth A Rodman and Petie Booth, 'Manipulated Commitments: The International Criminal Court in Uganda' (2013) 36 HRQ 271, 302; Adam Branch, 'International Justice, Local Injustice' (2004) 51(3) *Dissent* 22.

²⁶ Patrick Vinck, Phuong Pham, Suliman Baldo and Rachel Shigekane, *Living with Fear: A Population-based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo* (Human Rights Center, University of California Berkeley and International Center for Transitional Justice 2008); Rorisang Lekalake and Stephen Buchanan-Clarke, *Support for the International Criminal Court in Africa: Evidence from Kenya* (2015) Afrobarometer Policy Paper No. 23; *Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda* (Human Rights Center, University of California Berkeley and International Center for Transitional Justice 2005); Phuong Pham, Patrick Vinck, Eric Stover, Andrew Moss, Marieke Wierda, Richard Bailey, *When the War Ends: A Population-based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (Human Rights Center, University of California Berkeley and International Center for Transitional Justice 2007); Michael Patrick Broache, 'The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda faction)/CNDP/M23 Rebel Group' (Conference of the International Studies Association 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434703> accessed 31 May 2021; Stephen Smith Cody, Alexa Koenig and Eric Stover, 'Witness Testimony, Support and Protection at the ICC' in Kamari M Clarke, Abel S Knotternus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2016) 301; Birju Kotecha, 'The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism' (2018) 31(4) *LJIL* 939.

State.²⁷ Thus, some respondents question the ability of the Court to contribute to peace and reconciliation and consider its approach more likely to exacerbate tensions and endanger the peace process.²⁸ Meanwhile, for other respondents in the same States, there can be no peace and reconciliation without criminal justice; accountability and recognition of crimes is necessary for the reconciliation process to begin, and the ICC is understood as providing the means therefor.²⁹ Often, views of the ICC on the ground are more positive at the outset, with many respondents claiming that punishment of individuals is a necessary component of the peace and reconciliation process. However, these views often change once the ICC has rendered a sentence of imprisonment, as is discussed in the following subsection.

Overall, this section has demonstrated that the views on the ground as regards ICTs' contribution to peace and reconciliation are often more critical of ICTs than the institutions themselves. As regards the two *ad hoc* tribunals, which have had much more restricted mandates and time in which to make an impact on the ground (having been established several years before the ICC), there is little evidence that they have had a positive impact on peace and reconciliation in the former Yugoslavia and Rwanda.³⁰ In fact, local stakeholders often do not appear to acknowledge the relevance of the *ad hoc* tribunals to their own lives,³¹ and criticise their existence for being more significant for "international law or the idea of criminal justice than the region it was supposed to have an impact on."³² Views of the local stakeholders of the ICC are more nuanced and complicated by the fact that the Court often works whilst a conflict is ongoing. Whilst opinions on the ICC's potential impact tend to be positive in theory, they become more negative once the Court has started its work in a conflict-affected State. Added to this is evidence from many of the empirical studies discussed above that there is often no

²⁷ Linus Nnabuike Malu, 'The International Criminal Court and the Complex Road to Peace in Cote d'Ivoire' (2016) 16 *International Criminal Law Review* 826, 848-850.

²⁸ Pham, Vinck, Stover, Moss, Wierda, Bailey, (n 26) 5; Tim Murithi and Allan Ngari, *The ICC and Community-Level Reconciliation: In Country Perspectives* (Institute for Justice and Reconciliation 2011).

²⁹ Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court* (Human Rights Center, University of California Berkeley 2015) 71; Vinck, Pham, Baldo and Shigekane (n 26) 3.

³⁰ James Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia' (2005) 42(3) *Journal of Peace Research* 271, 287; Gert Vermeulen and Eveline De Wree, *Offender Reintegration and Rehabilitation as a Component of International Criminal Justice? Execution of Sentences at the Level of International Tribunals and Courts: Moving Beyond the Mere Protection of Procedural Rights and Minimal Fundamental Interests?* (Maklu 2014) 78.

³¹ Sara Parker, 'The International Criminal Tribunal for the Former Yugoslavia: The Promise and Reality of Reconciliation in Croatia' (2009) 15 (2) *Peace and Conflict Studies* 80, 88 regarding the ICTY; Elizabeth Neuffer, *The Keys to My Neighbour's House: Seeking Justice in Bosnia and Rwanda* (Picador 2001) 371.

³² Mégret (n 12) 1033.

mutually held understanding of what reconciliation means or entails, between different communities in a conflict-affected society.

This brings me to consider local stakeholders' views of the ultimate result of conviction by an ICT: sentencing to imprisonment. This next section examines whether local views on this post-conviction practice might contribute to acceptance of these courts' work or conversely, whether they explain the lack of overall trust in the courts discussed in this section.

1.2 Local stakeholder views on ICTs' sentences

Most empirical research on local perceptions of ICTR and ICTY sentences predate the Mechanism so in most cases this chapter refers to the ICTR and the ICTY rather than the Mechanism. However, as the Mechanism has not deviated from the practices of the ICTR and the ICTY in significant ways,³³ the perceptions of the local stakeholders on the ICTR and the ICTY sentences and their impact on peace and reconciliation are similarly relevant for the Mechanism. The ICC, in contrast to the two *ad hoc* tribunals, has a much larger and more diverse group of local stakeholders as the ICC deals with conflict in different parts of the world. Moreover, its work is in the much earlier stages than that of the *ad hoc* tribunals, and as such, it has convicted and sentenced much fewer individuals and its success in achieving its self-imposed objectives has received less interest to date. Thus far, as stated in the previous chapter, the ICC has imposed sentences on five individuals relating to the conflicts in the DRC, the CAR and Mali. As such, I focus on the perceptions polled in these countries principally but will also include those in other situation countries before the ICC, to gauge what the local stakeholders' views are with regard to international retributive justice and its potential impact on reconciliation.

The question of the appropriate sentence of imprisonment in any given case is often very important for local stakeholders. Perceptions of the ICTY's sentences in the States of the former Yugoslavia are not unified but very much divided across ethno-nationalistic lines, much the same as their views on the truth and the Tribunal's contribution to peace and reconciliation. The negative stance towards the Tribunal's sentences is most consistently negative among Serbs in Serbia and Bosnia; a survey conducted in Serbia in 2007 found that "only 7% of Serbian citizens polled believed the ICTY was unbiased when it tried Serbs" and many believed

³³ That is, except for the change in eligibility for ICTR convicted persons to request early release, from the stage of having served $\frac{3}{4}$ of their sentence to $\frac{2}{3}$.

sentences imposed on Serb convicts to be “much harsher than those imposed on the accused of other ethnic backgrounds.”³⁴ The Serb and Croat communities in Bosnia largely share these negative views of the Tribunal’s sentencing practices.³⁵

In contrast, Bosnian Muslims are not as critical of the Tribunal’s sentences. There is little talk of the ICTY’s supposed bias in the community, mostly because the Tribunal’s prosecutorial strategy has reinforced their sense of victimisation. Whilst Bosnian Muslim interviewees do tend to feel that justice has been served overall by the ICTY, there is some dissatisfaction with the sentences handed down. Critics among this community see the sentences as much “too lenient” and anything less than life imprisonment as unsatisfactory, meaning that although reinforcing their version of the truth of the war, the ICTY nevertheless fails to meet their expectations.³⁶ The controversy with which sentences handed down by the ICTY are met among victim groups and their communities often takes precedence over the conviction itself,³⁷ particularly when they relate to the Srebrenica genocide.³⁸ This is a rather common complaint of Bosnian Muslim interviewees against the sentencing practice of the ICTY; the sentences are sometimes even seen as rewarding the criminals for their actions.³⁹ It may well be that some victims will never be satisfied with the sentence imposed, whatever its length.⁴⁰

The last two cases of the ICTY, subsequently continued by the Mechanism, are the highest profile - Ratko Mladić, and Radovan Karadžić – and the outcomes of their trials have been long awaited by victim groups. One well-known victim group, the Mothers of Srebrenica, celebrated the sentence as the maximum sentence imposable by the Tribunal. However, many remained unsatisfied with the conviction because Mladić was not convicted of genocide outside Srebrenica.⁴¹ The second sentencing judgment was more controversial as Karadžić was

³⁴ Mirko Klarin, ‘The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia’ (2009) 7 JICJ 89, 92.

³⁵ *ibid* 90.

³⁶ *ibid*.

³⁷ Dan Saxon, ‘Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia’ (2005) 4(4) *Journal of Human Rights* 559, 564 quoting ‘Srebrenica Women Say Reduced Sentence for Bosnian Serb General Unacceptable’ *Radio Naba* (20 April 2004).

³⁸ Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 1) 70; Rachael Brown, ‘Life for Bosnian Serbs over Srebrenica massacre’ *ABC News* (11 June 2010) <<http://www.abc.net.au/news/stories/2010/06/11/2924331.htm>> accessed 31 May 2021.

³⁹ Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 1) 64.

⁴⁰ Slavenka Drakulić, ‘Truth is justice for Srebrenica’ *The Guardian* (10 June 2010) <<http://www.guardian.co.uk/commentisfree/2010/jun/10/popovic-beara-icty-war-crimes-srebrenica>> accessed 31 May 2021.

⁴¹ This has received a lot of media coverage, for example: ‘Srebrenica Survivors React to Mladic Life Sentence’ *Radio Free Europe Radio Liberty* (22 November 2017) <<https://www.rferl.org/a/icty-bosnia-mladic-srebrenica/28870232.html>>; ‘Bosnians Divided over Ratko Mladic Guilty Verdict for War Crimes, *The Guardian* (22 November 2017) <<https://www.theguardian.com/world/2017/nov/22/bosnians-divided-over-ratko-mladic-guilty-verdict-for-war-crimes>>; ‘Ratko Mladic Sentenced to Life in Prison for Genocide’ *Al Jazeera* (22

initially sentenced to 40-years' imprisonment, although the increase to life imprisonment by the Appeals Chamber was welcomed by victim groups much the same as Mladić's sentence.⁴² Interestingly, in practice there is no difference between a sentence of 40 years' imprisonment and life imprisonment for a 74-year old man; whether sentenced to 40 years' or life imprisonment, Karadžić will die in prison.⁴³ This underscores the importance of sentencing for victim groups in particular, as it sends a message of condemnation and understanding of the scale of harm caused to them.

In contrast, the ICTR has rendered significantly more sentences of life imprisonment than its sister tribunal,⁴⁴ which might help to explain the fact that there are fewer reactions in Rwanda to the ICTR's sentencing practice. Nevertheless, polls have consistently found that where the local public voice an opinion on the ICTR, their perceptions of the Tribunal's sentences are negative, with large numbers considering the sentencing practice of the Tribunal to be too lenient.⁴⁵ The criticism of the ICTR's sentences derives partly from the fact that Rwanda abolished the death penalty only in 2007, meaning that many did not understand how those convicted by the ICTR could get more lenient sentences than those handed out to the individuals convicted in Rwanda.⁴⁶ This leniency of the ICTR compared to national courts is counter-intuitive especially as the more high-ranking individuals were convicted by the Tribunal, whilst the small fish perpetrators were prosecuted by the national courts.⁴⁷

November 2017) <https://www.aljazeera.com/news/2017/11/22/ratko-mladic-sentenced-to-life-in-prison-for-genocide> accessed 31 May 2021.

⁴² 'Karadzic sentence increased to life for Bosnia genocide: UN' *Al Jazeera* (20 March 2019) <<https://www.aljazeera.com/news/2019/3/20/karadzic-sentence-increased-to-life-for-bosnia-genocide-un>>; Denis Džidić, 'Radovan Karadzic Sentenced to Life in Prison' *Balkan Insight* (20 March 2019) <https://balkaninsight.com/2019/03/20/radovan-karadzic-sentenced-to-life-in-prison/>; Julian Borger, 'Radovan Karadzic war crimes sentence increased to life in prison' *The Guardian* (20 March 2019) <<https://www.theguardian.com/law/2019/mar/20/radovan-karadzic-faces-final-verdict-in-bosnia-war-crimes-case>> accessed 31 May 2021.

⁴³ Richard J Goldstone and Amanda Hukanović, 'Expectations of the Victims of Radovan Karadzic' *Oxford Human Rights Hub* (30 April 2019) <<https://ohrh.law.ox.ac.uk/expectations-of-the-victims-of-radovan-karadzic/>> accessed 31 May 2021.

⁴⁴ Margaret deGuzman, 'Harsh Justice for International Crimes?' (2014) 39 *The Yale Journal of International Law* 1, 8.

⁴⁵ Bachmann and Fatić (n 16) 7.

⁴⁶ Sam Szoke-Burke, 'Avoiding Belittlement of Human Suffering: A Retributivist Critique of ICTR Sentencing Practices' (2012) 10 *JICJ* 561, 563; Barbora Holá and Hollie Nyseth Brehm, 'Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts' (2006) 3 *Genocide Studies and Prevention: An International Journal* 59, 77.

⁴⁷ *ibid* Holá and Brehm 78; Barbora Holá, Alette Smeulders and Catrien Bijleveld, 'International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR' (2011) 9 *JICJ* 411, 418-419.

As regards the permanent court, the ICC undertook interviews with over 100 individuals in the DRC after its first conviction and sentencing judgment. The vast majority of interviewees knew little of the court and its actions; almost half of those interviewed were unable to “identify the ICC’s mission, most could not say which ICC case they had applied to join, and many could not even identify the ICC as a criminal court.”⁴⁸ In contrast, public perceptions in the second conflict situation to lead to a conviction, in the CAR, are remarkably different. Before the conviction, in “a general population survey, nearly all (95%) found the ICC to be important,” of whom half believed it “would answer the need for justice” and 20% were convinced that it would “punish those responsible.”⁴⁹ Whilst the survey illustrated a lack of belief in the Court’s commitment to victims and ability to deter, it overall demonstrates that the ICC enjoyed widespread support in the CAR, at least before the conviction and sentence was rendered; only 10% of those questioned doubted the ICC’s impartiality.⁵⁰

However, since rendering sentences on five individuals related to the situations in the DRC, the CAR and Mali, responses to the ICC’s sentences have been similar to those in the former Yugoslavia and Rwanda. Whilst many consider convictions and imprisonment in general as a path to building justice, others consider the sentencing practice of the Court in specific cases too lenient, particularly in the DRC (the conflict situation that led to the first two convictions at the ICC).⁵¹ This is further supported by victim groups, who in reaction to the potential first early release at the ICC, that of Germain Katanga, decried that the initial sentence was too lenient and thus failed to serve as a deterrent,” instead convinced that a domestic court in the country would have pronounced “a much more appropriate sentence.”⁵² Field research has also been conducted in States whose situations are under investigation by the ICC but have yet to lead to any completed trials, including in Côte d’Ivoire and Kenya where the ICC has made no conviction and in Uganda where the ICC convicted Dominic Ongwen but has yet to sentence

⁴⁸ Cody, Stover, Balthazard, Koenig (n 29) 43.

⁴⁹ Patrick Vinck and Phuong Pham, ‘Outreach Evaluation: The International Criminal Court in the Central African Republic’ (2010) IJTJ 421, 440.

⁵⁰ *ibid.*

⁵¹ Olivia Bueno, ‘Reactions to the Sentencing of Germain Katanga: Some Comfort, Some Frustration’ *International Justice Monitor* (11 June 2014) <<https://www.ijmonitor.org/2014/06/reactions-to-the-sentencing-of-germain-katanga-some-comfort-some-frustration/>>; Luke Moffett, ‘Realising Justice for Victims before the International Criminal Court’ (2014) *International Crimes Database Brief* 6, 9; Olivia Bueno, ‘14 Years: Too Much or Not Enough?’ *International Justice Monitor* (13 July 2012) <<https://www.ijmonitor.org/2012/07/14-years-too-much-or-not-enough/>>; Radio Canal Revelation, ‘Voices from the Ground: Reactions to Final Lubanga Judgment’ *International Justice Monitor* (7 January 2015) <<https://www.ijmonitor.org/2015/01/voices-from-the-ground-reactions-to-final-lubanga-judgment/>> accessed 31 May 2021.

⁵² *Prosecutor v Katanga*: Legal Representative’s observations on the reduction of sentence of Germain Katanga ICC-01/04-01/07 (18 September 2015) para 48.

him. In Uganda, the majority of respondents held the ICC in high esteem, believing it would impact peace and justice on the ground,⁵³ a view shared by respondents in Côte d'Ivoire and Kenya, with an emphasis on the importance of convictions and punishment.⁵⁴ Whether such positive views of the ICC will persist post-conviction, and whether such individuals will accept the length of the sentence imposed and the manner of its enforcement is of course an entirely different question and remains to be seen.

In sum, negative perceptions of the sentences rendered by the *ad hoc* tribunals and the ICC have led local stakeholders to question the courts, demonstrating a lack of sociological legitimacy. Such questioning means that local people are not convinced by the work of these courts or their establishment of the truth, which in turn has consequences for the extent to which they can achieve their macro-level objectives of contributing to peace and reconciliation. This brings me to consider local views of the way in which these sentences are enforced, to determine whether ICTs benefit from greater sociological legitimacy in relation to this post-conviction practice.

1.3 Local stakeholder views on ICTs' sentence enforcement

The way in which international sentences are enforced is subject to particular local media attention in the conflict-affected societies, particularly the prison regime to which international convicts are subjected and the possibility of early release from imprisonment. Often, local stakeholders believe prisoners to be living in very comfortable conditions that are ill-fitting with the crimes they committed.⁵⁵ The prison conditions of ICTY convicts have caused outrage in Bosnia in particular, where it is unfathomable for victims groups that international convicts can be sent to serve their sentence in semi-open prisons with weekend leave and access to various recreational activities.⁵⁶ Even without such liberal prison conditions, internationally convicted individuals are seen as receiving preferential treatment. ICTR convicts tend to be imprisoned in newly constructed prison wings in Mali and Benin, where they benefit from better conditions than national prisoners in these countries, with access to medical care and

⁵³ *Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda* (n 27) 5.

⁵⁴ Cody, Stover, Balthazard, Koenig (n 29) 58-68.

⁵⁵ Nancy Amoury Combs, 'Prosecutor v. Biljana Plavšić: Case No. IT-00-39&40/1-S' (2003) 97 AJIL 929, 936; Bachmann and Fatić (n 16) 93; Holá and Brehm (n 46) 62; Roland Kostic, *Ambivalent Peace: External Peacebuilding, Threatened Identity and Reconciliation In Bosnia and Herzegovina* (Uppsala University 2007), 268; Bachmann and Fatić (n 16) 93.

⁵⁶ *ibid.*

regular meals, something that is not always available to the victims themselves.⁵⁷ Meanwhile, thousands of persons convicted by the domestic courts in Rwanda serve their sentences in severely overcrowded prisons.⁵⁸ Where prison conditions in Enforcement States are better than those in the conflict-affected State, this can be problematic for reconciliation efforts as “the superior treatment” received by international prisoners “could easily be perceived as unfair” and fuels allegations that the Tribunal lacks understanding of the victims’ plight.⁵⁹

The ICC’s practice with regard to Enforcement States has proven to be somewhat different from that of the *ad hoc* tribunals, as the first two convicted individuals were sent to serve their sentences in their State of nationality and in which their crimes were committed. Accordingly, they presumably served their sentences in the same conditions as nationally convicted individuals in the DRC, meaning there was no controversy regarding their conditions of imprisonment compared with those convicted by the national courts. Nevertheless, the third convicted individual to be transferred to an Enforcement State was sent not to his State of nationality - Mali - but to the United Kingdom, although local views of this practice of the Court have yet to be gauged. It remains to be seen what local stakeholders will think of the conditions of imprisonment imposed upon Al Mahdi and whether this has an impact on the ICC’s ability to contribute to peace and reconciliation.

Aside from the conditions of imprisonment, it is hardly surprising that the release of convicted persons has received local attention and has been subject to controversy. This is one area of an ICT’s work that directly affects local stakeholders who might once again be faced with the offenders in their hometown or even street on a daily basis (particularly of the ICTY).⁶⁰ This is particularly problematic where the released individual has not admitted his/her guilt, such as the release of Biljana Plavšić, in particular, which caused an outcry in Bosnia. Despite the ICTY’s “enthusiastic endorsement of her rehabilitation,” Ms. Plavšić recanted her regret and

⁵⁷ Jan Cristoph Nemitz, ‘The Legal Position of International Detainees: Applicable Law and Standards’ in Róisín Mulgrew and Denis Abels (eds), *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016) 5-6; Tracy Isaacs, ‘International Criminal Courts and Political Reconciliation’ (2016) 10 *Criminal Law and Philosophy* 133, 139; Holá and Brehm (n 46) 62.

⁵⁸ Mark A Drumbl, ‘A Hard Look at the Soft Theory of International Criminal Law’ in Leila Nadya Sadat and Michael P. Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Koninklijke Brill 2008) 12; Alana Erin Tiemessen, ‘After Arusha: Gacaca Justice in Post-Genocide Rwanda’ (2004) 8(1) *African Studies Quarterly* 57, 59; Megan M Westberg, ‘Rwanda’s Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR’ (2011) 59 *Kansas Law Review* 331, 362.

⁵⁹ Isaacs (n 57) 139.

⁶⁰ Martin Petrov and Dejana Radisavljević, ‘Post-Conviction Issues: Enforcement of Sentences and other Residual Responsibilities in Colleen Rohan and Gentian Zyberi (eds), *The Role of the Defence in International Criminal Justice*’ (CUP 2017) 360.

acknowledgment of her crimes immediately upon release, breeding inter-ethnic mistrust and harming the peace and reconciliation process in the region as a result.⁶¹

What is particularly telling in terms of local perceptions of ICTY sentences is the reception that those tried and or convicted by the Tribunal receive upon their return to the former Yugoslavia. There is a strong tendency for the ethnic community to which the individual belongs to welcome them back and, in some cases, revere them.⁶² During his trial, there were huge posters of support displayed on Croatian motorways for Ante Gotovina, and upon his release Tihomir Blaškić was welcomed back to Croatia “with slogans such as ‘Croatian heroes are not criminals.’”⁶³ The only Macedonian national to be convicted by the ICTY, Johan Tarčulovski, received a hero’s welcome upon his release from prison, arriving in Skoplje by a governmental airplane. Momčilo Krajišnik received a similar welcome upon his return to Republika Srpska and has been vocal in the media since his release, commenting negatively on ICTY sentences.⁶⁴ Meanwhile, funds have been raised for others during concerts and church gatherings upon their release. The state of affairs suggests that “the ICTY has failed as a pedagogical tool” in the former Yugoslavia because many of the individuals who were welcomed by the relevant post-conflict State continued their war rhetoric upon release, undermining the ICTY’s attempts to encourage a shared peaceful future.⁶⁵

In contrast, the situation of ICTR convicts is markedly different upon their release. Afraid to return to Rwanda, and unsuccessful in their asylum applications to other countries, these individuals are most often forced to live in a safe house in Tanzania. The conditions in the safe house also cause discontent among victims and the wider Rwandan public, because these individuals enjoy better living conditions than many victims, with most of their amenities paid for by the ICTR. Moreover, the ICTR’s early release practices have at times proven to be highly controversial, with the potential release of Hassan Ngeze recently causing such “outrage” in Rwanda that the Security Council felt compelled to intervene, leading to changes in the way

⁶¹ Jonathan H Choi, ‘Early Release in International Criminal Law’ (2014) 123 Yale Law Journal 1784, 1788.

⁶² Mégret (n 12) 1033.

⁶³ Saxon (n 37) 566; Kimi L King and James D Meernik, ‘Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice’ in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 76.

⁶⁴ ‘Ratni zločinac Krajišnik na Palama dočekan euforično, najavio zahtjev za reviziju’ *Slobodna Evropa* (30 August 2013) <<https://www.slobodnaevropa.org/a/krajisnik-izlazi-iz-zatvora-nakon-dvije-treine-odluene-kazne/25089001.html>> accessed 31 May 2021.

⁶⁵ Saxon (n 37) 565-566.

early release is handled by the Mechanism, making it conditional on the good behaviour of the individual.⁶⁶

As regards the ICC, local reception of its first early release decision was mixed. Victim groups expressed anger at the potential for Germain Katanga's early release,⁶⁷ which was subsequently met with outrage once the release was granted.⁶⁸ Meanwhile, the Defence presented evidence of rather more positive perceptions among the conflict-affected society,⁶⁹ which can be partly explained by the fact that different communities were approached for their opinions. Similarly, initial reactions to Katanga's release were rather positive in parts of the DRC, with one local individual stating that "he has served his sentence and paid."⁷⁰ The second release to be considered by the ICC was similarly met with contrasting reactions, from opposition by victim groups to others who have expressed words welcoming Lubanga Dyilo back to the community.⁷¹

Overall, the discussion has demonstrated that local stakeholder views on the contribution of ICTs to peace and reconciliation broadly through their existence, and in particular through their post-conviction practices, is rather critical. Instead, different communities within the conflict-affected societies often question these courts' work and have little trust in them and the truth they establish. This is true for both perceptions of leniency in the length of the sentences and the belief that internationally convicted persons benefit from more comfortable prison

⁶⁶ This case will be discussed in detail in Chapter VII. Barbora Holá, 'Early Release of ICTR Convicts: the Practice Beyond the Outrage' *Justice Info* (5 July 2019) <<https://www.justiceinfo.net/en/tribunals/ictr/41861-early-release-of-ictr-convicts-the-practice-beyond-the-outrage.html>>; Kurekura Nahimana na Rukundo ni ugukemukira abarokotse Jenocide-IBUKA' *Kigali Today* (20 December 2016) <<https://www.kigalitoday.com/amakuru/amakuru-mu-rwanda/article/kurekura-nahimana-na-rukundo-ni-uguhemukira-abarokotse-jenoside-ibuka>>; 'U Rwanda rwamaganye irekurwa rya Rukundo na Nahimana bahamijwe ibyaha bya Jenocide' *Umuryango* (16 December 2016) <[#!>](https://umuryango.rw/amakuru/mu-rwanda/ubutabera/article/u-rwanda-rwamaganye-irekurwa-rya-rukundo-na-nahimana-bahamijwe-ibyaha-byah) accessed 31 May 2021.

⁶⁷ *Prosecutor v Katanga*: Legal Representative's observations on the reduction of sentence of Germain Katanga (n 52).

⁶⁸ 'Ituri: La Libération de Germain Katanga provoque des scènes de liesse à Walendu Bindi' *Radio Okapi* (17 March 2017) <<https://www.radiookapi.net/2020/03/17/actualite/justice/ituri-la-liberation-de-germain-katanga-provoque-des-scenes-de-liesse>> accessed 31 May 2021.

⁶⁹ *Prosecutor v Katanga*: Defence Observations on the reduction of sentence of Mr Germain Katanga ICC-01/04-01/07 (11 September 2015).

⁷⁰ Elvis Katsana, 'Germain Katanga's Return to the DRC' *Justice Hub* (8 December 2015) <<https://testsite.justicehub.org/article/germain-katangas-return-to-the-drc/>> accessed 31 May 2021.

⁷¹ *Prosecutor v Lubanga Dyilo* (Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo) ICC-01/01-04/06 (22 September 2015); *Prosecutor v Lubanga Dyilo*: (Observations of the V01 group of victims on the possible review of Mr Thomas Lubanga Dyilo's sentence) ICC-01/01-04/01-06 (10 July 2015); Olivia Bueno, 'Reconsidering Lubanga's Sentence: Views from Ituri' *International Justice Monitor* (24 August 2015) <<https://www.ijmonitor.org/2015/08/reconsidering-lubangas-sentence-views-from-ituri/>> accessed 31 May 2021.

conditions and more favourable early release practices than those convicted by domestic courts. Such perceptions lead to feelings that internationally convicted persons are treated more favourably than those convicted domestically and sometimes even the victims themselves. This is problematic because justice only has the power to reconcile where punishment is seen as fair.⁷² Unfortunately, this is not the case for ICTs and in particular in the former Yugoslavia and Rwanda, where “fairness is viewed through an ethnic filter.”⁷³ It matters little that punishment has been imposed in an unbiased manner if the conflict-affected society feels it to be unfair, because perceptions of unfairness may encourage feelings of victimisation, which is incompatible with lasting peace and reconciliation.⁷⁴

The lack of trust felt by local stakeholders is not conducive to the closure needed for the peace and reconciliation process.⁷⁵ Indeed, where a community does not trust a court and its work, its sentences are very likely to be disregarded and the wider impact on peace and reconciliation greatly limited, as was the case with the Tokyo Tribunal discussed in Chapter I.⁷⁶ As well as being unconvinced of ICTs’ sentencing and enforcement practices, this section has demonstrated that it is an aspect of ICJ that is particularly important for local stakeholders. Indeed, it is an area of the ICTs’ work that the public often has a view on, which in turn means that it is instrumental in forming the public’s impressions of the ICTs’ and their potential impact.⁷⁷ Therefore, not only are post-conviction practices an important opportunity to promote sociological legitimacy because they are the ultimate result and legacy of an ICT, but also because they are particularly germane to local stakeholders.

Nevertheless, before considering ways of enhancing sociological legitimacy, the next section turns to considering why these ICTs tend to suffer from a lack of sociological legitimacy.

⁷² David A Crocker, ‘Punishment, Reconciliation and Democratic Deliberation’ (2002) 5 Buffalo Criminal Law Review 509, 535.

⁷³ Janine Natalya Clark, ‘The State Court of Bosnia and Herzegovina: A Path to Reconciliation?’ (2010) 13(4) Contemporary Justice Review 371, 375; Klarin (n 34) 92; Clark, ‘From Negative to Positive Peace: The Case of Bosnia and Herzegovina’ (n 4) 373.

⁷⁴ Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 1) 61; Martina Fischer, ‘Transitional Justice and Reconciliation: Theory and Practice’ in Beatrix Austin, Martina Fischer, Hans-Joachim Giessmann (eds), *Advancing Conflict Transformation: The Berghof Handbook II* (Barbara Budrich Publishers 2011) 418-419.

⁷⁵ Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 1) 64. I return to a discussion on conceptualising peace and reconciliation in Chapter V.

⁷⁶ Matthew Saul, ‘Local Ownership of the International Criminal Tribunal for Rwanda: Restorative and Retributive Effects’ (2012) 12(3) International Criminal Law Review 427, 433.

⁷⁷ Barbora Holá and Joris van Wijk, ‘Life after Conviction at International Criminal Tribunals: An Empirical Overview’ (2014) 12 JICJ 109, 110-111.

2. Reasons for ICTs' lack of sociological legitimacy

Some of the reasons behind the above-determined lack of sociological legitimacy are directly connected with the work of the ICTs, as those problems the courts could resolve – the institutional factors (discussed in section 2.1). However, other factors are external to the ICTs, as those they have less potential to impact upon but need nevertheless to take into consideration – the local factors (discussed in section 2.2).

2.1 Institutional factors for ICTs' lack of sociological legitimacy

The institutional factors that explain the lack of sociological legitimacy of ICTs among local stakeholders are three-fold and interconnected, revolving around the failure to provide definitions and means by which they can be assessed and a failure to fully acknowledge and engage with their local stakeholders as a result. Subsections 2.1.1 to 2.1.3 below consider each of the institutional factors in detail.

2.1.1 Failure to define reconciliation

As the above section on local perceptions has demonstrated, reconciliation is a relative term and there will often be a lack of agreement between different individuals and communities in a conflict-affected State as to what constitutes reconciliation (ranging from healed relationships, impossible as that might seem in the circumstances, to coexistence devoid of interaction).⁷⁸ It is not surprising that reconciliation “is open to many definitions and interpretations,”⁷⁹ particularly in conflict-affected societies, where consensus is likely to be lacking. Without a mutual understanding of reconciliation, it is a difficult task to contribute thereto for any court, let alone an ICT that is removed from the conflict-affected State, unless that court provides its own definition of reconciliation and works towards its achievement. ICTs missed a key opportunity to provide the basis by which their success can be assessed as well as to manage local expectations, by providing a definition of what they intended to achieve exactly. Despite the institutional assumption that ICJ and imprisonment in particular would contribute to societal reconciliation, little thought was given as to what societal reconciliation as a goal would entail⁸⁰ and how it would be furthered by rendering sentences of imprisonment and

⁷⁸ See section 1 above.

⁷⁹ Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 1) 56.

⁸⁰ Parker (n 31) 84.

enforcing them.⁸¹ The failure to articulate what ICTs understand by reconciliation extends as far as failing to specify if they see reconciliation as a goal or a process or both; the level of cooperation is sufficient to be regarded as reconciliation; who is to be reconciled with whom and how; and, when the courts' impact thereon could be measured.

Accordingly, the ICTs have failed to grapple head-on with the fact that reconciliation as a goal can refer to relations between warring parties – that is the victim and the offender - or the warring communities; it can be either individual or collective,⁸² making it important to explain which relationships ICTs intend to rebuild. In section 1.2 of Chapter II, I argued that the ICC has focused its recognition of local stakeholders primarily on direct victims, but all three courts have linked their work to societal peace and reconciliation. Whilst there is a link between individual and societal reconciliation, it is important not to conflate the two.⁸³ On the one hand, focusing solely on the direct victims and their needs in order to reconcile are both important (as those for whom ICTs intend to render justice and the group most directly affected by international crimes) and limiting, because it involves prioritising the needs of one specific group of individuals at the expense of the society.⁸⁴ The problem with focusing only on victims is that victims are only one subset of the local stakeholder group, meaning that we do not engage with the voices of the wider, more diverse society. On the other hand, the consequences of victimisation are not felt by the community or society as a whole, so focusing solely on societal reconciliation, for example, will not heal direct victims.⁸⁵

This failure to delineate what the objective of ICTs is, at what level and whom the courts will try to reconcile has led to unrealistically high expectations, as different individuals and communities evaluate the court through their own understanding of what the court would do, including for some that these courts would *achieve* reconciliation. The lack of thought given to

⁸¹ Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1(1) JICJ 64, 69; Harvey M Weinstein, 'Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief' (2011) 5 IJTJ 1, 6.

⁸² I return to these ideas and focus on the meaning, types and levels of reconciliation in detail in Chapter V. *ibid* Weinstein 6-7.

⁸³ Jonathan Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 International Criminal Law Review 263, 264.

⁸⁴ Chapters IV discusses the advantages and dangers of focusing on victims and their reconciliation needs. Lilian A Barria and Steven D Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9 (3) The International Journal of Human Rights 349, 363.

⁸⁵ Doak (n 83) 265; Pierre Hazan, 'Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice' (2006) 88 International Review of the Red Cross 19; Brandon Hamber, 'Does the Truth Heal? A psychological perspective on the political strategies for dealing with the legacy of political violence' in Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press 2001) 155-176.

the ICTs' macro-level objectives not only makes evaluating their impact thereon a difficult task, but also brings into doubt how genuine of an objective local peace and reconciliation are for these courts.⁸⁶

2.1.2 Failure to fully recognise the conflict-affected society and the collective harm of international crimes

Connected to this shortcoming of ICTs to define their objectives and provide the means by which their success can be measured, is the failure to recognise the conflict-affected society as a key constituency of ICTs to whom they are accountable.

Whilst, as part of the development of ICJ since the Nuremberg and Tokyo Tribunals discussed in Chapter I, modern ICTs have recognised victims and conflict-affected societies among their stakeholders to whom they must be held accountable, their engagement with this stakeholder group has been neither clear nor consistent. Instead, the ICTY's responsibility owed to local stakeholders is "often paid nothing more than lip-service,"⁸⁷ and the ICTR has "invested very little in bringing justice and reconciliation to Rwandans."⁸⁸ Both *ad hoc* tribunals took for granted that punishing individuals through a sentence of imprisonment should suffice to bring reconciliation to the conflict-affected societies. There is a lack of sense of ownership in the ICJ process and what it attempts to achieve for the conflict-affected communities. At times, institutional remarks have made it clear that the main stakeholder with whom these courts are concerned is the international community.⁸⁹ Local communities are an afterthought whose expectations and needs are to be considered as long as they do not clash with the concerns and wishes of the international community.⁹⁰ Such an understanding of ICTs is supported by senior officials including its spokesperson, who have argued that ICTs such as the ICTY do not view

⁸⁶ Phil Clark, 'Establishing a Conceptual Framework: Six Key Transitional Justice Themes' in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction, Reconciliation in Rwanda and Beyond* (Columbia University Press 2009) 192.

⁸⁷ Mégret (n 12) 1037.

⁸⁸ Jean-Marie Kamatali, 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans' (2005) 12(1) *New England Journal of International and Comparative Law* 89, 102.

⁸⁹ *ibid* 119.

⁹⁰ Mégret (n 12) 1031; Kendall and Nouwen (n 24) 36-37; Ramesh Thakur and Peter Malcontent, *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004) 217.

local stakeholders are their “primary constituency” for whom the courts were established,⁹¹ which has limited ICJ’s impact on local peace and reconciliation.⁹²

Connected to this failure of ICTs to fully recognise the importance of the conflict-affected *society* as local stakeholders are the difficulties of acknowledging and reckoning with the collective harm of international crimes. I have already suggested in relation to the ICC that it focuses its recognition of local stakeholders on direct victims.⁹³ Whilst the inclusion of victims in the ICJ process is positive,⁹⁴ international crimes such as those prosecuted by ICTs harm entire societies, making a focus solely on victims insufficient a response to mass conflict. The collective nature of international crimes means that the only way of dealing with the harm caused is to recognise both the collective conflict-affected society and the impact of the harm thereon, as well as on individual victims.⁹⁵ Victims do not exist in a vacuum; they belong to one or more communities in the conflict-affected society and are more widely members of that society too.⁹⁶ It is short-sighted to think only of reconciling victims with perpetrators, for example, in view of the link the courts have made between their work and *societal* reconciliation. As I have mentioned above and will discuss in detail in Chapter V, societal reconciliation requires inclusion of a cross-section of the society, rather than focusing *only* on one (albeit important) subset of the society, such as victims. Whilst victim satisfaction and reconciliation is important to ICTs’ work, ICJ does not seek to give victims personal satisfaction by punishing the perpetrator but should also contribute to the victims’ “ultimate integration as equal citizens,” something which they would have lost to at least some extent as a consequence of the crime(s) committed against them.⁹⁷ This is only achievable where the rest of the conflict-affected society also accepts the criminal justice process and outcome,⁹⁸ and is challenging because what direct victims want in any given case will likely change over time⁹⁹

⁹¹ Refik Hodžić, ‘*Accepting a Difficult Truth: ICTY is Not Our Court*’ *Balkan Insight* (6 March 2013) <<http://www.balkaninsight.com/en/article/accepting-a-difficult-truth-icty-is-not-our-court>> accessed 31 May 2021; Asa Rydberg, ‘Victims and the International Criminal Tribunal for the Former Yugoslavia’ in *Crime, Victims and Justice: Essays on Principles and Practice* (Routledge 2004) reported in Charles P Turnbull, ‘The Victims of Victim Participation in International Criminal Proceedings’ (2008) 29 *Michigan Journal of International Law* 777, 788 footnote 69.

⁹² Mégret (n 12) 1029-1031.

⁹³ Nicholas Waddell and Phil Clark, *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal Africa Society 2008) 66.

⁹⁴ *ibid.*

⁹⁵ Thorsten Bonacker and Cristoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (Springer TMC Asser Press 2013), 3.

⁹⁶ Mégret (n 12) 1035.

⁹⁷ *ibid* 1035.

⁹⁸ *ibid.*

⁹⁹ Seminar discussion ‘Criminal Justice and Crisis States’ reported in Nicholas Waddell and Phil Clark, *Peace, Justice and the ICC in Africa* (Royal African Society 2007) 42 <<https://www.lse.ac.uk/international->

and may well be different to what the society as a whole wants or needs. Even amongst themselves, victims do not hold homogenous views but are fractured, much the same as the societies to which they belong.¹⁰⁰

In other words, achieving justice and reconciliation means different things to different people.¹⁰¹ A conflict-affected society is likely to be a divided one, composed of communities that react in different ways to the work of a court and whose expectations do not coincide; these communities are often divided by ethnicity, nationality, or religion.¹⁰² One need only look at Bosnia as a case in point – a very polarised society where people’s expectations and perceptions are split across ethnic lines. In conflict situations such as these where there is division, it is common for communities to “possess deeply entrenched internal narratives denying responsibility for any crimes committed by their social group,” which impacts how they view justice and reconciliation.¹⁰³ When referring to justice, each community tends to mean that justice is to be consistent with their narrative of the conflict and who should be punished.¹⁰⁴ This means that it is inevitable that the court will “challenge at least one of the dominant nationalist narratives, resulting in increased distrust of the ICTY within that particular group.”¹⁰⁵ Where a conflict-affected society is divided, ICJ and sentences in particular can instead serve to increase the polarisation of the groups.¹⁰⁶ The courts have worked on the erroneous assumption that integration exists and that one narrative should suffice to satisfy all of the different communities within a given society.¹⁰⁷ The diversity of local stakeholders

development/Assets/Documents/PDFs/csrc-background-papers/Peace-Justice-and-the-ICC-series-report.pdf>accessed 31 May 2021; Waddell and Clark (n 93) 76.

¹⁰⁰ *ibid* Waddell and Clark.

¹⁰¹ Hugo van der Merwe, ‘Delivering Justice During Transition: Research Challenges’, in Hugo van der Merwe, Victoria Baxter and Audrey R Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace Press 2009) 138.

¹⁰² Stuart Ford, ‘A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms’ (2012) 45 *Vanderbilt Journal of Transnational Law* 405, 412.

¹⁰³ Barrie Sander, ‘Justifying International Criminal Punishment: A Critical Perspective’ in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (TOAEP 2019) 229.

¹⁰⁴ Ford (n 102) 464.

¹⁰⁵ Marko Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (2016) 47 *Georgetown Journal of International Law* 1321, 1365.

¹⁰⁶ Denis Abels, ‘Limiting the Objectives of the Enforcement of International Punishment’ in Róisín Mulgrew and Denis Abels (eds), *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016), 268.

¹⁰⁷ *ibid*.

emphasises how difficult yet unavoidable task it for an ICT to create a “broad consensus that justice has been done,”¹⁰⁸ as a prerequisite for reconciliation.

Yet, ICTs tend to group local stakeholders into a single, homogenous stakeholder group in order to simplify the task for themselves. Part of this includes creating an archetypal victim, whose expectations are simplified and are not necessarily representative of actual victims of mass atrocity.¹⁰⁹ Whilst this is unsurprising given the difficulty of representing the views of all of the many victims created by international crimes, particularly given the rather nascent and still developing nature of ICTs and the rendering of international sentences, it is no less unfortunate. Oversimplification of individuals’ needs is a dangerous road to take, as is often seen in the empirical research conducted in conflict-affected States, where victims as well as other communities feel that their voices are not being heard. This is where the need to inform and engage with local stakeholders is particularly important if the court is to dispel the belief that their suffering and expectations are not being heard. Unfortunately, as this next subsection examines, the courts have not proven to be very active in this respect.

2.1.3 Failure to adequately inform

The lack of local knowledge of the *ad hoc* tribunals has been widely reported, with one survey conducted in Serbia a decade into the ICTY’s work finding that only one-third of respondents considered themselves knowledgeable about the Tribunal’s work.¹¹⁰ Empirical studies in the former Yugoslavia have found a general lack of knowledge of the post-conviction practices of the ICTY, as discussed above, and where respondents considered themselves to be informed, they held information only as it related to convictions of individuals belonging to their ethno-nationalistic community.¹¹¹ Moreover, rather than promoting fairness and treating all communities equally, the ICTY for example has focused its outreach efforts on Bosnia and Serbia more so than on Croatia.¹¹² This reinforces feelings of bias, which is counter-productive

¹⁰⁸ Janine Natalya Clark, ‘Peace, Justice and the International Criminal Court: Limitations and Possibilities’ (2011) 9 JICJ 521, 523; Daniel Philpott, ‘Beyond Politics as Usual: Is Reconciliation Compatible with Liberalism?’ in Daniel Philpott (ed), *The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice* (University of Notre Dame Press 2006) 15.

¹⁰⁹ Frédéric Mégret, ‘In Whose Name? The ICC and the Search for Constituency’ in Carsten Stahn, Sarah Kendall and Christian M de Vos (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) 23-46; Waddell and Clark (n 93) 76.

¹¹⁰ *Javno Mnenje u Srbiji: Stavovi Prema Domaćem Pravosuđu za Ratne Zločine i Haškom Tribunalu* (Strategic Marketing and Media Research Institute 2005) reported by Janine Natalya Clark, ‘International War Crimes Tribunals and the Challenge of Outreach’ (2009) *International Criminal Law Review* 99, 109.

¹¹¹ Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 1) 62-63.

¹¹² Parker (n 31) 87.

to reconciliation efforts. Similarly damaging is the fact that it took six years for the Tribunal to employ a spokesperson who could speak in Bosnian/Croatian/Serbian.¹¹³ This must have had a negative effect on how the Tribunal's sentences were viewed, despite the translation of documents into the local languages. Whilst translation does not necessarily amount to access (particularly with the lengthy and complex nature of court judgments), it does contribute towards making ICTs more relevant and visible locally.¹¹⁴

Empirical studies have found that the majority of Rwandans do not tend to hold views or a particular interest in the work or contribution of the ICTR to their lives.¹¹⁵ In one empirical study, two-thirds of the respondents described themselves either as “not informed at all” or insufficiently informed about the Tribunal.¹¹⁶ For a conflict-affected society with a “largely rural and illiterate population” there must be “widespread dissemination of knowledge” that is adapted to the local stakeholders; the abundance of written information can achieve little in such circumstances.¹¹⁷ The *ad hoc* tribunals have at best understood outreach as a one-way communication and education tool, even where outreach centres are given promising names such as that of the ICTR: ‘Umusanzu mu Bwiyunge’, or ‘Contribution to Reconciliation’ in Kinyarwanda.¹¹⁸

As regards the ICC, some of the studies discussed above have found that respondents have very limited access to information about the Court and its work.¹¹⁹ Much the same as the *ad hoc* tribunals, the ICC has similarly been subject to criticism and misunderstandings by its local stakeholders,¹²⁰ in part due to the lack of accessible information, even on the ICC's website, with the latest Outreach Report on its website dating back to 2010.¹²¹ Moreover, the ICC has been criticised for failing to undertake substantial outreach activities in Uganda and the DRC

¹¹³ Clark, ‘International War Crimes Tribunals and the Challenge of Outreach’ (n 110) 105; Kristin Xueqin Wu, ‘Experiences that Count: A Comparative Study of the ICTY and SCSL in Shaping the Image of Justice’ (2013) 9(1) Utrecht Law Review 60, 71.

¹¹⁴ Victor Peskin, ‘Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme’ (2005) 3 JICJ 950, 957.

¹¹⁵ Schulz (n 17) 76; Peter Uvin and Charles Mironko, ‘Western and Local Approaches to Justice in Rwanda’ (2003) 9 Global Governance 219, 221.

¹¹⁶ Longman, Pham and Weinstein (n 15) 213.

¹¹⁷ Payam Akhavan, ‘Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda’ (1997) 7 Duke Journal of Comparative and International Law 325, 342.

¹¹⁸ Kendall and Nouwen (n 24) 32-33; Hodžić (n 91).

¹¹⁹ Vasuki Nesiah, ‘Local Ownership of Global Governance’ (2016) 14 JICJ 985, 991.

¹²⁰ See for example, Adam Hochschild, ‘The Trial of Thomas Lubanga’ *The Atlantic* (December 2009); William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 386 footnote 65.

¹²¹ At the ‘Interacting with communities affected by crimes’ webpage of the ICC website <<https://www.icc-cpi.int/about/interacting-with-communities>> accessed 31 May 2021.

before issuing arrest warrants.¹²² Notably, in the DRC and Uganda, where a majority of respondents said that they relied on the radio for information, radio broadcasts do not often focus on individual cases, so even those who have access to a radio are not necessarily well informed of particular cases.¹²³ These respondents expressed an interest in more communication and transparency from the ICC, so that they could know what to expect from the court, thereby showing an interest in ICJ but finding they were not the primary stakeholders thereof.¹²⁴ This desire for information is particularly heightened where a convicted person is released and returns to their pre-conviction address, as the case becomes more directly relevant to the conflict-affected society.¹²⁵ Overall, victims in particular in the DRC and Uganda “have only rudimentary knowledge about the ICC,” are unable to name the accused in the case they are participating in, and do not receive regular updates about the trials.¹²⁶ Respondents complained of a lack of contact with the ICC and a sense of not being listened to or informed of what is happening, aside from which few expressed an opinion on the ICC, let alone on specific cases and their impact on reconciliation.¹²⁷ Part of the reason for this is security, making it difficult to extend outreach activities to rural areas, where the majority of people live. Outreach then relies much more on the radio and television than on direct interaction with local stakeholders, meaning that those who do not have access to the radio or television are left uninformed.¹²⁸

Studies have shown that those living in rural areas know much less about the ICC than respondents in urban areas, so for example whilst participants in Uganda, the DRC, and Kenya “lacked access to information about the Court,” those in the Côte d’Ivoire had “a good understanding of the ICC.”¹²⁹ This lack of information is not new and was also reported by Human Rights Watch in 2008, concluding that field research in the DRC, Uganda, and Chad “revealed that misinformation and negative perceptions surrounding the court’s work are deeply-rooted and will require more intense and creative efforts by the court to address them

¹²² Lorna McGregor, *ICC Monitoring and Outreach Programme: First Outreach Report* (International Bar Association 2006) 10.

¹²³ Cody, Stover, Balthazard, Koenig (n 29) 43; Vinck, Pham, Baldo and Shigekane (n 26) 63; Pham, Vinck, Stover, Moss, Wierda, Bailey (n 27) 6.

¹²⁴ *ibid* Cody, Stover, Balthazard, Koenig (n 29) 44.

¹²⁵ *ibid* 45.

¹²⁶ *ibid* 46; Vinck, Pham, Baldo and Shigekane (n 26) 47.

¹²⁷ *ibid* 43.

¹²⁸ Waddell and Clark (n 93) 67.

¹²⁹ Cody, Stover, Balthazard, Koenig (n 29) 71.

effectively.”¹³⁰ It does not appear that the ICC has subsequently dealt with such misperceptions of the Court.

For all three ICTs, distance is a problem in itself for local stakeholders,¹³¹ understood not only in its geographic sense but also in a figurative one, thanks to the lack of (contextualised) information on their work.¹³² It is an important factor when it comes to outreach, because it too can be seen as remote and of little relevance to the people on the ground.¹³³ For example, when asked what she thought of the ICTY, one Bosnian Muslim interviewee “shrugged, sighed and uttered ‘Daleko je’ [It’s far away].”¹³⁴ This view is echoed in Rwanda, where the court is deemed to be remote and distinct from its local stakeholders¹³⁵ and the ICC, where the court is described as having “little or no cultural relevance in the local communities it is supposed to serve.”¹³⁶ This is in part linked to the fact that often the domestic legal system is different from its international counterpart, making it difficult for local stakeholders to comprehend, and creating certain expectations that are unlikely to be met by an ICT, such as expectations of reparations or sentences such as the death penalty for example. This, in turn, has consequences for how international sentences are perceived locally, and makes communication a particularly important tool for enhancing international courts’ restorative impact.

In sum, whilst each of the four factors discussed above are challenges for a court of law (particularly one that relies on the international community to establish and fund the court, making it directly accountable to this stakeholder group), they are nevertheless factors well within the control of ICTs. In response to these factors explaining the failure to garner sociological legitimacy from local stakeholders, ICTs could firstly define what they understand by reconciliation, how they aim to contribute to it and the means by which they can be assessed. Secondly, courts could give greater recognition to their local stakeholders, making their aim to work for these conflict-affected societies explicit by seeing them as actors as well as beneficiaries of ICJ. Thirdly, courts could respond more adequately to the type of harm caused by mass conflicts, by recognising both the collective and the individual harm and needs for reconciliation. The harm is at the community and societal level as well as individual, and so

¹³⁰ *Courting History: The Landmark International Criminal Court’s First Years* (Human Rights Review 11 July 2008) 118 <<https://www.hrw.org/reports/2008/icc0708/8.htm>> accessed 31 May 2021.

¹³¹ Stover (n 6) 125.

¹³² Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 1) 62.

¹³³ Waddell and Clark (n 94) 68; Clark, ‘The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina’ (n 4) 484.

¹³⁴ Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 1) 63.

¹³⁵ Barria and Roper (n 84) 363.

¹³⁶ Waddell and Clark (n 94) 77.

should be the response. Fourthly and finally, ICTs could provide timely, context-specific and relevant information to their local stakeholders. Where information format and content are generic, it cannot be relevant to the local stakeholders, who may either be unable to read or comprehend the information or simply uninterested in the information, instead requiring more detailed content on a particular case of direct relevance to them. Whilst I have recognised the importance of information-giving as a crucial starting point, it is insufficient by itself as a way of engaging with local stakeholders without other forms of interaction because the provision of information with little interaction facilitates the distortion of the ICTs' work to suit the vested interests of those in power more than justice.¹³⁷

This failure to inform local stakeholders in order to bridge the distance between the ICTs and conflict-affected societies, has left local stakeholders to rely on other sources of information, to which the next subsection turns.

2.2 Local factors for ICTs' lack of sociological legitimacy

Whilst the two *ad hoc* tribunals and the ICC are somewhat responsible for the negative perceptions of their local stakeholders, as discussed in section 2.1 above, they do not work in a vacuum. There is a particular political situation in each conflict-affected State, which may not necessarily be conducive to contributing to peace and reconciliation through an ICT. Consequently, this subsection discusses the role of the context on the ground and, in particular, that of the media and political elites in the conflict-affected societies, as a factor that has affected the sociological legitimacy of ICTs. Where ICTs fail to reckon with the institutional challenges of contributing to local peace and reconciliation, whole communities are left to rely on, and are often heavily influenced by the media and politicians in their respective States.¹³⁸

Surveys have repeatedly demonstrated that a great majority of people rely on the local media, themselves far from objective when it comes to the ICTY. Surveys conducted thus demonstrate that over “90% of Croatian and Bosnian respondents have never visited the ICTY website” and “90% of Serbian respondents said that they never read an ICTY judgment,” but are instead heavily influenced by the local media and politicians' rhetoric, among other local actors.¹³⁹

¹³⁷ As the former ICTY spokesperson argues, “decontextualised dissemination of information and endless series of conferences” is not likely to impact positively on public perception; it is too vague and irrelevant to local stakeholders' lives: Hodžić (n 91). I return to this point and build on it in Chapter VI.

¹³⁸ Mégret (n 12) 1039.

¹³⁹ Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (n 105) 1331-1332.

Similarly, respondents in Rwanda say that they rely on the radio and television for information on the ICTR and a minority say they receive their information about the Tribunal from newspapers or speeches from local politicians.¹⁴⁰ Surveys on how those who have knowledge about the ICC and its work obtain such information have found that 90% relied on the radio, and others referred to friends and their communities, newspapers or the television.¹⁴¹ Despite the talk of numerous outreach activities, “less than 2% of those interviewed reported having participated in an ICC outreach” activity.¹⁴²

Local perceptions are highly dependent on whether a court’s decisions fit existing perceptions regarding blame and victimisation as well as the rhetoric and acceptance of influential individuals in the society - the politicians, religious leaders and media.¹⁴³ Public acceptance of a court’s work and its sentences often “depend[s] more on the approval of a nation’s leaders” than on a court’s outreach programme.¹⁴⁴ Local politicians and media outlets have to support the work of the court, if it is to stand a chance of achieving its broader objectives, because it is through their “lens” that the public receives the majority of its information.¹⁴⁵ As the local media is often critical of such sentences, so are local stakeholders. Any outreach efforts that are “opposed by the [local] elites” cannot be effective;¹⁴⁶ a hostile political environment and media outlets that are controlled by or sympathetic to the local politicians’ propaganda will jeopardise the possibility of restoring peace and reconciliation through international punishment.

This state of affairs makes the support and acceptance of local media outlets and political elites for ICTs important, because without it, ICTs are often unable to complete their mandate. The lack of support is particularly evident in Croatia and Serbia towards the ICTY, where the Governments used the media (largely owned by and loyal to the Government) to propagate information and opinions on the ICTY that suited their goals. This state of affairs is

¹⁴⁰ Schulz (n 17), 85.

¹⁴¹ Vinck and Pham (n 49) 433-434; Cody, Stover, Balthazard, Koenig (n 29) 21; *Courting History: The Landmark International Criminal Court’s First Years* (n 130).

¹⁴² *ibid* Vinck and Pham 421, 433-434.

¹⁴³ Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (n 105) 1342-1344 and 1360; Marko Milanović, ‘Courting Failure: When are International Criminal Courts Likely to Be Believed by Local Audiences?’ in Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen, Jens David Ohlin and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020), 265.

¹⁴⁴ Peskin (n 114) 953.

¹⁴⁵ Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (n 105) 1331.

¹⁴⁶ *ibid* 1370.

unsurprising as the key political figures in Croatia, Serbia and Bosnia and Herzegovina at the time were also key political actors during the war, and as such continued scaremongering their constituents and feeding the war rhetoric, in an effort to maintain power. It would have been political suicide for these politicians to change their views of the war and the ICTY prosecutions.¹⁴⁷ Rather than waning over time, the use of war rhetoric has tended to strengthen in these States the more time has passed, despite these efforts of the Tribunal.

The fact that most people have “neither the time nor the expertise to assess the ICTY” themselves and instead receive their information on international sentences in particular through the local media¹⁴⁸ means that they often “fall prey to political manipulators¹⁴⁹ The media in Serbia for example often reports on convicted persons who are either in detention in Scheveningen or serving their sentences in an Enforcement State, claiming that the sentences are harsh, that the convicts are not receiving adequate medical care and are subjected to mistreatment.¹⁵⁰ Statistics on the numbers of ethnic Serbs to be convicted are compared with individuals from other ethnic backgrounds.¹⁵¹ In contrast, sparse detail is provided on the background of a case and the crimes for which an individual has been convicted.¹⁵² It is not unusual to find in the media opinions such as that of a local politician who stated that “[i]t is not logical for such draconian sentences to be given to political and military functionaries of Serbia who did everything constitutionally permitted to protect the integrity and sovereignty of our country.”¹⁵³ Media reports do little, if anything, to contradict such statements.

Whilst the context behind the continuing ethno-nationalist polarisation in the States of the former Yugoslavia and the existence of war rhetoric is dependent on much more than the work of the ICTY, the Tribunal did not react to the misinformation propagated by media loyal to or

¹⁴⁷ Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (n 105) 1336.

¹⁴⁸ Milanović, ‘Courting Failure: When are International Criminal Courts Likely to Be Believed by Local Audiences?’ (n 143) 264.

¹⁴⁹ Marko Milanović, ‘The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem’ (2016) 110(2) AJIL 233, 258; *ibid* Milanović, ‘Courting Failure: When are International Criminal Courts Likely to Be Believed by Local Audiences?’ 265-266.

¹⁵⁰ Ivana Denisov, ‘Serbian Media & the International Criminal Tribunal for the Former Yugoslavia’ (LLM Graduate Department of Law University of Toronto 2012) 14 and 28.

¹⁵¹ ‘Srbima hiljadu godina za ratne zločine’ *Politika* (13 April 2008) <<http://www.politika.rs/sr/clanak/39288/Srbima-hiljadu-godina-za-ratne-zlocine> > accessed 31 May 2021.

¹⁵² Klarin (n 34) 92.

¹⁵³ ‘Reakcije u Srbiji na Presude’ B92 (26 February 2009)

<http://www.b92.net/info/vesti/index.php?yyyy=2009&mm=02&dd=26&nav_category=64&nav_id=347164> accessed 31 May 2021.

owned by the State. The ICTY instead remained silent and convinced that the facts it had established would suffice to contribute to peace and reconciliation.¹⁵⁴

However, where such local media and political elites are not supportive of ICJ and its mandate to fight impunity, establish the truth, and contribute to peace and reconciliation by the punishment of guilty individuals, this reliance on local media for information can be a severe hindrance to ICTs. The ICTY has from inception had to work without the support of the governments in Croatia and Serbia, as well as the Serb and Croatian representatives in Bosnian politics, who have refused to hand over documents and even individuals requested by the Tribunal.¹⁵⁵ As a result of this lack of local government support, the ICTY first prosecuted ‘small fish’ individuals in the conflict.

In comparison, the ICTR had initial local support, with the Rwandan government actively showing support for the establishment of an ICT. Although the government subsequently voted against Resolution 955, partly because it questioned the court’s jurisdiction and ability to achieve its objectives,¹⁵⁶ and partly in response to its attempts to prosecute individuals from the other main ethnic group in Rwanda – the Tutsi, as this did not fit with the narrative of the genocide propagated/endorsed by the government.¹⁵⁷ As it did not have the same political pressure as the ICTY, the ICTR was able to immediately prosecute those in positions of power, including politicians and military leaders – the ‘big fish’ – specifically thanks to the “substantial cooperation not only from the government of Rwanda, but also from the governments of other African nations to which many of the suspected war criminals had fled.”¹⁵⁸ At the same time, the existence of hostility of local politicians when their stance on the conflict and the crimes committed does not fit with the prosecutorial strategy of the ICT “reveals how national-political considerations continue to affect the work of the tribunals.”¹⁵⁹ This is similarly true for the ICC, either investigating crimes in States that have referred conflict situations to the Court, or of its own accord. The manner in which the Court is seized of the

¹⁵⁴ For a discussion on this see, for example, Dejana Radisavljević and Martin Petrov, ‘Srebrenica and genocide denial in the former Yugoslavia: What has the ICTY done to address it?’ in Paul Behrens, Olaf Jensen, Nicholas Terry (eds.), *Holocaust and Genocide Denial: A Contextual Perspective* (Routledge 2017) 152-153.

¹⁵⁵ This is well documented by the ICTY, and can also be seen on the ICTY’s webpage ‘The Fugitives’ <<https://www.icty.org/en/about/office-of-the-prosecutor/the-fugitives>> accessed 31 May 2021.

¹⁵⁶ Payam Akhavan, ‘The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment’ (1996) 90(3) *AJIL* 501, 504.

¹⁵⁷ Theodor Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’ (2006) 100(3) *AJIL* 551, 561.

¹⁵⁸ *ibid* 563.

¹⁵⁹ *ibid* 561.

conflict situation impacts greatly how the State assists the Court in apprehending individuals and securing witness testimony.

In sum, whilst ICTs do not have control over local media and political support, these institutions' influence on local stakeholders can be significant. Accordingly, ICTs would benefit from taking these factors into consideration, as part of the overall context of the conflict and society in question, when attempting to resolve the problems discussed in section 2.1. If they are able to build into their definition of reconciliation, recognition of local stakeholders and information-giving practices the overarching local context, they stand a better chance of being relevant to local stakeholders and thereby would be better able to achieve their macro-level objectives. An ICT that engages more actively and fully with its local stakeholders could at least mitigate the effects of hateful and biased media on its peace and reconciliation efforts through sentencing. Furthermore, whilst the influence of local media illustrates the limits of what an ICT can do in terms of peace and reconciliation in the face of hostile local actors,¹⁶⁰ it also emphasises the need to include all levels of the conflict-affected society, which would in turn not leave whole groups reliant on the local media alone. Offering an alternative to the local propaganda machine is necessary, even its success can only be limited.

Conclusion

This chapter has explored the extent of sociological legitimacy enjoyed by the two *ad hoc* tribunals and the ICC, as it is essential to their ability to achieve their macro-level objectives. Despite the establishment of outreach programmes and their pioneering work, outreach undertaken by the *ad hoc* tribunals has not proved very successful in garnering local support. Local stakeholders of all three ICTs largely consider them to have had little impact on the restoration of local peace and reconciliation and are neither trusting nor accepting of these courts' post-conviction practices. This is the case despite the differences in these local stakeholders' culture, religion and ethnicity, and the divergences between the sentences rendered by the three courts. Whilst research on the perceptions on the ICC's post-conviction practices is much less developed, studies have found that there is disparity between the rather widespread support that the ICC received at the early stages of its work and local perceptions post-conviction.

¹⁶⁰ Barrie Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law' (2015) 5(3) European Society of International Law Conference Paper 1, 20.

I have suggested in this chapter that there are both institutional and local factors that have contributed to the lack of sociological legitimacy of ICTs from their local stakeholders, both generally regarding the existence and work of ICTs as well as specifically concerning the sentences of imprisonment they impose and the way in which these sentences are enforced. The lack of local trust is partly due to the of local media and political elites' influence of local stakeholders and the fact that their views are very often based almost solely on local media, which is less than objective and rather more incendiary in their reporting. Nevertheless, I have outlined three specific failings of the ICTs which have contributed to the lack of trust of local stakeholders in the work of these institutions: a failure to define the macro-level objectives of the courts as a clear way of judging them fairly, based on what they say they will do; a failure to fully recognise local stakeholders and the collective harm of the crimes prosecuted by ICTs; and a failure to inform. All of these shortcomings are closely connected and potentially solvable by the courts. Having argued that all three ICTs suffer from a lack of sociological legitimacy for the same reasons, which is affecting their efficacy in achieving their macro-level objectives, the next chapter turns to the question of what ICTs could do in response.

CHAPTER IV - Reacting to the failure of ICTs to garner sociological legitimacy and contribute to peace and reconciliation: options

Introduction

Having discussed the sociological legitimacy challenges faced by ICTs in Chapter III, this chapter examines the different responses thereto. Indeed the failure of ICTs to garner sociological legitimacy from their local stakeholders and the ensuing effect on their ability to contribute to local peace and reconciliation has been the subject of growing debate among legal scholars.¹ Scholars are polarised in the way they react to this failure of ICTs, with some proposing innovative ways of changing ICJ to further enhance its sociological legitimacy, whilst other emphasise its normative legitimacy and downplay the importance of contributing to local peace and reconciliation, and therefore the significance of local stakeholders' views.

Section 1 discusses calls for ICTs to focus on their restorative potential, which means giving more prominence to local peace and reconciliation and conflict-affected societies. On the one hand, it could entail reconceptualising ICJ to reflect the needs of the conflict-affected society, or even questioning whether ICJ is the only or appropriate response to mass conflict (discussed in section 1.1). On the other hand, it could mean making the punishment imposed by ICTs more responsive to local needs by, for example, focusing on the wishes of the direct victims of mass conflict (discussed in section 1.2). Section 2 considers the opposing view, calling for ICTs to focus on their retributive ethos, instead of aiming to have an impact on local peace and reconciliation. This argument is based on the contention that retributive justice and the promotion of peace and reconciliation are incompatible (in section 2.1), and that ICTs should focus on global interests and leave the promotion of local peace and reconciliation to other, more suitable mechanisms (in section 2.2).

As this chapter discusses, there are numerous advantages and limitations of both the restorative and retributive stances. It is these advantages and limitations that lead me to suggest, in Part

¹ I have briefly engaged with this problematic in Dejana Radisavljević, 'The ICTY and the Balancing Act: Reconciliation as Rehabilitation' in Juan Pablo Perez-Leon-Acevedo and Joanna Nicholson (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing their Rights* (Routledge 2020) 129-131. In this chapter, I build on the introductory discussion made in the above-cited reference and expand on the arguments made therein.

Two of this thesis, an alternative, mediated conceptualisation of the link between ICJ and peace and reconciliation and the means of enhancing ICTs' sociological legitimacy.

1. Focusing on the restorative potential of ICJ

One of the most prominent responses to the difficulties faced by the *ad hoc* tribunals and the ICC in contributing to local peace and reconciliation, because of their lack of sociological legitimacy, is to suggest reformulating the focus of ICTs, to seeing it through the lens of restorative justice. I introduced restorative justice in section 1 of Chapter I as “a search for solutions which promote repair, reconciliation, and reassurance,”² which requires the involvement of different sections of a society and focuses on reconciling parties.³ This is known as the bottom-up approach to ICJ, in other words focusing on what the individuals on the ground require from justice, and victims in particular, in order to “heal,” “satisfy”⁴ and reconcile them with the criminals for their own benefit and that of the conflict-affected society.⁵ The argument is based on the belief that despite the harm that international crimes cause at the societal level, the success of ICTs is particularly contingent on the acceptance and cooperation of victim communities, as well as their participation in the design of policies.⁶ Restorative justice scholars argue for greater participation of ICTs' local stakeholders, contending that it promotes feelings of ownership. This would entail recasting local stakeholders “as both facilitators [of] and participants” in ICJ who require support from the court.⁷ Firstly, local stakeholders are facilitators because without victims and witnesses, there would be no trial and no conviction and, secondly, participants with rights and expectations of their own. Under this view, engagement with the conflict-affected society, and victims in particular, empowers them in both roles,⁸ which is significant because one of the challenges of promoting peace and reconciliation is the lack of ownership felt by the conflict-affected society. Accordingly,

² Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990) 181.

³ Tony F Marshall, *Restorative Justice: An Overview* (Home Office Research Development and Statistics Directorate 1999) 5.

⁴ Henham, ‘Theorizing the Penalty of Sentencing in International Criminal Trials’ (n 4) 432-442; Jonathan Doak, ‘The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions (2011) 11 ICLR 263, 265; Jean-Marie Kamatali, ‘Accountability for Genocide and Other Gross Human Rights Violations: The Need for an Integrated and Victim-based Transitional Justice’ (2007) 9(2) Journal of Genocide Research 275.

⁵ James Meernik and Kimi King, ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’ (2003) 16 LJIL 717, 722.

⁶ Ralph Henham, ‘International Sentencing in the Context of Collective Violence’ (2007) 7 ICLR 449, 467-468.

⁷ Róisín Mulgrew, *Towards the Development of the International Penal System* (CUP 2013) 232.

⁸ *ibid.*

empowering the local stakeholders by giving them a role in ICJ serves to further peace and reconciliation.

For restorative justice scholars then, reconciliation is understood as a relative term requiring contextualisation and relying on victim satisfaction in order to have meaning. In discussing reconciliation, restorative justice scholars focus on the healing of previously broken relationships with individuals and victim catharsis, emphasising the need for empathy, trust and interaction between individuals.⁹ Under such an understanding of reconciliation, an outside institution such as an ICT can impose neither the definition of reconciliation nor the means of achieving it.

In this regard, for restorative justice scholars, there are two main schools of thought as to what can be done for ICTs as a conflict response to garner greater sociological legitimacy. At its most extreme, restorative justice scholars call for a reconceptualisation of the international community's response to mass conflict by allowing victims and local communities to decide on the mechanism they find most suitable for the purposes of peace and reconciliation (discussed in section 1.1). Alternatively, there are more modest calls for reformulating the meaning of punishment to fit with the needs of the victims and conflict-affected society (discussed in section 1.2).

1.1 Reconceptualising the response to mass conflict: choice of mechanisms

Instead of focusing on rendering justice as it is understood by ICTs, emphasis is placed on encouraging social cohesion. The premise of reconceptualisation in such a way is that lasting peace and reconciliation mean rebuilding the society and the ties of individuals to the society. Accordingly, one such call includes arguing for a form of collective responsibility for international crimes rather than placing emphasis solely on the individual.¹⁰ The argument is that international crimes are rarely committed by 'lone wolves' and instead rely on a particular context and the assistance of a large portion of the society so focusing solely on the individual neither reflects the nature of the crimes nor is it able to make a positive impact at the community or societal level.¹¹ The proposed focus on the collective rather than the individual is significant

⁹ Claire Garbett, 'The Truth and the Trial: Victim Participation, Restorative Justice and the International Criminal Court' (2013) 16(2) *Contemporary Justice Review* 193, 197; Caroline Fournet, 'Mass Atrocity: Theories and Concepts of Accountability – on the Schizophrenia of Accountability' in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Routledge 2011) 27.

¹⁰ Mark A Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 196-206.

¹¹ For a discussion on the profile of international offenders see Alette Smeulers, Maartje Weerdesteijn and Barbora Holá (eds), *Perpetrators of International Crimes: Theories, Methods and Evidence* (OUP 2019).

because the society as a whole is affected by mass conflict and must be reconciled. However, it would entail courts passing judgment on entire communities, which might perpetuate the type of inter-communal hatred and fear that initially led to the conflict. Accordingly, the approach could encourage criticisms of bias of some communities, who might feel victimised by the courts, therefore harming rather than enhancing ICTs' sociological legitimacy. Chapter I discussed the significance of even early examples of ICJ avoiding assigning collective guilt.¹²

Alternatively, there are calls for victims and the conflict-affected society more generally to decide on the most suitable mechanism to promote local peace and reconciliation. The initiative is proposed from a communitarian perspective, very much centred on the conflict-affected society as a collective, and allowing different communities to communicate and decide on their own requirements of justice.¹³ The authors of this view are concerned with communicative penalties that must be seen as “part of a shared experience of moral education and renewal” rather than imposed retributive justice and penalties.¹⁴ This is linked to proposals for greater contact between different groups with conflicting interests and provision for the inclusion of each group in ICJ.¹⁵ However, whilst ICTs can provide contact between conflicting groups, they cannot assume the role of a truth and reconciliation commission or domestic courts as they are fundamentally distanced from the conflict-affected society. As it is left for the affected communities to decide which intervention is best suited to their particular context, this might mean, *inter alia*, recourse to criminal trials or truth and reconciliation commissions, focusing on restoring economic and cultural strength or institutional and constitutional reforms.¹⁶ Reconceptualising the response to mass conflict then could lead to replacing ICJ with other forms of dispute resolution, such as the *Gacaca* courts in Rwanda or the South African Truth and Reconciliation Commission, for example. ICJ is then an option rather than a process imposed on conflict-affected societies.

Such an approach has the advantage of giving the conflict-affected society a dominant role in deciding the responses to mass conflict that best fit with the society, its laws, culture and religion; it makes responses to mass atrocities deeply contextualised. However, my thesis is

¹² See section 2.1.1 of Chapter I.

¹³ Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice* (Palgrave Macmillan 2010) 16.

¹⁴ Ralph Henham, ‘Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research’ (2007) 5 JICJ 757, 771.

¹⁵ Henham, ‘International Sentencing in the Context of Collective Violence’ (n 6) 463.

¹⁶ Drumbl (n 10) 206; Laurel E Fletcher and Harvey M Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24 HRQ 573, 638-639.

focused on generating greater sociological legitimacy for ICTs rather than calling their existence into question. As such, I do not engage with such radical reforms of conflict-response.

Moreover, alongside the advantages, there is also a risk that the collective will drown out the voice of the individual, ignoring the voices of those most victimised during the conflict. If the consequence of promoting peace and reconciliation in this way is drowning out the voices of individuals, we have to ask how desirable an approach it is. This is a conceptual issue and a limitation in terms of how this idea could further peace and reconciliation for the same reasons that it is an issue to focus primarily on victims' expectations (discussed in section 1.2): the problem of selectively choosing one group over the other, whether it is for the benefit of victims or collective groups.

Furthermore, whilst the idea is novel for its focus on the conflict-affected society, giving it agency to decide what it needs for societal reconciliation, it assumes there is a common understanding of peace, justice and reconciliation and how to achieve any of these objectives. Yet, it is not surprising to find that there is a lack of cohesion in recently conflict-affected societies, with divergence between communities' views on the meaning of the terms and means of achieving them.¹⁷ The lack of consensus renders decision-making particularly challenging and less likely to contribute to peace and reconciliation than to reignite conflict. At the same time, the diversity of expectations in conflict-affected societies emphasises how important a task it is for ICTs to create "a broad consensus that justice has been done," as a prerequisite for achieving their macro-level objectives.¹⁸ This means that inclusion of conflict-affected societies is equally important, if not more so, where there is a conflict between the interests between different groups. Moreover, the divergence in expectations and needs between individual victims and the conflict-affected society are not necessarily irreconcilable, as many underscore the importance of retribution.¹⁹ However, reconciliation requires both the

¹⁷ Hugo van der Merwe, 'Delivering Justice During Transition: Research Challenges', in Hugo van der Merwe, Victoria Baxter and Audrey R Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace Press 2009) 138; 'The Future of International Criminal Justice' *The Hague Justice Portal* (9 October 2009) 8 <<http://www.haguejusticeportal.net/index.php?id=11106>> accessed 31 May 2021.

¹⁸ Janine Natalya Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' (2011) 9 JICJ 521-545, 523; Daniel Philpott, 'Beyond Politics as Usual: Is Reconciliation Compatible with Liberalism?' in Daniel Philpott (ed), *The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice* (University of Notre Dame Press 2006) 15.

¹⁹ See section 1.2 of Chapter III for a discussion on the victims' demands for justice and lengthy sentences.

recognition of the individual victims and of the conflict-affected society, rather than a choice between the two.²⁰

A further issue with this call for reconceptualisation is that the international community that creates, funds and supports ICTs is not necessarily ready for such an overhaul of the current system. Such an approach would be somewhat easier with a small number of like-minded States, with similarly open notions of justice and how to secure it. Such is not the case with the current state of international criminal law and justice; developed as it is by 123 States Parties to the Rome Statute of the ICC and the 193 members of the United Nations. With the large number of States making up the international community comes cultural diversity and distinct views of the meaning of justice and reconciliation. If the expectations of the international community are effectively ignored, ICJ loses not only its effectiveness (as a State-reliant system), but also its legitimacy as it ceases to be international.²¹ ICJ is just that: international. This must be given due weight when considering the amount of deference to be given to particular conflict-affected societies and their constituent communities. ICJ cannot take the place of national criminal justice systems and meet all of the needs and expectations of each individual conflict-affected society. As I argued in Chapters I and II, ICTs have two main stakeholder groups: international stakeholders and local stakeholders. Their needs must be balanced to ensure ICJ is serving both of their constituents. In order to mitigate the challenges of convincing ICTs' other main stakeholder group – the international community – such reforms could theoretically be “gradually articulated” and implemented, with existing policies being modified rather than designing entirely new ones.²² This is important if international stakeholders are to continue giving their support to ICTs; a more carefully calibrated reform would be softer, more cautious and thought out and thus more likely to be accepted by the international community. This is mainly because the international community has little interest in the particular situation and victims before the ICT, and rather more of an interest in developing and upholding international criminal law and justice, as discussed in Chapters I and II. Any reforms that would run counter to this would likely fail because the essential support of the international community could not be garnered. Nevertheless, however gradual the

²⁰ I focus on the meaning of reconciliation in the following chapter. Sarah E Jankowitz, *The Order of Victimhood: Violence, Hierarchy and Building Peace in Northern Ireland* (Palgrave Macmillan 2019) 59; Trudy Govier, *Taking Wrongs Seriously: Acknowledgement, Reconciliation and the Politics of Sustainable Peace* (Humanities Press 2006) 11; David Bloomfield, Teresa Barnes and Luc Huyse, *Reconciliation After Violent Conflict* (International Institute for Democracy and Electoral Assistance 2003) 22-23.

²¹ Matthew Saul, ‘Local Ownership of the International Criminal Tribunal for Rwanda: Restorative and Retributive Effects’ (2012) 12 ICLR 427, 450.

²² Drumbl (n 10) 207.

implementation of these propositions, the above-discussed problems remain with focusing on local stakeholders as the *main* stakeholder of ICJ, whether the idea is to reform the focus of ICTs from an individualist to a community ethos, or giving local communities a choice of institutions in response to mass conflict. This is particularly significant because we now have a permanent international criminal court and many of the calls for reconstruction are unlikely to garner the support of the international stakeholders who have placed their stakes on this type of conflict response.

1.2 Reformulating the meaning of punishment to meet victims' needs

Alternatively, another option for enhancing ICTs' sociological legitimacy entails making the meaning of punishment more responsive to local needs. This model of justice immediately conjures up victim compensation, restitution and other forms of reparation in comparison with retributive models of justice that envisage a sentence of imprisonment as the main type of punishment imposed by courts.²³ However, it can also entail making imprisonment more context-specific to the society, particularly meeting the wishes of victims.²⁴ Advocates of this approach call for more "sensitivity" towards and consultation with victims and conflict-affected societies²⁵ and encouraging "the building of consensus" among groups.²⁶ It is argued that sentencing practices, in particular, should be seen as "negotiation" between parties, crucially giving victims a primary role in saying what they expect of sentencing at an ICT.²⁷ Similarly, victims are offered the opportunity to express their opinions about enforcement issues, including about early release, which would also provide them the opportunity to better understand court practices and encourage victim ownership of the process.²⁸

Recalibrating trial justice so that it better promotes peace and reconciliation requires providing for greater local stakeholder participation, specifically for direct victims.²⁹ The implications of this are that court officials must make themselves more approachable to and "inclusive" of victims.³⁰ The position is based on the understanding that if ICTs are to stand a chance of

²³ Henham, 'Theorizing the Penalty of Sentencing in International Criminal Trials' (n 4) 432-442.

²⁴ Meernik and King (n 5) 722.

²⁵ Henham, 'Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research' (n 14) 758; Janine Natalya Clark, 'The Three Rs: Retributive Justice, Restorative Justice, and Reconciliation' (2008) 11(4) Contemporary Justice Review 331, 345; Drumbl (n 10) 206.

²⁶ Fletcher and Weinstein (n 16) 638-639.

²⁷ Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Routledge 2005) 58.

²⁸ Mulgrew (n 7) 232.

²⁹ Henham, 'International Sentencing in the Context of Collective Violence' (n 6) 467-468.

³⁰ Findlay and Henham, *Beyond Punishment: Achieving International Criminal Justice* (n 13) 26.

contributing to peace and reconciliation, their decisions must include those most directly affected by them – the local stakeholders - because it is inclusion that promotes respect of the trial process and its outcome. Thus, international punishment “should be derived from transitional and restorative justice principles and methodologies,” focusing on restoring peace and contributing to reconciliation, as well as being “more visible, inclusive and culturally relevant” for the conflict-affected society.³¹ The focus of ICJ would then reflect the need to repair the harm done to the society and the relationships between individuals and communities within the society.³² In restorative justice models, the emphasis on the victim is crucial, because reconciliation is understood as healing wounds, making it necessary to focus efforts on those most harmed by the conflict. It is argued that the consequences of mass crimes affect not only the victims but also the entire society, due to their scale and destructive nature, and therefore focusing on victim reconciliation will also feed into societal reconciliation.³³

Under this view, retributive justice should correspond with the victims’ expectations using the judges’ “discretionary power” in sentencing, reflect the society’s punishment norms,³⁴ or even that “notions of reparations and reconciliation should *direct* sentencing” decisions.³⁵ One suggestion for importing restorative justice more clearly into ICJ is to include for mediation between the victim and offender before sentencing, so that the former can explain the harm caused to him/her, and the latter has the opportunity to express remorse, which links to the offender’s rehabilitation.³⁶ It is then for the judge to use his/her discretionary power to decide the weight to be given to the results of the mediation. This idea is novel for recognising the role of the offender in reconciliation efforts. Moreover, mediation offers both the victim and the offender a chance to express themselves and for the victim to confront the offender, which has the potential to serve establishing the truth. The previous chapter emphasised the significance of establishing the truth for victims and the wider society in order to allow the conflict-affected society to move on from the past and envisage a shared future.³⁷

³¹ Mulgrew (n 7) 27.

³² Jessica M Kelder, Barbora Holá and Joris van Wijk, ‘Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR’ (2014) 14 ICLR 1177, 1201.

³³ Doak (n 4) 268.

³⁴ Henham, ‘Theorizing the Penalty of Sentencing in International Criminal Trials’ (2004) (n 4) 436-437; Mulgrew (n 7) 25-26 and 218; Allison Morris, ‘Critiquing the Critics: A Brief Response to Critics of Restorative Justice’ (2002) 42 British Journal of Criminology 596.

³⁵ Henham, ‘Theorizing the Penalty of Sentencing in International Criminal Trials’ (n 4) 445-446.

³⁶ Doak (n 4) 295-296; Kelder, Holá and Wijk (n 32) 1201. I have linked mediation to rehabilitation regarding the ICTY in Radisavljević (n 1) 139.

³⁷ In the following chapter I focus on the meaning and multiplicity of truth.

Another suggestion for meaningful participation involves creating a penal board or a sentencing commission with broad and inclusive participation, including victims and the work of respected scholars.³⁸ This would have the potential of promoting local ownership of post-conviction practices and thereby also increasing the sociological legitimacy of ICTs by making them culturally relevant and sensitive to the conflict-affected society.³⁹ However, despite the advantages of broad participation of a wide range of local actors, these ideas also raise several questions about representation. Deciding who to include also inherently means deciding who to exclude, and whilst some exclusion is inevitable, it is important that such a conceptual limitation is recognised by those arguing for such a penal board or commission. This brings up a further question regarding the status of the board or commission's decisions – if courts are bound to respect their decisions, how this would fit in with the rights of the offender (these rights are discussed in more detail in section 2 below). Depending on the answers to these questions, the penal board could either advise judges and fit with the current model of ICJ, slightly adapting it, or alternatively reconstruct it entirely by having a more decisive role.

The idea of giving victims a greater role in decision-making, for example through a penal board, promotes uniformity of approach over uniformity in outcomes, which could give both them and the broader conflict-affected society (depending on whether a cross-section of the conflict-affected society is included in the penal board, for example) more ownership of the process. Despite the benefits of providing for greater victim participation, there are several conceptual and practical issues. Firstly, greater victim participation in sentencing could also have negative consequences for both the victims and the fairness of the criminal justice process. There is a possibility that some victims will experience adverse effects of greater participation in the criminal justice process by being exposed to additional trauma from testifying about events they are not ready to talk about or from cross-examination by defence counsel, which could prove to be “a new cause of secondary victimization” rather than cathartic.⁴⁰ The response of restorative justice scholars would be that it is not for ICTs to decide what is beneficial or harmful for the victims, as it undermines their agency. Nevertheless, the risk of

³⁸ Marlies Glasius, ‘Do International Criminal Courts Require Democratic Legitimacy?’ (2012) 23(1) EJIL 43, 65; Jens David Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ (2009) 23 Cornell Law Faculty Publications 373, 403-404.

³⁹ *ibid* Glasius 65.

⁴⁰ Christine Van den Wyngaert Hon, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2011) 44 Case Western Reserve Journal of International Law 475, 495.

further victimisation would need to be mitigated by providing victims with thorough information on ICJ and what they can expect.

Secondly, it promotes giving only one small group of victims the right to participate.⁴¹ Even such inclusive reconstructions of ICJ would make it a selective exercise as not all victims can be included, which is contrary to the bottom-up approach of reformulating the international community's response to mass conflict to include for greater engagement of victims and fit more closely with their expectations. The exclusion of certain victims is not the only problem because direct victims are not the only individuals who suffer in a conflict. Focusing on victim participation implies ignoring the wider conflict-affected society. Whilst victims are an important part of the stakeholder group, their healing alone cannot achieve collective peace and reconciliation. As such, I suggest that it would be short-sighted to focus only on reconciling victims with perpetrators because ICJ is not concerned with giving victims personal satisfaction through retributive processes (as discussed in Chapter II) but should also contribute to the victims' "integration as equal citizens" as part of a wider society.⁴² Whilst the experiences of the victims are important considerations for ICJ, ICTs convict individuals for "having breached the law, not for the fact that they have inflicted trauma as perceived subjectively" by the victim.⁴³ Moreover, convincing victims of ICTs' work does not equate to convincing the local stakeholder group as a whole. This is the case unless we accept that victims share the same expectation of justice and reconciliation as the wider society to which they belong, which is not supported by the previous chapter. Therefore, I contend that whilst mediation or penal boards provide an opportunity for victim participation, which is important to both individual and societal reconciliation, in order to overcome the deficiencies in focusing only on victims, such ideas would need to be complemented by additional means of enhancing sociological legitimacy. Moreover, it is important to recognise that no matter how context-sensitive a court makes its post-conviction practices, i.e. sentencing for example, some practices will run counter to popular belief in certain groups of a conflict-affected society.⁴⁴

Another suggestion for reinforcing ICTs' sociological legitimacy is by taking into account local sentencing laws, which would have the advantage of reflecting the expectations of the broader

⁴¹ Nancy Amoury Combs, 'Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing' (2016) 41 *Yale Journal of International Law* 1, 36.

⁴² Frédéric Mégret, 'The Legacy of the ICTY as Seen Through Some of its Actors and Observers' (2011) 3 *Goettingen Journal of International Law* 1011, 1035.

⁴³ Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90(870) *International Review of the Red Cross* 441, 449.

⁴⁴ Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1(1) *JICJ* 64, 82.

conflict-affected society, rather than focusing on victim satisfaction.⁴⁵ This idea would make international sentences more likely to satisfy the conflict-affected society, than just a subset thereof, hence being more able to foster societal reconciliation. It would lead to each ICT having different sentencing laws and practices, in recognition of the fact that their mandates often differ (evident in the fact that we have for example both *ad hoc* and permanent ICTs).⁴⁶ Whilst that is not necessarily negative, ICTs tend to face the same challenges to their sociological legitimacy, which are not only explained by the fact that sentencing practices sometimes differ from that of the domestic courts in the conflict-affected society. Accordingly, the idea would do little to enhance sociological legitimacy where the ICT is questioned not because its sentencing practice does not reflect local laws, but because it is accused of bias or preferential treatment in enforcement, for example. Moreover, whilst the idea might be adapted to *ad hoc* tribunals dealing with one conflict, it becomes more challenging to put into practice for a permanent court such as the ICC. The ICC deals with very different societies with divergent sentencing practices and this would lead to the same court handing out drastically different sentences to individuals having committed similar or the same crimes. This, in turn, would put into question the relevance of a permanent court, rather than many *ad hoc* tribunals, each dealing with separate conflicts. Yet, the international community (also a stakeholder of ICJ) chose to establish a *permanent* international criminal court.

Having discussed the suggestions of restorative justice scholars to reconceptualise ICJ and the benefits and ideological limitations and difficulties of putting these options into practice, I turn next to the opposing view, and examine whether it might be a more suitable response to the failure of ICTs to garner sociological legitimacy and impact peace and reconciliation on the ground.

2. Focusing on the retributive ethos of ICJ

Retributive justice scholars call for limiting ICTs' macro-level objectives and aspiring only to achieve the traditional domestic criminal justice objectives of punishing individuals for violations of criminal law (as discussed in section 1 of Chapter I) and meeting the expectations of the international community as a key stakeholder group. These objectives allow ICTs to focus on individualising sentences and ensuring they are proportionate, regardless of the expectations of local stakeholders. Compared to the solutions proposed by restorative justice

⁴⁵ Combs (n 41) 36-37.

⁴⁶ *ibid* 48.

scholars in section 1 above, this is a top-down approach to ICJ, which focuses on the international community's visions of justice and imposing it on the local stakeholders. Much the same as in the discussion of restorative justice, the retributivist argument emanates from a conceptualisation of reconciliation as an end-goal of restored relationships, a term that is context-reliant and lacking in meaning where it is not embedded in a particular society. Under such an understanding of reconciliation, it is impossible to impose a conceptualisation or achievement thereof on a society. As a result, these scholars posit that reconciliation has no place as an objective of ICJ institutions.

The contention is firstly that retributive justice as enacted by ICTs is incompatible with restorative objectives such as the promotion of peace and reconciliation, and as such these should not be included among the macro-level objectives of ICTs (discussed in section 2.1). Secondly, retributivists argue that ICTs should focus on global interests and leave the restoration of *local* peace and reconciliation to alternative mechanisms (discussed in section 2.2).

2.1 Limiting ICJ's objectives to exclude peace and reconciliation

This view is based on the argument that ICJ is in reality not all that fundamentally different from its national counterpart and as such should focus on furthering the objectives of domestic courts in focusing on retribution. The compatibility of peace and reconciliation with ICJ is questioned either generally or specifically as part of its post-conviction practices.⁴⁷

The contention that ICJ is incompatible with promoting peace and reconciliation comes from a concern that transitional justice aims such as these will interfere with the focus of ICJ on offenders, and the domestic criminal law aims, such as retribution that ensures the punishment of the individual is proportionate.⁴⁸ Moreover, it is argued that reconciliation requires giving victims direct encounters with the criminals, which retributive accounts of justice are ill-equipped to provide, because direct contact between the victim and offender is not envisaged in international trials.⁴⁹ In this sense, retributivists and restorative justice scholars alike believe that victims need some sort of mediation with the offenders in order to promote reconciliation.

⁴⁷ Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2006) 43 *SJIL* 39, 88; Denis Abels, 'Limiting the Objectives of the Enforcement of International Punishment' in Róisín Mulgrew and Denis Abels (eds), *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016), 272.

⁴⁸ Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 *Michigan Journal of International Law* 79, 95.

⁴⁹ Doak (n 4) 288.

However, retributivists' stance is that adversarial trials promote seeing the offender as "an enemy," meaning that ICJ bears little in common with reconciliation and, as such, mediation would be unsuitable.⁵⁰ It is argued that retributive justice rightly focuses on the offender, and as such can consider neither the needs of victims or the broader conflict-affected society, nor their peace and reconciliation.⁵¹

The alternative - basing trial process and outcomes on the victims' expectations - would be in conflict with ensuring the equality of arms, guaranteeing the accused person's fundamental rights to a fair and speedy trial are respected and that the sentence imposed is proportionate to the seriousness of the offences committed, rather than the expectations of victims.⁵² Courts of law have the responsibility to protect the offender as well as the duty to protect society from the same individual,⁵³ and must respect the offender's dignity.⁵⁴ A focus on peace and reconciliation and the satisfaction of victims has the potential to put the offender in a situation where they have to defend themselves from the prosecution and the victims as two separate parties.⁵⁵ As such, it is inappropriate to conflate the wider objectives of ICJ with those of punishing individuals, which would mean treating the offender as a means to an end.⁵⁶ If courts are to ensure that punishment is fair, individualised and in accordance with just deserts, they cannot give emphasis to peace and reconciliation which might call for a lighter or lengthier sentence than would be commensurate with the guilt of the offender.⁵⁷ To do so would also be problematic where the conflict-affected society expects ICTs to impose the death penalty, which, as Chapter I explained, is an expectation that modern ICJ cannot satisfy.

Consequently, the appropriate level of engagement with local stakeholders is seen as to be minimal at best, and contrary to "the fight against impunity" at worst because it would make

⁵⁰ Pablo D Eiroa, 'Justice, Reconciliation, Peace: If and Why Punish through International Criminal Tribunals' (2007) *Revista di filosofia del diritto internazionale e della politica globale* <<https://www.juragentium.org/topics/wlgo/cortona/en/eiroa.htm>> accessed 31 May 2021.

⁵¹ Shahram Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' (2014) 3 *Penn State Journal of Law & International Affairs* 30, 49; Mirjan R Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago Kent Law Review* 329, 364.

⁵² Abels (n 47) 267; *ibid* Damaška 334; Mirjan R Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2010) 36 *North Carolina Journal of International Law and Commercial Regulation* 365, 373; Sergey Vasiliev, 'International Criminal Trials: A Normative Theory' (PhD thesis, Amsterdam Center for International Law 2014) 170.

⁵³ Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21(4) *LJIL* 925, 938; Sloane (n 47) 82.

⁵⁴ Vasiliev (n 52).

⁵⁵ Radisavljević (n 1) 131.

⁵⁶ Darryl Robinson, 'International Criminal Law as Justice' (2013) 11 *JICJ* 699, 701; Sloane (n 47) 88.

⁵⁷ Vasiliev (n 52).

international trials even slower if victims were given greater participatory rights.⁵⁸ This is further linked to the argument that giving victims the right to a free narrative means that judges would hear emotional and horrific accounts by victims, which could unjustly lead them to assign the offender more guilt than they would otherwise.⁵⁹ However, in the case of ICTs this is necessarily true to an extent regardless of the level of victim participation because of the horrific nature of the crimes in question. Judges must be trusted to make a fair judgment regardless of the testimony of the victim.

Where peace and reconciliation are deemed incompatible specifically with the post-conviction practices of ICJ, the argument is that sentences should only aim not to subvert the broader objectives of ICJ, rather than aiming to contribute thereto. Accordingly, peace and reconciliation should not be a factor taken into consideration in post-conviction decision-making, despite the references of some judges discussed in Chapter II who refer to reconciliation when imposing sentences of imprisonment.⁶⁰ This is connected to the argument that too much prominence has been given to reconciliation when making sentencing decisions, and that this broader objective should be discarded for the benefit of more realistic, achievable penal objectives that focus on the offender, such as retribution and deterrence.⁶¹ Under this view, penal objectives such as retribution and deterrence could theoretically be aligned with ICJ's broader goals, but only if to do so does not impact penal standards.⁶² Nevertheless, contributing to peace and reconciliation remains understood as a desirable but incidental impact of the ICTs' work and not an objective in and of itself.⁶³

Reconciliation, then, is better contributed to as part of an outreach programme external to the trial process or as part of the trial process, but prior to conviction.⁶⁴ Emphasis is often placed on the potential reconciliatory impact of reparations for victims of international crimes, which are provided as an alternative to substantive participation in the ICJ process. However, as previous chapters have suggested, victims want more than reparations, and to view victim satisfaction only through reparations would undo the lessons learned by ICTs to date.⁶⁵ Whilst

⁵⁸ Van den Wyngaert Hon (n 40) 495.

⁵⁹ Damaška (n 52) 373; Radisavljević (n 1) 131.

⁶⁰ *ibid* Damaška.

⁶¹ Dana (n 51) 42.

⁶² Abels (n 47) 267.

⁶³ Bert Swart, 'Damaška and the Faces of International Criminal Justice' (2008) 6 JICJ 87, 104; Vasiliev (n 52) 217.

⁶⁴ Abels (n 47) 272; Damaška (n 51) 349.

⁶⁵ Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court' (2015) 26(2) Criminal Law Forum 255, 277; Ernesto Kiza, Corene Rathgeber and

I agree that peace and reconciliation should be promoted at the trial phase of an ICT's work, the contention that peace and reconciliation have no place as considerations during post-conviction practices is problematic. Sentences and the way in which they are enforced are of as much importance to local stakeholders as the trial. As already discussed, sentences are a critical and ultimate point at which courts can further peace and reconciliation as an objective and the fact that penal objectives should be promoted does not negate the need to promote the broader objectives of ICJ.

Retributive justice scholars often bolster their argument on the incompatibility of retributive justice with peace and reconciliation by referring to the existence of different understanding of what is understood by peace and reconciliation, particularly in a conflict context. In order to emphasise the incompatibility of retributive justice with the contribution to peace and reconciliation, is the existence of different views on reconciliation and justice, including among local stakeholders.⁶⁶ I have discussed in section 1 above the problem with the fact that a common understanding of reconciliation is often lacking in the aftermath of conflict, and it may well be that reconciliation remains a process rather than a completed outcome, "at least for the generations that directly experienced" the conflict.⁶⁷ However, this is not sufficient in itself to reject reconciliation, because courts retain their responsibilities towards local stakeholders despite the difficulties inherent in promoting peace and reconciliation under such circumstances.

The argument comes from a fear that where a court focuses on reconciliation, it runs the risk of "validating" its practices based only on this objective, which might not further the establishment of the truth and instead encourage impunity, where the society chooses to forgive and forget rather than bring individuals to justice.⁶⁸ Whilst no single objective should be prioritised over another, and I have emphasised that ICTs have both macro- and micro-level objectives to respect, this does not mean reconciliation is inherently incompatible with ICJ. It means achieving the macro-level objective of contributing to local peace should be tempered against the other objectives of ICTs, including those specific to punishment.

Holger C Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes towards Addressing Atrocities* (Max Planck Institute for Foreign and International Criminal Law: Hamburg 2006) 15.

⁶⁶ Damaška (n 51) 346.

⁶⁷ Louis Kriesberg, 'External Contributions to Post-Mass-Crime Rehabilitation' in Beatrice Pouligny, Simon Chesterman and Albrecht Schnabel (eds), *After Mass Crime: Rebuilding States and Communities* (United Nations University Press 2007) 265.

⁶⁸ Juan E Méndez, 'National Reconciliation, Transnational Justice, and the International Criminal Court' (2001) 15(1) *Ethics and International Affairs* 25, 28.

Whilst in deciding on the imposition of a sentence, penal objectives are important and must not be superseded by the macro-level objectives of ICTs, I contend that an ‘either or’ decision need not be made between promoting penal objectives in sentencing individuals and enforcing their sentences, and contributing to peace and reconciliation for conflict-affected societies. ICTs’ responsibility to protect the offender and respect their retributive ethos does not preclude them from clarifying efforts of promoting reconciliation and engaging with local stakeholders to this end. Similarly, rather than proving to be too determinative, reconciliation has been referred to in sentencing decisions in an inconsistent and unexplained manner, with little thought given as to how it is being served by a particular sentence (as discussed in section 2 of Chapter II). One enforcement objective in particular – rehabilitation – is closely linked to promoting peace and reconciliation, focused as it is on reforming the offender and preparing them for release to the conflict-affected society, such that their return to the society does not endanger the peace process.⁶⁹ In this regard, the peace versus justice dichotomy is more pertinent when deciding whether to prosecute, rather than how to punish.⁷⁰ Furthermore, the focus on the offender corresponds with the understanding that reconciliation must include all sections of the conflict-affected society, which means inclusion of the offender. As such, despite contentions to the contrary, focusing on the offender, ensuring the trial is fair⁷¹ and in respect of his/her dignity need not be incompatible with promoting reconciliation.⁷² Domestic criminal courts similarly recognise the importance of recognising society and victims and the impact that sentences have on them, as discussed in section 1 of Chapter I. To argue that ICTs should ignore peace and reconciliation in their enactment of punishment is to argue that domestic criminal justice systems should similarly aim to have no broader impact on society.

Moreover, in the case of ICJ in particular, the assertion of such an ambitious objective such as contributing to peace and reconciliation is hardly surprising when we consider the expense incurred in establishing and maintaining ICTs. Such courts cost a considerable amount to establish, which is an additional expense for States who already invest in their own national courts; international trials are significantly more expensive than their national counterparts.⁷³

⁶⁹ Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 509-510; William Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’ (1997) 7 *Duke Journal of Comparative and International Law* 461, 503; Radisavljević (n 1) 140.

⁷⁰ For a discussion thereon see: Matthew Brubacher, ‘The Development of Prosecutorial Discretion in International Criminal Courts’ in Ediel Hughes, William A. Schabas and Ramesh Thakur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press 2007) <<http://collections.unu.edu/eserv/UNU:2482/pdf9789280811414.pdf>> accessed 31 May 2021.

⁷¹ Bloomfield, Barnes, and Huyse (n 20) 100; Vasiliev (n 52) 190.

⁷² Larry May and Shannon E Fyfe, *International Criminal Tribunals: A Normative Defense* (CUP 2017) 188.

⁷³ David Wippman, ‘The Costs of International Justice’ (2006) 100(4) *AJIL* 861.

The fact that they espouse such broad overarching objectives and cost so much, makes it doubtful whether the international community would be eager for such institutions without belief in their ability to achieve their objectives. It is questionable whether States would invest so much in ICTs that were only intended to fulfil retributive objectives, which their domestic counterparts could fulfil (albeit not the domestic counterparts of the conflict-affected society, but a third country) without incurring the same expense as do international courts.⁷⁴ Indeed, to say that ICTs are neither able to nor should be expected to contribute to peace and reconciliation is problematic because the UN Charter makes it clear that the restoration of global peace and security are its overarching objectives when taking any course of action in the face of conflict.⁷⁵

Having considered the limitations of this argument of retributivist scholars that ICTs should limit their objectives and exclude references to peace and reconciliation, I next turn to the second argument of retributivists.

2.2 Limiting ICJ's objectives to the global peace and security and serving the international community

Instead of arguing that ICTs cannot contribute to peace and reconciliation is the contention that they should focus on the global rather than the local. At best, the argument is that ICTs can play a “modest but important role” for local peace and reconciliation, when complemented by other mechanisms and the participation of the conflict-affected society,⁷⁶ but it should not be an explicit objective.

The contention is that ICTs intend to restore and maintain global peace and security, rather than peace and reconciliation for conflict-affected societies.⁷⁷ One of the reasons behind such an argument is that ICTs alone “have little, if any, power to shape local public opinion.”⁷⁸ Under this view, peace and reconciliation can only be achieved locally, through local media and political support; ICTs simply cannot do this without their support on the ground.⁷⁹ Certainly in so far as local factors for mistrust of ICTs are concerned (as discussed in section

⁷⁴ Jean Galbraith, ‘The Pace of International Justice’ (2009) 79 *Michigan Journal of International Law* 79,132.

⁷⁵ Charter of the United Nations (24 October 1945) 1 UNTS XVI, Chapter I <<https://www.un.org/en/sections/un-charter/chapter-vii/>> accessed 31 May 2021.

⁷⁶ Dana (n 51) 49.

⁷⁷ Damaška (n 51) 335.

⁷⁸ Marko Milanović, ‘Courting Failure: When are International Criminal Courts Likely to Be Believed by Local Audiences?’ in Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen, Jens David Ohlin and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020) 290.

⁷⁹ Marko Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (2016) 47 *Georgetown Journal of International Law* 1321, 1370.

2.2 of Chapter III), these are beyond the control of ICTs. However, notably, as discussed in Chapters I and II, the maintenance of global peace and security is not achievable without also providing for peace and reconciliation for the conflict-affected society. It would be short-sighted not to envisage promotion of local peace and reconciliation on the ground as well as global peace and security because the state of affairs in the conflict-affected society could potentially undermine global peace. The argument for focusing on global peace and security is linked to the view that ICTs should not be burdened with satisfying victims' expectations because their ultimate audience is the international community and alternative methods exist to respond to victims' expectations.⁸⁰ As they are more attuned to the conflict-affected society and the context on the ground, other mechanisms such as truth and reconciliation commissions, for example, arguably have a bigger potential to contribute to societal reconciliation and provide a more comprehensive truth of the conflict than a court of law.⁸¹

This viewpoint is linked to the argument that the international community is the primary audience of ICTs, and the disparity between their expectations of criminal justice and the requirements of promoting reconciliation.⁸² The implication is that the conflict-affected society does not hold the same status as a stakeholder group of an ICT as the international community. It is based on pragmatism as the international community establishes and funds institutions of ICJ. As the international community is the primary audience of ICTs, one suggestion is to establish "global sentencing norms," rather than mimicking local sentencing practices.⁸³ The benefit of this approach is that developing international sentencing laws would provide coherence to ICTs' post-conviction practices.⁸⁴ Here, consistency in outcome is given precedence over consistency in approach, compared to the views discussed in section 1. However, whilst international sentencing laws would provide more consistency in outcomes, this would not only be difficult to formulate but would provide ICTs with no guidance on achieving their broader objectives. Sentencing coherence alone cannot promote peace and reconciliation, because justice must be seen to be done, thus despite the benefits of such a development, it would not assist ICTs in achieving their macro-level objectives.

⁸⁰ Damaška (n 51) 343.

⁸¹ Tracy Isaacs, 'International Criminal Courts and Political Reconciliation' (2016) 10 *Criminal Law and Philosophy* 133, 142; Van den Wyngaert Hon (n 40) 495; Damaška (n 52) 376-377.

⁸² Isaacs (n 81) 135.

⁸³ Margaret M. deGuzman, 'Harsh Justice for International Crimes?' (2014) 39 *YJIL* 1, 24.

⁸⁴ Sloane (n 47) 55; Barbora Holá, 'Sentencing of International Crimes at the ICTY and ICTR Consistency of Sentencing Case Law' (2012) 4(4) *Amsterdam Law Forum* 3.

In section 1 above, I argued against making local stakeholders' expectations the primary concern of ICTs at the expense of the international community. Similarly, I caution against giving the international community the role of *primary* stakeholder because to do so means ignoring a similarly important stakeholder group without which the court could not function. Were the international community to be seen as the principal stakeholder, any contribution to peace and reconciliation would be inherently limited because these concepts rely on a particular context and society. Moreover, even where the importance of the international community as a stakeholder is emphasised, previous chapters have underlined the importance of local peace and reconciliation and having an impact on local stakeholders for the international community. Greater acceptance of the work of ICTs by their local stakeholders should be welcomed by the international community too because it demonstrates to the international stakeholders the relevance and importance of the courts, thereby attracting and helping to sustain international interest and funding.

In conclusion, the argument that ICJ is concerned with global rather than local expectations is unconvincing as it is not a question of choosing one stakeholder over the other but balancing the ICTs' accountability towards both groups. ICJ would not function with only one of these stakeholder groups. Similarly, global peace and security are unstable without local peace and reconciliation. Accordingly, ICTs are intended to contribute to local peace and reconciliation even where they do not manifestly declare this among their overarching objectives (although in the example of the two *ad hoc* tribunals and the ICC, their core documents do also refer to the restoration of peace). ICJ, much the same as domestic criminal justice, has little meaning if it does not work to serve peace and reconciliation through justice. Even where they are understood merely as an extension of domestic courts on the international plane, ICTs retain their intended impact on local peace and reconciliation because it is similarly an objective of domestic criminal justice. The difference is that ICTs must serve both international and local communities and contribute to global and local peace.

Conclusion

This chapter has analysed the predominant suggestions of leading scholars as regards reacting to the sociological legitimacy challenge of ICJ and the difficulty that modern ICTs have faced in contributing to local peace reconciliation. Scholars' reactions to this challenge essentially depend on whether they believe the international community must contribute to peace and reconciliation in response to mass conflict. The two schools of thought on this problematic tend

to be poles apart, with one calling for ICJ to adopt a restorative focus and endorsing a reconceptualisation of retributive justice, whilst the other suggests limiting the objectives of ICJ in order to exclude peace and reconciliation as explicit objectives and to instead embrace the retributive ethos of ICTs. Restorative justice scholars call for more sensitivity and responsiveness to the expectations of local stakeholders, both the direct victims and the different communities that make up the conflict-affected society. They posit that punishment must fit within this broader context if ICTs are to stand a chance of promoting peace and reconciliation, their macro-level objectives. Such scholars further contend that not only is reconciliation a self-imposed objective of ICTs, but it is also a necessary objective if they are to be more than of symbolic value for the conflict-affected society. On the other hand, an equally prominent suggestion is to minimise the objectives of ICJ. The contention is either that ICJ is ill-equipped to pursue peace and reconciliation because it is incompatible with retributive justice and punishment of the individual, or that ICTs should focus only on global peace and security and with it, their international stakeholders.

Despite the many advantages of both a restorative and retributive focus for ICJ, this chapter has argued that there are also conceptual limitations of both viewpoints. Firstly, focusing on victims or the conflict-affected society is problematic, as not only does focusing on one exclude contributing to peace and reconciliation for the other, but it also has the consequence of ignoring the importance of international stakeholders. This is premised on limited conceptualisations of the requirements for reconciliation – that either the victims or the conflict-affected society must be prioritised. Similarly, focusing on peace and reconciliation at during post-conviction practices relegates the importance of penal objectives by focusing on the impact of post-conviction practices on peace and reconciliation at the expense of emphasising retribution, deterrence, incapacitation and/or rehabilitation, for example. It also means reconstructing ICJ and its retributive framework entirely, despite the wishes of many victims for retribution. Secondly, questioning the role of peace and reconciliation as overarching objectives of ICJ adds little to my thesis – not only have modern ICTs recognised the importance of peace and reconciliation as an objective, but they are well obliged to do so. Without peace and reconciliation as an overarching objective, ICJ cannot hope to be an adequate response to mass atrocities. Peace and security at the global level are self-imposed objectives of modern ICTs and global peace is unattainable, or at least unstable, without similarly promoting peace on the ground for conflict-affected societies.⁸⁵ The fact that

⁸⁵ See section 1 of Chapter II.

reconciliation is culturally relative, that ICTs are constrained by the obligation to respect the rights of the offender and that their' impact on peace and reconciliation is dependent on the support of local actors does not invalidate reconciliation as an objective. Rather than being irreconcilable, justice, peace and reconciliation are part of the same puzzle.⁸⁶

As ICTs must contribute to peace and reconciliation on the ground, in the next chapter I deconstruct and explain the meaning of peace and reconciliation in order to suggest the unique contribution that ICJ can make thereto.

⁸⁶ Mareike Schomerus, 'International Criminal Law in Peace Processes: The Case of the International Criminal Court and the Lord's Resistance Army' in Morten Bergsmo, Wui Ling Cheah, Tianying Song and Ping Yi (eds), *Historical Origins of International Criminal Law* (vol. 4) (TOAEP 2015) 336.

PART TWO

**INTERNATIONAL CRIMINAL JUSTICE: SOLUTIONS
FOR CONTRIBUTING TO PEACE AND
RECONCILIATION**

CHAPTER V – Enhancing sociological legitimacy and contributing to local peace and reconciliation: providing the means for assessment

Introduction

Part I determined that the macro-level objectives of ICJ – derived from their domestic counterpart – is ensuring societal peace through retributive justice. In the case of ICTs, this macro-level objective extends to both global peace and security and local peace and reconciliation. Part I also demonstrated a lack of sociological legitimacy of ICTs among their local stakeholders, particularly in relation to their post-conviction practices. The restorative justice-focused responses to this legitimacy challenge have proven promising in their initiatives aimed at encouraging local ownership, yet conceptually limited in ignoring ICTs’ international stakeholders. In contrast, the retributive stance failed to respond to the challenge, instead questioning the self-imposed objectives that give ICJ meaning. Whilst opposed, both stances are based on an understanding of reconciliation as healed relationships. In response, this chapter considers the meaning of peace and reconciliation in depth. The previous chapter concluded that ICTs must contribute to local peace and reconciliation, and by providing a nuanced and comprehensive definition of the concept, I suggest *how* ICTs through imprisonment contribute to this macro-level objective without requiring ICJ’s reconceptualisation.

Thus, section 1 begins by dissecting the meaning of peace and reconciliation, how they relate and their connection with accountability. Section 2 builds on the meaning of reconciliation by focusing on the components thereof and suggests those that are most amenable to promotion by ICTs. Section 3 then suggests the specific facets of ICJ that promotes the above-determined components of reconciliation, both in general and specifically through sentencing.

1. Meaning of and interaction between peace and reconciliation and their relevance to ICJ

In examining the meaning of peace and reconciliation in this section, I provide the definitions that ICTs themselves have failed to consider in depth, thereby engaging with one of the main institutional factors for ICTs’ failure to convince their local stakeholders. This will set the basis for suggesting how they are neither incompatible with ICJ nor unattainable without

reconceptualisation of trial justice, contrary to the theories discussed in the previous Chapter. Section 1.1 considers the meaning of peace, and section 1.2 discusses the meaning of reconciliation.

1.1 The meaning of peace

This section considers the meaning of peace as it was defined by “‘the father’ of peace studies,” Johan Galtung.¹ A basic conceptualisation of peace is a negation of violence,² which in turn raises the question what is understood by violence. Violence is traditionally understood as direct and inter-personal harm, but it can also be intercommunal and interstate, as well as of a less obvious nature: structural.³ Direct violence is relatively obvious and easily recognisable as it is physical and has an actor and a receiver, whilst structural violence is more indirect and comes from a particular social structure.⁴ Structural violence is institutionalised and built into the system, evident in, for example discrimination, and comes in the form of repression or exploitation of individuals, communities or societies.⁵ The different types of violence will require distinct responses with the aim of restoring peace; for example, broader action is needed to remove the causes of structural violence because it is institutionalised and wide-ranging and will affect the lives of individuals in many ways. Both types of violence – physical and structural - can have a cultural dimension, meaning they are legitimised in, for example, symbolism, religion, ideology, language, law, education and media.⁶ Whilst they appear quite separate, the two types of violence are not mutually exclusive; they feed into one another because structural violence is maintained or can lead to overt direct, physical violence on a large scale, and when committed on a large scale, direct, physical violence can indeed be manifested or transformed into structural violence as well.⁷

In response to such structural and physical violence what is needed is an integral account of peace and peace restoration approaches to capture the different types of violence and their impact on both individual victims and the broader society, and to make sure that the triggers of violence are addressed. As such, no institution alone could hope to fully restore peace on the

¹ Sara Horowitz, ‘Mediation’ in Charles Webel and Johan Galtung (eds), *Handbook of Peace and Conflict Studies* (Routledge 2007) 58.

² Johan Galtung, *Theories of Peace: A Synthetic Approach to Peace Thinking* (International Peace Research Institute 1967) 17.

³ Johan Galtung, ‘Peace, and Peace Research’ (1969) 6(3) *Journal of Peace Research* 167, 173.

⁴ Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (SAGE 1996) 2.

⁵ *ibid.*

⁶ Johan Galtung, ‘Cultural Violence’ (1990) 27(3) *Journal of Peace Research* 291, 294.

⁷ *ibid.* 302.

ground; there would need to be a concerted effort. In this regard, the root causes of the conflict (for example ethnicity, religion, politics and economics), as well as the types of violence in evidence, are an important consideration when thinking of conflict resolution.⁸ Where the root causes of the conflict remain unaddressed, they can be transformed into structural violence and can in turn lead to physical interpersonal, intercommunal or interstate violence. Where there is structural violence, it is important to consider who should be involved in a response thereto and how, for example the inclusion of the government or groups which were involved in the crimes.⁹ Incidentally the root causes of conflict are often prolonged or continued after the fact as the local factors that lead to mistrust of ICTs, discussed in section 2.2 of Chapter III.

The basic understanding of violence is closely related to the conceptualisation of peace, which can also have direct and structural dimensions. “Negative peace” consists of the absence of physical violence, whilst “positive peace” requires the absence of structural violence.¹⁰ In the case of mass violence, peace will most likely first entail an end to the conflict and physical violence, albeit with continuing antagonism between the parties to the conflict – negative peace.¹¹ Negative peace denotes little or no inter-group contact, which in the long-term cannot be sustainable whilst remaining peaceful if different communities are to co-exist within a State. Therein lie the limits of negative peace: it is insufficient to rebuild ties and reconstruct society after a conflict.¹² Instead, it describes a situation in which conflict is not resolved but concealed, and tensions remain high.¹³ In such a state of affairs, the tensions remain latent and could conceivably be reignited, because the root causes of the conflict have not been addressed. This might mean viewing conflicts as at least partially resolved because there is a certain level of peace, but that would be highly dependent on the situation, because the lack of open violence might be more a case of pragmatism than a sense of peaceful relations between previously warring parties. Despite the lack of inter-group interaction, negative intrastate peace is maintained because conflicting communities recognise the necessity to coexist within a single

⁸ Ehito Kimura, ‘Justice and Reconciliation in Southeast Asia and Beyond’ in Chaiwat Satha-Anand and Olivier Urbain (eds), *The Promise of Reconciliation? Examining Violent and Nonviolent Effects on Asian Conflicts* (Routledge 2017).

⁹ I return to the challenge of engaging with different stakeholders, including those implicated in crimes, in detail in the following chapter.

¹⁰ Galtung, ‘Peace, and Peace Research’ (n 3) 183; Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (n 4) 14.

¹¹ Johan Galtung, ‘An Editorial: What is Peace Research?’ (1964) 1(1) *Journal of Peace Research* 1.

¹² Vittorio Vitello, ‘The “Positive Peace” Concept within the United Nations Peacekeeping: A Galtunian Assessment of United Nations Operation in Mozambique, Onumoz (1992 – 1994)’ (Master’s thesis, LUISS, 2016) 80.

¹³ Patricia M Shields, ‘Limits of Negative Peace, Faces of Positive Peace’ (2017) 47(3) *Parameters* 5, 11.

State, where there is no alternative. Bosnia and Herzegovina provides a prime example of such a scenario, as there is scant inter-ethnic dialogue, interaction or trust but nonetheless a notable lack of direct violence between communities living side by side within the same State.¹⁴ In such a scenario, negative peace has some value, because there is a notable lack of violence and open hostility, which is certainly preferable to outright war (at least, according to the values of the international community).

Meanwhile, positive peace means a state of affairs characterised by a change of attitudes towards the other, and rebuilding of institutions and structures, all of which facilitate sustainable peaceful co-existence because they mark a stark change to the conflict situation on all levels.¹⁵ Requiring as it does sympathy, “cooperation and social justice development,” and dealing with the root causes of conflict, positive peace is more stable than negative peace, and includes the pursuit of justice.¹⁶ Accountability through ICJ contributes to positive peace by paving the way for a positive transformation¹⁷ and “providing closure” by addressing the root causes of the conflict and acknowledging the suffering of the victims.¹⁸ I argued in sections 1 and 2 of Chapter I that the pursuit of peace and justice are interconnected, both in the domestic and international context. Whilst negative peace conjures up the absence of something negative and, as such, does not necessarily include notions of justice and accountability, positive peace requires a more positive change; a move towards restoring the balance between victims and offenders and rebuilding trust. The more positive the peace in the conflict-affected State, the more stable the peace, all else being equal. This suggests that peace is best understood as a continuum,¹⁹ where although there are distinctions between the two types of peace, they overlap, much the same as different types of violence. Moreover, sympathy in particular is also a component of reconciliation, making positive peace akin to and closely related to

¹⁴ See section 1 of Chapter III for a discussion of the lack of inter-ethnic interaction in the former Yugoslavia, and for example: Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005) 146-5; Janine Natalya Clark, ‘The ICTY and Reconciliation in Croatia: A Case Study of Vukovar’ (2012) 10 JICJ 397, 420; Dejana Radisavljević, ‘The ICTY and the Balancing Act: Reconciliation as Rehabilitation’ in Juan Pablo Perez-Leon-Acevedo and Joanna Nicholson (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing their Rights* (Routledge 2020) 126-127.

¹⁵ *Positive Peace Report: Conceptualising and Measuring the Attitudes, Institutions, and Structures That Build a More Peaceful Society* (Institute for Economics and Peace 2015), 4.

¹⁶ Galtung (n 11) 1-4; Shields (n 13) 8.

¹⁷ Katerina Mansour and Laura Riches, ‘Peace versus Justice: A False Dichotomy’ (2017) *Contemporary Issues in Conflict Resolution* 1, 2.

¹⁸ Cherif Bassiouni, ‘Justice and Peace: The Importance of Choosing Accountability over Realpolitik’ (2003) 35(2) *Case Western Reserve Journal of International Law* 191, 192. I suggest in section 2 below the precise contribution of ICJ and punishment to peace and reconciliation.

¹⁹ Vitello (n 12) 882.

reconciliation. Stable, positive peace link ICTs to societal reconciliation because sustainable peace is unattainable without it,²⁰ and as such I next turn to the meaning of reconciliation.

1.2 The meaning of reconciliation

At a basic level, reconciliation denotes an improvement in relationships, rapprochement between parties, a bridging of differences. A comprehensive understanding of reconciliation must recognise that it is a dynamic (as opposed to linear) process *and* outcome,²¹ with different degrees and levels. Reconciliation is neither straightforwardly a process nor an outcome but both; and should be recognised as a circular notion with differing degrees.

Much the same as there are dimensions of peace, there are different types of reconciliation – thin and thick. Thinner reconciliation means an external change in behaviour towards the other and is more a question of pragmatism than meaningful interpersonal reconciliation. It is more attainable an objective for a formal institution such as a criminal court of law.²² Here reconciliation means accepting something displeasing and unwanted, but necessary (such as coexistence in a State, for example in multi-ethnic and multi-religious Bosnia and Herzegovina).²³ This conception of reconciliation, based on peaceful coexistence - negative peace - with minimal interaction, can seem “hollow” because negative peace hinges on pretence, silence and a lack of collaboration between conflicting individuals and/or communities.²⁴ Nevertheless, in some instances thin reconciliation will be a very positive change to the situation (for instance, compared to ongoing violence), and certainly a cause for celebration, where thick reconciliation is not conceivable. Without thin reconciliation, it is generally impossible to achieve deeper improvement of relationships. Although reconciliation is not to be understood as a linear concept, and there are instead degrees of reconciliation, *sometimes* a prelude will be necessary – a first degree of reconciliation - but whether this will be needed or not will depend on the local context that determines the precise contours of reconciliation.

²⁰ Donna Pankhurst, ‘Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace’ (1999) 20 *Third World Quarterly* 239, 254.

²¹ David Bloomfield, Teresa Barnes and Luc Huyse (eds), *Reconciliation After Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance 2003) 12.

²² See discussion in section 2 below.

²³ Dinka Čorkalo Biruški and Dean Ajduković, ‘Intergroup Reconciliation or Social Reconstruction: Measuring Community Recovery After War’ (Meeting of the European Association of Social Psychology, Israel 2009).

²⁴ Birju Kotecha, ‘The Complexity of Reconciliation’ (2017) FICHL Policy Brief Series No. 79, 2.

Thicker conceptions of reconciliation, on the other hand, denote a psychological change where people feel different emotions and see the humanity of the other, believing that the individual is no longer dangerous and is worth more than his/her crimes.²⁵ It entails the healing of social relationships where individuals and communities believe in a shared future and are ready to move forward from the past conflict. Thick reconciliation denotes “a sense of community, an active interest in mutual well-being and progress,”²⁶ requires empathy and respect towards the other and is concerned with the future of the society.²⁷ In practice, in a conflict-affected society, there will be both a thinner degree of reconciliation where focus is on a change of behaviour towards the other and elements of emotional change.²⁸

As reconciliation is both a process and an outcome, and can be demonstrated in an external and psychological change towards the other, it must be recognised that not all individuals will be moving towards it at the same time.²⁹ Some individuals might reconcile both in private and public; whilst some will be moving towards each other in public but not in their private lives; and, others will be more comfortable with rapprochement in a private setting but not in a public one.³⁰ In other words, individuals might reconcile insofar as is necessary for societal peace, and thus as neighbours, but not as friends (i.e. without re-establishing their prior relationship). Such a state could fit both with negative and positive peace because mutual respect might not necessarily lead to friendship, for example. In certain societies, the transitional stage from one degree of reconciliation to the other will be short-lived, whilst in others it can take years. One can imagine examples where certain groups within a society are unable to envisage anything more than non-violent coexistence. At the same time, other groups within the society may well be more open to a thicker degree of reconciliation – the building of trust in the other. In still other groups, a willingness to empathise with the other may understandably be missing in conflict-affected societies due to the gravity of the crimes committed and the unwillingness of

²⁵ Susan Dwyer, ‘Reconciliation for Realists’ (1999) 13 *Ethics and International Affairs* 81, 83–88; Jodi Halpern and Harvey M Weinstein, ‘Rehumanizing the Other: Empathy and Reconciliation’ (2004) 26 *Human Rights* 561, 567.

²⁶ Julija Bogoeva, ‘Prosecuting War Criminals as the Basis for Reconciliation Policy’ (2015) FICHL Policy Brief Series No. 42, 2.

²⁷ Kotecha (n 24) 2.

²⁸ Bloomfield, Barnes and Huyse (n 21) 19.

²⁹ Adrian Little and Sarah Maddison, ‘Reconciliation, Transformation, Struggle: An Introduction’ (2017) 38(2) *International Political Science Review* 145, 150; Sarah Maddison, ‘Can we Reconcile? Understanding the Multi-level Challenges of Conflict Transformation’ (2017) 38(2) *International Political Science Review* 155.

³⁰ Bloomfield, Barnes, and Huyse (n 21) 79.

offenders to admit their crimes, making empathy towards them more challenging and unlikely.³¹

As a multi-level concept, reconciliation can be at the individual, community, society, and political level.³² Individual reconciliation is a re-establishment of relations between two individuals, most clearly the victim and the offender. Notably, the term reconciliation implies there is something to *reconcile*; to restore or to fix a previously fine relationship that has since been broken.³³ This will not necessarily be the case as divisions might well be deep-seated and long-standing, existing well before the conflict. To expect a total *reconciliation* when there is no prior good relationship would be mistaken. As such, the importance of individual reconciliation will depend on the pre-conflict state of affairs, and the existence of a prior relationship. Where individual reconciliation is relevant, we can conceive of thick reconciliation and healing as reconciliation because it is about interpersonal forgiveness and trust and an emotional change.³⁴ At the broader, community, societal and political reconciliation, interpersonal trust and forgiveness are not as relevant as we are concerned with relations between communities and societies. Community, societal and political reconciliation are more pragmatic changes of action towards the other than a deep emotional change towards an enemy.³⁵ Political reconciliation means “repairing political relationships,” “(re-)building a system of shared legal rules” and restoring faith in the rule of law, where individuals see themselves and others as belonging to a common society.³⁶ It is these broader levels of reconciliation – community, societal and political – that have more resonance with institutions such as ICTs, as I discuss in section 2 below. Whilst the different levels of reconciliation are distinct, one level can feed into another. Individual reconciliation can contribute somewhat and encourage societal reconciliation; and, political reconciliation can provide the impetus for

³¹ *ibid* 21. For a discussion on denial and reconciliation generally, also see for example: Oliver Diggelmann, ‘International Criminal Tribunals and Reconciliation: Reflections on the Role of Remorse and Apology’ (2016) 14(5) JICJ 1073; Jean Decety and Jason M Cowell, ‘Empathy, Justice and Moral Behaviour’ (2015) 6(3) AJOB Neuroscience 3.

³² Bloomfield, Barnes and Huysse (n 21) 23.

³³ Caryl E Rusbult, Peggy A Hannon, Shevaun L Stocker and Eli J Finkel, ‘Forgiveness and Relational Repair’ in Everett L Worthington Jr. (eds), *Handbook of Forgiveness* (Routledge 2007) 185-206.

³⁴ Jonathan Doak, ‘The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions (2011) 11 ICLR 263, 265. Section 2 of this chapter discusses forgiveness and trust as components of reconciliation.

³⁵ Erin McCandless, ‘The Case of Land in Zimbabwe: Causes of Conflict, Foundation for Sustained Peace’ in Mohammed Abu-Nimer (ed), *Reconciliation, Justice and Coexistence: Theory and Practice* (Lexington Books 2001) 213-4.

³⁶ Colleen Murphy, *A Moral Theory of Political Reconciliation* (CUP 2010) 177 and 18.

individual reconciliation.³⁷ Providing the opportunity for inter-community dialogue is key to this, as a way of systematically and persistently confronting the past in order to move forward.³⁸

The multi-level nature of reconciliation means that efforts must include different sections of the society,³⁹ as a way of reconstructing the entire conflict-affected society. I argued in section 2.1.3 of Chapter III and section 1.2 of Chapter IV against focusing reconciliation efforts solely on victims. Since victims are only one group within a conflict-affected society, ICTs must focus on more than just victims in order to reconcile a society in the context of conflict.⁴⁰ Thus, if we are concerned with communal or societal reconciliation, we must include a broad range of stakeholders in the conflict-affected society including the victims and offenders. Moreover, the class of ‘victims’ should be understood not only as the direct victims but as also including family members or close friends, who would also have been traumatised by the crimes and consequences thereof.⁴¹ Similarly, offenders and their family members and friends are important actors in the reconciliation process because reconciliation is about inclusion, not exclusion. These individuals form part of the society, particularly if they remain in the State post-conflict or return there upon release from imprisonment and must then coexist alongside the victims and their communities.⁴²

The different levels of reconciliation and the number of different actors involved (each potentially going in different directions in terms of whether and to what extent to reconcile with one another) means that only a flexible and multivariate understanding of reconciliation, which acknowledges that there are different types and degrees of reconciliation in different circumstances, is compatible with the chaos created in a conflict and the disorder that it leaves thereafter.⁴³ Accordingly, no one process can contend with the destruction and confusion

³⁷ Bloomfield, Barnes and Huyse (n 21) 21; Kjell-Åke Nordquist, *Reconciliation as a Political Concept: Some Observations and Remarks* (Documento de investigación núm. 17, Centro de Estudios Políticos e Internacionales 2009) 22; Barbara A Misztal, ‘Political Forgiveness’ Transformative Potential’ (2016) 29 *International Journal of Politics, Culture and Society* 1.

³⁸ Ana Ljubojević, *Frames of Acceptance of International Criminal Justice in Serbia* (International Nuremberg Principles Academy 2017) 25.

³⁹ For a discussion on the need to include cross-sections of the conflict-affected society and recognise collective harm as well as the harm to the victims, see section 2.1.3 of Chapter III and section 1.1 of Chapter IV.

⁴⁰ Pankhurst (n 20) 254.

⁴¹ See generally Sandra Walklate, *Imagining the Victims of Crime* (Open University Press 2007).

⁴² A good generic source on this is Henrique Carvalho and Anna Chamberlen, ‘Why Punishment Pleases: Punitive Feelings in a World of Hostile Solidarity’ (2018) 20(2) *Punishment & Society* 1.

⁴³ As recognised by the UN Security Council, ‘Reconciliation Must Evolve to Reflect Growing Complexity of Today’s Conflicts, Participants Stress during Day-Long Security Council Open Debate’ (19 November 2019) SC/14024 8868th meeting <<https://www.un.org/press/en/2019/sc14024.doc.htm>> accessed 31 May 2021.

created by conflicts,⁴⁴ and often, partnership with other mechanisms or organisations might further the reconciliation process. Indeed, where it is understood as a thick, interpersonal restoration of ties, reconciliation is beyond the means of a foreign institutional response such as ICTs alone. Whether to reconcile on an interpersonal level is a question for each individual, rather than for an institution to impose. However, where it is understood in a thinner, collective dimension, as a more pragmatic “development of effective working relations,” it both can and must be promoted by ICTs.⁴⁵ These broader levels of reconciliation can also gradually advance individual reconciliation by “nurturing basic respect both for new institutions and for former enemies” and giving victims and offenders an opportunity to feel part of a broader society that is forward looking.⁴⁶ In such a way, ICTs have the potential to contribute to different levels of reconciliation, commencing with the collective. Political reconciliation, in particular, can be promoted by ICTs because of its focus on building pragmatic working relationships and ensuring effective coexistence and thereby creating the basis for community or individual reconciliation.

Such a comprehensive understanding of reconciliation and its connection with ICJ makes the concept difficult to measure, and this is where the different components of reconciliation are an important consideration, to which the next section turns, making it a more tangible concept.⁴⁷

2. Components of reconciliation and amenability for promotion by ICTs

This section turns to the components of reconciliation: sympathy, forgiveness, establishment of the truth and the restoration of trust (in section 2.1). Based on this discussion, I suggest (in section 2.2) the specific components to which ICTs can make a unique contribution, further explaining the role of ICTs in peace and reconciliation.

2.1 Components of reconciliation

The first component of reconciliation is sympathy: the ability to imagine oneself in another person’s circumstances.⁴⁸ Acceptance that other ethnic, religious or national groups were also

⁴⁴ David A Crocker, ‘Reckoning with Past Wrongs: A Normative Framework’ (1999) 13(1) *Ethics and International Affairs* 43, 45 and 60.

⁴⁵ David Bloomfield, *On Good Terms: Clarifying Reconciliation* (Berghoff Report 14, 2006) 29.

⁴⁶ *ibid* 29.

⁴⁷ Kotecha (n 24) 2.

⁴⁸ Nir Eisikovits, ‘On the Benefits of Sympathy for Political Reconciliation’ (2004) 105 *Journal of Social and Political Theory* 31, 39.

victims of the conflict is an important factor of sympathy in a conflict context. Such acceptance stands in stark contrast to the “rigid moralisms” that can facilitate conflict in the first place,⁴⁹ without requiring the individual to abandon their own beliefs (about the conflict for example). It is important to distinguish sympathy from empathy, the latter meaning to imagine oneself in the other’s place, rather than to condone or endorse his/her acts on an ideological basis.⁵⁰ Sympathy nonetheless opens the door to dialogue between individuals and the rebuilding of broken relationships, at least to some degree.⁵¹ This means that not only can and do victims need to sympathise with offenders, but the offenders also need to sympathise with the victims. Where this is possible, there is evidence of a clear disassociation with the type of ‘us and them’ rhetoric used in war because it requires consideration of the other as a person.

Sympathy, when understood at the interpersonal level loses its meaning when institutionalised, therefore making it more difficult for an ICT to promote it. Nevertheless, sympathy can also be at a societal or political level; with communities or States “addressing formal questions” and “settling claims.”⁵² This openness and flexibility towards the other whilst nonetheless not condoning their crimes acknowledges the connection between peace and justice in order to ensure the sustainability of peace efforts.⁵³ In order for sympathy to contribute to societal or political reconciliation, there must be action from both sides of the conflict, including recognition of guilt. Where such recognition is missing, sympathy will have less relevance because it would be one-sided and therefore unlikely to encourage dialogue. Therefore, the importance of sympathy as a component of reconciliation depends entirely on the situation and whether each party is willing to admit their actions during the conflict. The conflicts of the 1990s which led to the establishment of the two *ad hoc* tribunals demonstrate that offenders’ acknowledgment of their crimes is often not forthcoming. Case studies in Bosnia and Herzegovina have demonstrated the lack of sympathy between parties, with each vilifying the other, in partly explained by the unwillingness of offenders’ in each community to acknowledge guilt.⁵⁴ Furthermore, individual sympathy is not as pertinent in the context of thin reconciliation, because there is no emotional change in the individuals or communities, or in interstate conflicts, because the individuals within the society do not need to coexist in the same

⁴⁹ Shields (n 13) 9.

⁵⁰ Eisikovits (n 48) 43.

⁵¹ Shields (n 13) 10.

⁵² Eisikovits (n 48) 44.

⁵³ John P. Lederach, ‘Justpeace’ (presentation at the University of Vienna 15 November 2017) <<http://homepage.univie.ac.at/silvia.michal-misak/justpeace.htm>> accessed 31 May 2021.

⁵⁴ Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the ICTY* (Routledge 2014) 96.

way and have a level of distance between them. Instead, the sympathy of the State institutions towards the other State, for example, would be more relevant.

The second component of reconciliation is forgiveness; a particularly demanding and therefore challenging component in the context of conflict. Forgiveness is a manifold term, but the clearest way of conceptualising it is as letting go of revenge and resentment, and as a resumption of relationships.⁵⁵

Often when we talk about forgiveness, we are referring to interpersonal forgiveness, and this means a change in attitude between individuals that were previously in conflict towards one another, a softening of attitudes and stances that led to the conflict.⁵⁶ However, referring to a change in attitude is insufficient without defining the type and degree of change. It is one thing to resume relations to the extent necessary for peaceful coexistence, and something else entirely to move beyond “hatred and revenge,” which in turn is distinct from thinking positively about that individual, and even to have feelings of goodwill towards them.⁵⁷ Much the same as with sympathy, forgiveness does not equate to condoning the convict’s actions; this would be unimaginable in the context of mass crimes where the scale of crimes is so great and heinous. Accordingly, the individual or community can forgive the offender whilst nevertheless judging their actions unjustifiable.⁵⁸ Forgiveness allows the victim to free themselves from the hatred felt as a result of the crimes and to recognise the criminal as an individual with whom they could again be associated in some way.⁵⁹ This then means not only a personal emotional change for the victim but also a change in the way the victim sees the offender as an individual separate from their crimes.⁶⁰ Such a form of forgiveness is a “prerogative for primary victims”: in other words, it is for the direct victims to decide whether they forgive the offenders,⁶¹ and often implies that there is a relationship to heal and thus will not always be relevant. Moreover, where

⁵⁵ William Neblett, ‘Forgiveness and Ideals’ (1974) 83(330) *Mind* 269; Jeffrie G Murphy, ‘Forgiveness’ in Lawrence C Becker and Charlotte B Becker (eds), *Encyclopedia of Ethics* (Routledge 2001) 561–562; Jeffrie G Murphy and Jean Hampton, *Forgiveness and Mercy* (CUP 1998) 16-17.; Paul M Hughes, ‘Two Cheers for Forgiveness (and Even Fewer for Revenge)’ (2016) 44(2) *Philosophia* 361, 362.

⁵⁶ *ibid* Murphy and Hampton 21; Paul M Hughes, ‘What is Involved in Forgiving?’ (1993) 27(3) *Journal of Value Inquiry* 331.

⁵⁷ Neelke Doorn, ‘Forgiveness and Reconciliation in Transitional Justice Practices’ (2008) 15(3) *Ethical Perspectives* 381, 382; Jeffrie G Murphy, *Getting Even: Forgiveness and Its Limits* (OUP 2012), 9-17; Glen Pettigrove, *Forgiveness and Love* (OUP 2003) 15.

⁵⁸ Brandon Warmke and Michael McKenna, ‘Moral Responsibility, Forgiveness, and Conversation’ in Ishtiyaque Haji and Justin Caouette (eds), *Free Will and Moral Responsibility* (Cambridge Scholars Publishing 2013) 189–212.

⁵⁹ Murphy and Hampton (n 55) 83 and 85.

⁶⁰ *ibid* 37.

⁶¹ Trudy Govier and Wilhelm Verwoerd, ‘Forgiveness: The Victim’s Prerogative’ (2002) 21(2) *South African Journal of Philosophy* 97, 110.

forgiveness is understood as an interpersonal, deep change of feelings, it would be inconceivable for someone to forgive on someone else's behalf. Interpersonal forgiveness loses value when it becomes a collective endeavour because it imposes a collective decision on the individual, suppressing their right to choose whether they are ready for an emotional change towards the offender. In the aftermath of mass conflict, it is first important for victims to regain a sense of self-worth, making forgiveness a last step for the individual victims and not something that should be undertaken in their name.⁶²

Forgiveness is to be given weight in peace and reconciliation with caution, because asking victims to forgive places a burden on them. If reconciliation is not 'true' or 'complete' without forgiveness, then there is a risk that the burden of reconciliation for the entire society is placed on the shoulders of those most gravely affected by the conflict.⁶³ This cannot and should not be a means of attempting to promote stable peace and reconciliation. Whilst those most affected by atrocity have a stake in (and therefore, some responsibility for) societal reconciliation, the burden must not be too cumbersome because part of the reconstruction of the conflict-affected society is redressing the balance in favour of the victims. At the same time, to deny that victims and other local stakeholders have any responsibility makes them passive in the peace process, and seen as individuals with little "capacity to participate" in reconciliation efforts.⁶⁴ Whilst this passivity is intended to take away the burden from the victims, it also thereby denies them the opportunity of personal and collective empowerment.⁶⁵ A balance must thus be struck between promoting forgiveness without giving it undue weight where the conflict context is not favourable to interpersonal forgiveness.

As well as a deeply interpersonal notion, forgiveness in political contexts focuses on the public actions taken by victims and their communities in order to demonstrate forgiveness (as opposed to their private feelings towards the offender): relational forgiveness. It is often more immediately feasible in the aftermath of mass conflict because it is possible to officially 'forgive' so as to assume better relations and ensure a peaceful coexistence whilst at the same not forgiving the individuals concerned on a personal level.⁶⁶ Where there is interstate harm,

⁶² Doorn (n 57) 387.

⁶³ Govier and Verwoerd (n 61) 110; Bloomfield (n 45) 20.

⁶⁴ Astrid Jamar, *Victims' Inclusion and Transitional Justice: Attending to the Exclusivity of Inclusion Politics* (Political Settlements Programme 2018) 19.

⁶⁵ Larry May, 'Mass Rape and the Concept of International Crime' in Carol Prager and Trudy Govier (eds), *Dilemmas of Reconciliation: Cases and Concepts* (Wilfrid Laurier University Press 2003) 122; Bloomfield, Barnes, Huyse (n 21) 62.

⁶⁶ Bloomfield (n 45) 24; Joanna Shapland, 'Forgiveness in Restorative Justice: Is it Necessary? Is it Useful?' (2016) 5(1) *Oxford Journal of Law and Religion* 94.

or where one group has harmed another, group or State forgiveness can be suitable.⁶⁷ The State could forgive, “not on behalf or in place of victims but in its own right,” by for example not punishing the individual for their crimes, which might build the basis for individuals themselves to forgive the offender(s).⁶⁸ Whether State forgiveness on behalf of its citizens is appropriate will depend on the type of conflict in question (i.e. State forgiveness for an interstate conflict would be more relevant than in a domestic, intrastate conflict between communities),⁶⁹ and who committed the crimes (whether or not the State was actively involved). State forgiveness on behalf of its citizens would thus be questionable where atrocities were perpetrated by the State, using its machinery, institutions and processes.

The question arises in this context whether forgiveness is ever appropriate because mass violence is so heinous,⁷⁰ and whether it should be conditional on the admission of guilt.⁷¹ This emphasises the fact that the pertinence of forgiveness will depend on context, and the will of individuals. Without acknowledgment, forgiveness has little value for societal reconciliation because reconciliation requires both parties to the conflict to accept their responsibilities.⁷² However, if forgiveness is understood as an external action, as explained above (where an individual resumes relations with the other for the sake of peace), this would mean that some notion and level of forgiveness is possible within the confines of negative peace.⁷³ It would not then be unreasonable to talk of reconciliation provided peaceful coexistence is reestablished. It is also conceivable that such “pragmatic forgiveness” might lead, in the longer-term, to a deeper forgiveness and thicker reconciliation out of mere tolerance.⁷⁴

⁶⁷ Peter Digeser, *Political Forgiveness* (Cornell University Press 2001) 9 and 109-146.

⁶⁸ Nicola Lacey and Hanna Pickard, ‘To Blame or to Forgive? Reconciling Forgiveness and Punishment in Criminal Justice’ (2015) 35(4) *Oxford Journal of Legal Studies* 665, 668 and 677; Nicholas Wolterstorff, ‘Is It Possible and Sometimes Desirable for States to Forgive?’ (2013) 41(3) *Journal of Religious Ethics* 417, 431; see also Charles L Griswold, *Forgiveness: A Philosophical Exploration* (CUP 2007) 140 regarding the role of “political apology in State forgiveness.”

⁶⁹ Digeser (n 67) 9 and 109-146.

⁷⁰ Joram Graf Haber, *Forgiveness* (Lanham: Rowman and Littlefield 1991) 84-86; John Kekes, ‘Blame Versus Forgiveness’ (2009) 92(4) *The Monist* 488, 501; see also Oliver Hallich, ‘Can the Paradox of Forgiveness Be Dissolved?’ (2013) 16(5) *Ethical Theory and Moral Practice* 999, 1003; Leo Zaibert, ‘The Paradox of Forgiveness’ (2009) 6(3) *Journal of Moral Philosophy* 365.

⁷¹ For two opposing views on this question see Griswold (n 68) 38-110 and Eve Garrard and David McNaughton, ‘Conditional Unconditional Forgiveness’ in Christel Fricke (ed), *The Ethics of Forgiveness: A Collection of Essays* (Routledge 2011) 97–106.

⁷² Griswold (n 68) 38-110.

⁷³ Augustine Nwoye, ‘Promoting Forgiveness Through Restorative Conferencing’ in Ani Kalayjian and Raymond F Paloutzian (eds), *Forgiveness and Reconciliation: Psychological Pathways to Conflict Transformation and Peace Building* (Springer 2009) 123.

⁷⁴ Christina Jayne Montiel, ‘Constructive and Destructive Post-Conflict Forgiveness’ (2000) 12(1) *Peace Review* 95, 100.

Interpersonal forgiveness is neither necessarily indispensable nor appropriate for all reconciliation efforts. The level and suitability of interpersonal forgiveness should be left to the individual victims to decide upon and cannot be imposed upon them, but it can nevertheless be encouraged by establishing the truth: the third component of reconciliation. The maxim that there can be no peace without justice, is often accompanied by the addition that there can be “no justice without truth.”⁷⁵ The premise is that it would be impossible to restore peace among individuals or groups if there is no establishment of the truth about what happened in a conflict. It raises the question: what does truth entail? In a conflict-affected society, in particular, it is difficult to talk of *the* truth, rather competing truths. Furthermore, truth as a notion is relative and not as unambiguous as it might first appear; there are different types of truth including factual, personal, social, restorative and legal.⁷⁶ Factual truth is an impartial, objective account of what happened, whilst personal, social and restorative truth are subjective, depend on the individuals in question, and are less based on factual evidence and more on interaction.⁷⁷ Legal truth, on the other hand, is akin to factual truth only insofar as it relates to the individual accused before the court and the case that the court is hearing. It is thus a more restricted type of truth and one corroborated by an impartial legal body, which gives it considerable weight.⁷⁸

Whatever the type of truth sought and mechanism chosen to establish truth, there would need to be a multitude of different stakeholders, actors and mechanisms involved in order to be able to create a full picture of what happened during the conflict, how and why. Whether this is realistically possible can only be speculated upon because there is no guarantee that the necessary resources will be available, in bringing all of the different stakeholders together, having open access to the documentation and conflict locations. Nevertheless, even if we were to accept that this would be possible, it would be necessary to define truth and decide what does and does not fit within that term for every act committed during the conflict in order to have *the* truth of the conflict. Suffice it to say that this would be a cumbersome undertaking, and overall, a futile one, because it would be impossible to arrive at *the* truth. Conflict situations are characterised by chaos, ruin and confusion and, against that background, it would be

⁷⁵ Albin Eser, ‘Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY’ in Bert Swart, Alexander Zahar, and Göran Sluiter, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 116.

⁷⁶ Yasmin Naqvi, ‘The Right to the Truth in International Law: Fact or Fiction?’ (2006) 88(862) *International Review of the Red Cross* 245, 254.

⁷⁷ Albie Sachs, ‘Healing of a Nation’ in Alex Boraine and Janet Levy (eds), *The Healing of a Nation? Justice in Transition* (Amnesty 1995) 105; *Truth and Reconciliation Commission of South Africa Report* (vol 1, Truth and Reconciliation Commission 29 October 1998) 113.

⁷⁸ Later in this chapter, I focus on legal truth because this is the only type of truth that ICTs can establish.

unrealistic to assume that we could hope to discover everything that happened in a conflict and why.

Instead, reconciliation is more about negotiating “competing and paradoxical narratives” and tolerating difference.⁷⁹ Furthermore, in order to have any reconciliatory impact on the society, any official account of the truth would need to be “accepted and internalized” by the relevant stakeholders.⁸⁰ Often, many local stakeholders only accept the truth established by ICTs where it fits with their understanding of the conflict; individuals are willing to accept a new idea or opinion only if “it preserves the older stock of truths with a minimum of modification.”⁸¹ One example is the situation in the States of the former Yugoslavia, where only the narrative of the conflict and truths that coincide with the beliefs of the particular group in question regarding the conflict and of their (historical) victimisation is accepted.⁸² Truth as a component of reconciliation is particularly challenging where different communities need to coexist because the in-and out-group narratives would be particularly present in the aftermath of conflict. The fear that this might cause for individuals from different communities could make acceptance of truth that does not coincide with their in-group beliefs difficult, as is the case in the former Yugoslavia. Where the conflict is an interstate one, this will not be as significant an issue because there isn’t the same type of co-existence.

Moreover, acceptance of a shared truth is not always necessary for thinner reconciliation⁸³ because coexistence is more about pragmatism than healing of relationships and deeper trust. In view of the uncertain character of *the* truth, where there cannot realistically be a consensus or a common understanding of the reality of the conflict, we should aim for what might be termed “the best possible truth.”⁸⁴ It involves acknowledging that often there is not one

⁷⁹ Rachel Kerr, ‘The ‘Art’ of Reconciliation’ (2017) FICHL Policy Brief Series No. 78, 2.

⁸⁰ Janine Natalya Clark, ‘The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina’ (2009) 7(3) JICJ 463, 475; Janine Natalya Clark, ‘Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship’ (2011) 11 ICLR 241, 259; Payam Akhavan, ‘Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda’ (1997) 7 Duke Journal of Comparative and International Law 325, 341; Payam Akhavan, ‘Justice in the Hague, Peace in the Former Yugoslavia? A commentary on the United Nations War Crimes Tribunal’ (1998) 20 Human Rights Quarterly 737, 770.

⁸¹ William James, *Pragmatism: A New Name for some Old Ways of Thinking* (Harvard University Press 1975) 34-35; Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (n 78) 1336-1340.

⁸² *ibid* Milanović 1359-1366; Milanović, ‘Courting Failure: When are International Criminal Courts Likely to Be Believed by Local Audiences?’ (n 77) 263-266.

⁸³ Clark, ‘Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship’ (n 80) 258; David Mendeloff, ‘Truth-Seeking, Truth-Telling and Postconflict Peacebuilding: Curb the Enthusiasm?’ (2004) 6 International Studies Review 355, 366.

⁸⁴ Eser (n 75) 122.

understanding of the truth but multiple interpretations of what happened in a given situation and why, and at the same time, there would be certain overlapping understandings that would allow for some kind of mutual understanding and acceptance of the events that took place.

Establishment of the truth is closely linked with the fourth component of reconciliation: restoring trust. By establishing truth (assuming it is believed by the conflict-affected societies), there is less space for mistrust and doubt. Admittedly, different stakeholders might react differently to finding out the truth of a crime in any given situation, which might either impact positively or negatively on their reconciliation.⁸⁵ Thus, finding out the exact truth of a particular crime might well be counterproductive to peace and reconciliation and instead create further enmity in the short term, where individuals uncover that their neighbours were involved in crimes committed against them.⁸⁶ Nevertheless, the short-term tension is unlikely to hinder reconciliation in the long-term, as peace based on lies means violence can reignite more easily and make the peace attained an unstable one. Moreover, as stated above, reconciliation and personal catharsis for victims are not necessarily synonymous.

Trust can have different meanings and degrees depending on whether reconciliation is sought at the individual, community, societal or political level and whether it is understood as being of a thinner or thicker nature. Where reconciliation is understood as thin, trust is akin to “civic trust” or “democratic reciprocity;” analogous to pragmatic cooperation in support of mere peaceful coexistence.⁸⁷ On the other hand, trust under thick reconciliation would denote deep trust in the other, a reestablishment of relations and a vision of a shared future.⁸⁸ Deep trust can be overly ambitious and unrealistic in conflict-affected societies because the trust between the individuals, communities and or societies would have been completely broken, and the level of violence difficult to balance with the prior trust in the same people. To focus on rebuilding deep-seated trust in the other in the face of such heinous crimes could set up reconciliation efforts to fail because it is not realistic in the short term. If it is through this understanding that we measure the success of having rebuilt trust between parties and promoted reconciliation, then we will always be disappointed; deep trust is difficult to achieve even in the absence of

⁸⁵ Bogoeva (n 26) 2; Clark (n 54).

⁸⁶ Nicos Trimikliniotis, ‘Sociology of Reconciliation: Learning from Comparing Violent Conflicts and Reconciliation Processes’ (2012) 61(2) *Current Sociology* 244, 253.

⁸⁷ Pablo De Greiff, ‘The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted’ in Mark Gibney and Rhoda Howard-Hassmann (eds), *The Age of Apology: The West Confronts its Past* (University of Pennsylvania Press 2006) 125-126; David A Crocker ‘Reckoning with Past Wrongs: A Normative Framework’ in Carol AL Prager and Trudy Govier (eds), *Dilemmas of Reconciliation: Cases and Concepts* (Wilfrid Laurier University Press 2003) 54.

⁸⁸ Bloomfield (n 45) 20.

mass conflict.⁸⁹ A deep, emotional level of trust in the other as a person could take a long time to be established, if ever, in conflict-affected societies because that level of trust is “often restricted to friends and kin.”⁹⁰ It can be difficult enough for victims to “take the leap to minimal trust”⁹¹ because the damage caused is so atrocious, large scale and ideologically driven. Therefore, trust is a component of reconciliation in the long-term, a constant work in progress, much the same as reconciliation itself.

We can talk of trust at multiple different levels: between individuals, between communities or between societies. It is particularly challenging at the community level because those that are not in the community we identify with are often by default regarded as “untrustworthy,” which all the more likely in a conflict situation.⁹² Social solidarity is unlikely to be in evidence in the aftermath of conflict, where there is fear and resentment between communities, so that often differences in culture, tradition or socio-economic class are brought to the forefront. This is even more so the case where the conflict is an intrastate one because the relationships in question needs to continue within the same State, regardless of the severe damage. At the same time, this notion of ‘in and out groups’, ‘us and them’, makes intergroup trust particularly important in conflict-affected societies because trust stands in stark contrast to the rhetoric used in war and would prevent the outbreak of further conflict.

Despite the fact that deep trust may well not be within reach for a long time after the conflict, if ever, it is possible to encourage a level of trust that fits with thin reconciliation, for example trust in State institutions. By promoting a common ground as fellow citizens of a State, trust in State institutions and create the building blocks for interpersonal trust: trust trickles down from level to level.⁹³ This, however, would depend on whether the State was complicit in the conflict, in which case their role as an intermediary would not necessarily be as relevant or desirable. In such a case, other intermediaries, including civil society, and cultural or religious leaders, will be particularly important.

⁸⁹ Shiping Tang, ‘Reconciliation and the Remaking of Anarchy’ (2011) 63(4) World Politics 711, 739.

⁹⁰ Katrin Dudgeon and John D Brewer, ‘Victims and Compromise in Northern Ireland’ in John D Brewer (ed), *The Sociology of Compromise after Conflict* (Palgrave Macmillan 2018), 40.

⁹¹ *ibid* 41.

⁹² Miles Hewstone, Jared B Kenworthy, Ed Cairns, Nichole Tausch, Joanne Hughes, Tania Tam, Alberto Voci, Ulrich von Hecker and Catherine Pinder, ‘Stepping Stones to Reconciliation in Northern Ireland; Intergroup Contact, Forgiveness and Trust’ in Arie Nadler, Thomas Malloy and Jeffrey D Fisher (eds), *The Social Psychology of Intergroup Reconciliation* (OUP 2008) 211.

⁹³ Nordquist (n 37) 22; Misztal (n 37) 11.

In sum, the pertinence of each of these components will depend on three factors: the level of reconciliation (individual, community, societal or political); the depth of reconciliation (thinner of thicker conceptions), and the type of conflict (in particular, whether there is a prior relationship to restore and the role of the State in the conflict). This brings me to suggest the particular components of reconciliation to which ICTs can contribute.

2.2 Components of reconciliation most amenable to promotion by ICTs

Of the above-discussed components of reconciliation, the establishment of truth and restoration of trust are particularly susceptible to being promoted at an institutional level. One of the primary functions of a court of law is to establish the facts of a crime, as they pertain to the individual standing accused before them.⁹⁴ This is similarly important to the promotion of reconciliation. Whilst trial processes cannot adequately capture the historical, political, societal, and religious contexts that led to the conflict, or build a comprehensive history of the different actions committed during the conflict, they do make a unique and important contribution to establishing truth.⁹⁵ They establish the legal truth, which, although not comprehensive, is an integral part of the wider truth. As I said in section 2.1 above, legal truth is about establishing the facts as they pertain to the individual before the court; ascertaining a particular factual issue.⁹⁶ Although legal truth is limited, the strict evidentiary rules of a criminal court of law give the facts established by it an added level of legitimacy, despite the fact that sociological legitimacy in the conflict-affected society might be missing.⁹⁷ Such trials also make public information about a particular crime or the context behind it that might never have been ascertained without the trial, thanks to victim testimony for example.⁹⁸ By establishing legal truth, courts create a historical record which minimises the space for denial and manipulation and thus sets the basis for sustainable peace, by contesting rhetoric that is likely to aggravate tensions.

Trials are “a forum for reflecting and reconciling competing perceptions” of events in an official setting, and as such it is important to decide which versions of the truth carry weight

⁹⁴ Mirjan R Damaška, ‘Truth in Adjudication’ (1998) Yale Law School Legal Scholarship Repository 289.

⁹⁵ Jakob v. H. Holtermann, ‘One of the Challenges that can Plausibly be Raised Against Them? On the Role of Truth in Debates about the Legitimacy of International Criminal Tribunals’ in Nobuo Hayashi and Cecilia M Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 218; Shannon E Fyfe, ‘Truth, Testimony and Epistemic Injustice in International Criminal Law’ in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (TOAEP 2019) 308.

⁹⁶ *ibid* Holtermann 226.

⁹⁷ Sara Darehsori, *Selling Justice Short: Why Accountability Matters for Peace* (Human Rights Watch 2009), 6.

⁹⁸ *ibid*.

and why.⁹⁹ The challenge remains in the inherent selectivity involved in a trial's arriving at an official 'Truth,' which restricts its potential for inclusiveness because some accounts will necessarily be excluded. Trials are not necessarily the only manner of establishing the truth, as other mechanisms such as truth and reconciliation commissions also have such an objective. However, a truth and reconciliation commission cannot provide the type of institutional, legal truth that a court is concerned with. For some victims, the institutionalised nature of a trial where the truth of what happened to their loved ones is recognised by a judge and those in the trial, is important, as official recognition of the harm caused to them.¹⁰⁰ Moreover, once guilt is established by a court, the truth established by it will lead to some type of punishment, and this too can be important both for the victims and the entire society to move forward,¹⁰¹ for the reasons I discuss in section 3.

As well as establishing the legal truth, international criminal prosecutions and punishment demonstrate that regardless of their position, no one is above the law and their crimes will not go unpunished.¹⁰² Accountability through criminal justice creates the basis for the rebuilding of trust because it instills faith in the rule of law, in human rights and if relevant, in the institutions of the State.¹⁰³ Ensuring there is accountability for crimes means victims need not resort to revenge or enacting their own justice, which would further destabilise the peace process.¹⁰⁴ By redressing the balance between the victim and the offender, and addressing the root causes of the conflict in an open fora (rather than leaving them to remain latent and making it possible that they reignite), accountability gives the entire conflict-affected society the opportunity to move forward with the peace process rather than being stuck in the past.¹⁰⁵ It is also an opportunity for governments to distance themselves from the crimes that were committed during the conflict, thereby reuniting people and building trust.¹⁰⁶ Where this is relevant, cooperation with an ICT can help build the legitimacy of a government, which is of great importance to building a sustainable peace, because trust often begins with trust in the

⁹⁹ Henham, 'Theorizing the Penalty of Sentencing in International Criminal Trials' (n 4) 432-433.

¹⁰⁰ Markus T Funk, *Victims' Rights and Advocacy at the International Criminal Court* (OUP 2010) 127.

¹⁰¹ *Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda* (Human Rights Center, University of California Berkeley and International Center for Transitional Justice 2005) 25-28; Stephen Cody, Eric Stove, Mychelle Balthazard, Alexa Koenig, *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court* (Human Rights Center, University of California Berkeley 2015) 3 and 68.

¹⁰² Bloomfield (n 45) 21.

¹⁰³ Bloomfield, Barnes and Huyse (n 21) 97.

¹⁰⁴ *ibid.*

¹⁰⁵ Bogoeva (n 26) 2.

¹⁰⁶ Siri Gloppen, 'Roads to Reconciliation: A Conceptual Framework' in Elin Skar, Siri Gloppen and Astrid Suhrke (eds) *Roads to Reconciliation* (Lexington Books 2005).

State and its institutions, and the belief that conflict will not break out again.¹⁰⁷ This of course is not always relevant or useful for peace because it requires the government in question to be distanced from the crimes, to be regarded as legitimate and unbiased by the people(s) and to cooperate fully with ICJ. Although a component of thinner reconciliation, trust in the State and its institutions can provide the basis for thicker reconciliation and restoring of ties between individuals and communities previously at war.¹⁰⁸

Both of these contributions – to truth and trust – are furthered by ICTs’ neutrality and distance from the conflict. As regards trust in particular, a degree of neutrality to counteract the rhetoric of conflict and put into practice the subjective notion of restoring trust would be useful at the interpersonal, intercommunal and/or inter-societal levels.¹⁰⁹ Much as with sympathy and forgiveness, the restoration of trust is aided by an admission of guilt. In the case of international crimes this will not always be forthcoming (the *ad hoc* tribunals are just one example of offenders continuing to deny their guilt post-conviction).¹¹⁰ The role of ICTs can be important in such circumstances because the pronouncement of guilt by an ICT can serve to replace the admission of guilt by the offender, where it is not forthcoming.

ICTs are inherently removed from the conflicts both geographically and symbolically, and as such, have a greater potential to be unbiased in rendering justice and establishing the truth,¹¹¹ particularly as ICJ is triggered where the national courts are unwilling or unable to fill this role of rendering justice themselves. Local governments in the aftermath of conflict will often not be in a position to prosecute, whether it is because they are unwilling or unable to due to the impact the war would have had on the State institutions and the rule of law.¹¹² Consequently, ICJ becomes important in creating the building blocks for reconciliation. Whilst opposing sides

¹⁰⁷ Jon Elster, ‘Transitional Justice and Political Violence’ (Paper presented at the ‘Transitional Justice and Civil War Settlements’ workshop in Bogotá, Colombia 18-19 October 2005); Seminar discussion ‘Criminal Justice and Crisis States’ reported in Nicholas Waddell and Phil Clark, *Peace, Justice and the ICC in Africa* (Royal African Society 2007) 42 <<https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csdc-background-papers/Peace-Justice-and-the-ICC-series-report.pdf>> accessed 31 May 2021.

¹⁰⁸ Bloomfield (n 45) 20.

¹⁰⁹ Jennifer Schense and Linda Carter, *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (International Nuremberg Principles Academy 2016) 352.

¹¹⁰ For a discussion on guilty pleas at the two *ad hoc* tribunals, see Janine Natalya Clark, ‘Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation’ (2009) 20(2) EJIL 415; Barbora Holá, Alette Smeulers and Catrien Bijleveld, ‘International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR’ (2011) 9 JICJ 411; Nancy Amoury Combs, ‘Copping a Plea to Genocide: The Plea Bargaining of International Crimes’ (2002) 151(1) University of Pennsylvania Law Review 1.

¹¹¹ Bogoeva (n 26) 2. I note however that this will not necessarily always be accepted by local stakeholders, and ICTs will need to work on promoting their sociological legitimacy, as discussed in section 3 of Chapter II and section 1 of Chapter VI.

¹¹² Jens David Ohlin, ‘Peace, Security, and Prosecutorial Discretion’ in Carsten Stahn and Göran Sluiter (eds), *The emerging practice of the International Criminal Court* (Nijhoff 2009) 194.

of a conflict may theoretically be able to reconcile without an objective third party, the conflicts that have led to modern ICTs have demonstrated such entrenched conflicts that a neutral intervening actor has consistently proven necessary to provide any resolution to the conflict. However, whilst important for establishing the truth and restoring trust, neutrality means little for the promotion of peace and reconciliation where the conflict-affected society remains unconvinced thereof; the significance of neutrality is theoretical and conditional on the ICTs' ability to convince their stakeholders.

In sum, thus far I have concluded that ICTs can promote a thinner degree of reconciliation on which thicker degrees can be built, particularly in its contribution to collective levels of reconciliation (in section 1 above). In this section, I have focused on the particular components of reconciliation that ICTs contribute to, similarly mostly at a collective rather than interpersonal level. The next section turns to suggesting the specific facets of ICJ that contribute to the above-determined degrees, levels and components of reconciliation, thereby answering the question as to how the work of ICTs contributes to peace and reconciliation.

3. How ICJ contributes to peace and reconciliation

3.1 Facets of ICTs' work that contribute to peace and reconciliation

This section argues that ICTs contribute to the above-determined thinner degree of both collective and individual reconciliation (and in particular truth and trust as components of reconciliation) in three ways: giving victims a forum to have their voices heard; individualising guilt; and, separating the offenders from the conflict-affected society. These three aspects of criminal justice give ICTs a clear and specific role in peace and reconciliation.

Firstly, ICTs contribute to peace and reconciliation by giving victims a forum to have their voices heard, to provide witness and attain a sense of justice from the prosecution of perpetrators.¹¹³ This contribution of ICTs is essential to counter the marginalisation and harm caused by the offender's crimes and ensure the chain of hatred, revenge and guilt are not to be passed on from generation to generation within victim communities,¹¹⁴ as one of the fundamental purposes of criminal justice, both domestic and international, as discussed in Chapter I. The satisfaction of seeing the perpetrator being held accountable for their actions

¹¹³ Albeit a likely incomplete sense of justice, because the term will mean different things to different individuals.

¹¹⁴ Zoran Pajić, 'Reflections on the Record and Practices of the ICTY', in James Gow, Rachel Kerr, Zoran Pajić (eds), *Prosecuting War Crimes – Lessons and Legacies of the ICTY* (Routledge 2014) 237.

through criminal punishment, and having victims' stories heard publicly is something courts can do best, and in fact only courts can provide this in a manner that is consistent with the fundamental values of human dignity and human rights, recognised by the international community.¹¹⁵ Whilst there would not be complete satisfaction for victims (as they are not permitted free narrative before the court), there is a level of satisfaction and healing for some victims from testifying, having their story heard and seeing the offender's actions censured. Indeed, victims that have testified before the *ad hoc* tribunals and the ICC have often stated that the trial process and having their stories heard was necessary before they could consider reconciliation.¹¹⁶ This is a facet of ICJ that focuses on individual reconciliation. Whilst I suggested in Chapter IV that victim satisfaction is insufficient for societal reconciliation, individual reconciliation can contribute to societal reconciliation, particularly in the case of structural violence.¹¹⁷ Conferring on this facet of ICTs' work not only an impact on individual but also collective reconciliation.

Secondly, the focus of ICTs on individual criminal responsibility eschews blaming entire communities, which in turn facilitates the restoration of trust.¹¹⁸ ICTs, much the same as their national counterparts, focus on individual criminal responsibility and thereby avoid assigning community guilt. The move away from collective guilt is important firstly in recognition of the fact that individuals commit crimes, although these are often State-sponsored and facilitated, and secondly because it provides an alternative to the community-level blame and victimhood that is emblematic of mass conflict, where the conflict is made to seem inevitable and therefore justified.¹¹⁹ Part of the contribution of ICTs is to break down the competition between different communities for the status of "victims" of the conflict, which is important for reconciliation because the constant run for victimisation of oneself runs at the expense of the other, and is counterproductive to seeing the worth in the other.¹²⁰

¹¹⁵ Hassan B Jallow, 'Justice and the Rule of Law: A Global Perspective' (2009) 43(1) *The International Lawyer* 77, 78.

¹¹⁶ Stover (n 14) 110.

¹¹⁷ Jallow (n 115) 78.

¹¹⁸ *Contra* Mark A Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99(2) *Northwestern University Law Review* 539.

¹¹⁹ Bartłomiej Krzan, 'International Criminal Court Facing the Peace vs. Justice Dilemma' (2016) 2(2) *International Comparative Jurisprudence* 81; Niel J Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1997) 59(4) *Law and Contemporary Problems* 127, 128.

¹²⁰ Janine Natalya Clark, 'The 'Crime of Crimes': Genocide, Criminal Trials and Reconciliation' (2012) 14(1) *Journal of Genocide Research* 55, 61; Martina Fischer, 'Transitional Justice and Reconciliation: Theory and Practice' in Beatrix Austin, Martina Fischer, Hans-Joachim Giessmann (eds), *Advancing Conflict Transformation: The Berghof Handbook II* (Barbara Budrich Publishers 2011), 418-419; Stuart Ford, 'A Social Psychology Model

By focusing on the individual, courts attempt to de-stigmatise the wider communities, hierarchies, and institutions used to pursue the conflict by focusing on individuals.¹²¹ In this way, retributive justice against individuals can be a useful means of encouraging sympathy (or at least, discouraging hatred) of wider groups. This is not necessarily to say that there is no inter-community blame as a result of the prosecution of individuals. Despite the focus of the ICTY on individual criminal responsibility, for example, blame between communities is commonplace in the States of the former Yugoslavia. Nevertheless, holding individuals to account through criminal justice remains an important component of building towards longer-term peace and reconciliation in conflict-affected societies. The alternative, collective guilt, creates an ‘us and them’ situation where ultra-nationalist politicians can exploit such feelings to trigger conflict. The absence of accountability breeds such divisive mentalities. Where there is collective victimisation and vilification, conflicts might be connected to anger for past suffering. Collective victimisation and vilification could then be passed on to future generations, thus destabilising peace in the long term.¹²² This facet of ICTs therefore contributes specifically to collective reconciliation at the collective level.

Thirdly, in the immediate aftermath of conflict and in the short-term, ICTs separate the highest-ranking offenders from the conflict-affected State, in order to protect the victims and so as not to endanger the fragile peace process. This separation provides a sense of security where the conflict-affected society can commence the reconciliation process, therefore feeding into collective levels of reconciliation. In the alternative, the victimisation and discrimination of the conflict would not have a marked end and there would instead be a security risk where the individual offenders could continue to incite further hatred or commit other crimes. Where the principal offenders remain on the territory and impunity reigns, it would be naïve to talk of reconciliation because there are more pressing security needs for the community.¹²³ Security is therefore an important factor when considering reconciliation efforts. Moreover, the contribution of separating offenders to reconciliation is undermined if there is no punishment at the conclusion of the trial following a conviction, since the offender is likely to return to the

of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms’ (2012) 45 *Vanderbilt Journal of Transnational Law* 405, 465-466.

¹²¹ For a discussion on social cohesion and scapegoating of the individual see for example: Emile Durkheim, *The Division of Labour in Society* (Macmillan 1997); Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Routledge 1999); Immi Tallgren, ‘The Durkheimian Spell of International Criminal Law?’ (2013) 71 *Revue interdisciplinaire d’études juridiques* 137.

¹²² For example, Clark, ‘The ‘Crime of Crimes’: Genocide, Criminal Trials and Reconciliation’ (n 120) 61; Fischer (n 120) 418-419.

¹²³ *ibid* Fischer 417.

conflict-affected State immediately.¹²⁴ For this reason, I next turn to the role of sentencing in particular, in the following subsection.

3.2 Facets of international sentencing that contribute to peace and reconciliation

Rather than being counterproductive to reconciliation, ICT's retributive justice and sentencing in particular can further their contributions to local peace and reconciliation in the long-term. The contribution of sentencing to the peace and reconciliation process comes primarily from stigmatisation of the crimes and rehabilitation of the convicted individual, in preparation for their peaceful reinsertion into society.

Firstly, by stigmatising 'big fish' offenders, sentencing can be instrumental in encouraging forgiveness and trust of victims towards the 'small fish' offenders,¹²⁵ and "leads to the spreading of empathy,"¹²⁶ where individuals see the humanity of the other again.¹²⁷ Such stigmatisation must be at the individual level so as not to stigmatise whole communities, thus linking the impact thereof on individual criminal responsibility. In this way, stigmatisation also contributes to collective reconciliation. As discussed in Chapters I and II, international sentences of imprisonment have a particularly strong symbolic potential in that they express global condemnation.¹²⁸ Although such punishment has a similarly expressive role at the national level,¹²⁹ because of the attention that ICTs receive, their broader audience gives them a particular role to communicate censure as they work on behalf of the international community. This gives international sentences the opportunity to have a broader social value than their

¹²⁴ M Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9, 26-27; Steven Ratner, Jason S Abrams and James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (OUP 2009) 175; Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time has Passed' (2005) 38 *Cornell International Law Journal* 753, 775; Laurel E Fletcher and Harvey M Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573, 589; Mark A Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: *Hamdan*, the Geneva Conventions, and International Criminal Law' (2007) 35 *George Washington Law Review* 1165, 1182-83.

¹²⁵ Bogoeva (n 26) 2. I have discussed rehabilitation, its forms and connection with peace and reconciliation as it relates to domestic sentencing and enforcement in section 1.2 of Chapter I, and its relevance to international sentencing and enforcement in section 2.2 of Chapter I, and section 2 of Chapter II. This section reiterates some of those points and builds on the reconciliatory potential of rehabilitation.

¹²⁶ Mirjan R Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2010) 36 *North Carolina Journal of International Law and Commercial Regulation* 365, 377.

¹²⁷ Halpern and Weinstein (n 25) 567.

¹²⁸ Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure* (CUP 2014) 17; David Garland, *Punishment in Modern Society: A Study in Social Theory* (University of Chicago Press 1990) 232.

¹²⁹ Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49(3) *The Monist* 397; Joshua Glasgow, 'The Expressivist Theory of Punishment Defended' (2015) 34(6) *Law and Philosophy* 601.

national counterpart.¹³⁰ The disapproval is communicated not only to the offender, but to the victims, the entire conflict-affected society,¹³¹ as well as more internationally, and to potential offenders in the future. Sentences of imprisonment demonstrate to the offender societal reproach of his/her actions, and if enforced can act as a deterrent, because the threat of punishment becomes reality and is a sign to potential offenders.¹³² Disapproval on the world stage can also help to provide closure, which links censure and international sentences to peace and reconciliation.¹³³ Making an individual accountable for their actions and punishing them for them is part of restoring balance between the victim and offender.¹³⁴ The alternative, failing to punish individuals responsible for violence, can cause additional unrest and violence as victims resort to revenge or rendering justice themselves.

Secondly, rehabilitation is one micro-level objective of a sentence of imprisonment and enforcement thereof that is particularly instrumental in contributing to peace and reconciliation.¹³⁵ I have discussed the link between this micro-level objective of punishment, both at the domestic and international level, and its connection with peace and reconciliation. Without repeating the same arguments, here I wish to underscore that rehabilitation supports ICTs in their establishment of the truth and in facilitating the restoration of trust.¹³⁶ Rehabilitation can further the establishment of the truth because where the offender in question is rehabilitated they may be more willing to divulge information on missing individuals or burial sites for example, which can be important for creating the basis for interpersonal trust.

If successful, rehabilitation is important for the victim, offender and conflict-affected society and can contribute to individual and collective reconciliation. Rehabilitation can reassure victims that the release of the offender need not be a “source of retraumatization.”¹³⁷ It prepares the offender for reinsertion into the conflict-affected society, potentially giving them “a new

¹³⁰ Silvia D’Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Hart Publishing 2011) 295.

¹³¹ See section 1.2.1 of Chapter I for a discussion. E.g. Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (4th edn, OUP 2016) 59; Shapland (n 66) 99.

¹³² Diane Marie Amann, ‘Group Mentality, Expressivism and Genocide’ (2002) 2 ICLR 93, 120; Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester University Press 1986) 52.

¹³³ Cryer, Friman, Robinson and Wilmshurst (n 129) 24.

¹³⁴ Murphy (n 36) 184.

¹³⁵ I have already suggested the importance of rehabilitation to reconciliation efforts in Radisavljević (n 14) 133-137.

¹³⁶ William A Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’ (1997) 7 Duke Journal of Comparative and International Law 461, 503.

¹³⁷ Bloomfield, Barnes, and Huyse (n 21) 74.

set of values and morals and a desire to contribute to society.”¹³⁸ Positive peace and reconciliation, as discussed above, require inclusion of different groups within the conflict-affected society, and this includes the offender. This is however but a theoretical contribution of international sentencing to peace and reconciliation, contingent on taking the objective seriously, delineating how to contribute thereto and giving local stakeholders a greater role in the process. In the alternative, ICTs release individuals who return to the conflict-affected society, recant their words of remorse, continue their war rhetoric and antagonise victim groups.¹³⁹

Conclusion

This chapter has responded both to the failure of ICTs to define their macro-level objectives and the conceptualisation of reconciliation only as deep healing of relationships, discussed in the previous chapter. The purpose of the chapter was to provide a comprehensive and nuanced understanding of peace and reconciliation and, based on this, suggest how ICJ contributes thereto. I have suggested that where peace is understood in its positive form, it denotes a healing of relationships and a transformation of the society to a forward-looking one. Positive peace, in turn, requires accountability because without dealing with the mistakes of the past and redressing wrongs, we are doomed to repeat them. It is then this understanding of peace that links peace to reconciliation, by making reconciliation a means of promoting sustainable peace. Reconciliation should be understood as an improvement of relationships between previously conflicting parties, from individuals to communities within a conflict-affected society. This includes an understanding of reconciliation from a minimalistic cessation of violence and peaceful coexistence to a deeper healing of relationships – thin and thick reconciliation.

ICTs are unable to deliver thick reconciliation requiring interpersonal sympathy and forgiveness, for which different conflict-response mechanisms will be more suitable. However, they promote thinner reconciliation as a long-term process and the components of establishing the truth and restoration of trust, particularly by separating offenders from the conflict, giving victims a voice and individualising guilt. Sentencing has a unique contribution to the overall way in which ICTs promote peace and reconciliation, through stigmatisation and rehabilitation

¹³⁸ Joel Meyer, ‘Reflections on Some Theories of Punishment’ (1968) 59(4) *Journal of Criminal Law and Criminology* 595, 597.

¹³⁹ Jelena Subotić, ‘The Cruelty of False Remorse: Biljana Plavšić at The Hague’ (2012) 36 *Southeastern Europe* 39; Jessica M Kelder, Barbora Holá and Joris van Wijk, ‘Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR’ (2014) 14 *International Criminal Law Review* 1177, 1199.

of the offender. Accordingly, whilst ICTs through international sentencing cannot *achieve* reconciliation as an outcome, dependent as it is on several different factors beyond its control, it does have the potential to make a unique contribution thereto.¹⁴⁰

However, this contribution of ICJ and sentencing to peace and reconciliation is hypothetical and contingent on ICTs' sociological legitimacy, without which it is impossible to restore trust by establishing truth (as it would not be internalised by the conflict-affected society). This is where the perceptions of local stakeholders are particularly meaningful; justice must be seen to be done. In the following chapter, I focus on answering the question as to how these courts' sociological legitimacy can be enhanced, in order meet their reconciliatory potential discussed in this chapter.

¹⁴⁰ Kriesberg L, 'External Contributions to Post-Mass-Crime Rehabilitation' in Beatrice Pouligny, Simon Chesterman and Albrecht Schnabel, *After mass crime: Rebuilding states and communities* (United Nations University Press, 2007), 265-268. I have made this point specifically in relation to the ICTY in Radisavljević (n 14) 140.

CHAPTER VI – Enhancing sociological legitimacy and contributing to local peace and reconciliation: engagement with local stakeholders

Introduction

The previous chapter provided a definition of the macro-level objectives of ICJ and suggested the contribution of ICTs and sentencing in contributing to peace and reconciliation for conflict-affected societies. I also contended that the contribution of ICJ and sentencing to these macro-level objectives is conditional on ICTs' ability to garner sociological legitimacy from their local stakeholders. If ICJ is to contribute to local reconciliation, it must be able to speak to the conflict-affected society, its communities and individuals, and be understood as a necessity for societal peace and reconciliation.¹ Whilst reconciliation cannot be imposed, it can be contributed to, especially where efforts involve the participation of the communities themselves and their different factions, including public institutions and individuals.²

Accordingly, this chapter focuses on the way in which these courts can enhance their sociological legitimacy in order to contribute to peace and reconciliation more effectively, aside from providing the means for their assessment by defining their objectives. In this chapter, I argue that ICTs should enhance their sociological legitimacy by adopting a strategy for engaging with their local stakeholders, particularly during their post-conviction practices, which recognises the stakeholder's concerns and seeks their input in the criminal justice process, giving them ownership. In turn, this would enable ICTs' post-conviction practices to fully meet their reconciliatory potential, as argued in Chapter V. In proposing such an engagement framework, I apply the findings of the previous chapter specifically to the post-conviction practices of ICTs and use elements of the restorative propositions discussed in Chapter IV, which are nonetheless mediated, in respect of the retributive ethos of ICTs.

As I have argued in Chapter V, reconciliation requires interaction between individuals and communities previously at war, and must be context-specific in order to have meaning for the conflict-affected society, this chapter applies the meaning of reconciliation to post-conviction

¹ Jean Marie Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR' (2003) 16 LJIL 115, 120.

² Juan Mendez, 'National Reconciliation, Transnational Justice, and the International Criminal Court' 15 (1) (2001) Ethics and International Affairs 25, 28.

practices and suggests how ICTs should encourage dialogue and interaction at this stage of ICJ, before considering in-depth the meaning of contextualisation for ICTs. Section 1 thus considers the significance of seeing ICTs as dialogue-facilitators and emphasises why the most promising response to their sociological legitimacy challenge is comprehensive, contextualised engagement with their local stakeholders. Section 2 returns to the notion of contextualisation, examining what contextualisation entails and how it can be approached by ICTs, by considering the root causes of the conflict. The discussion in the first two sections provide the basis for proposing a normative engagement framework with local stakeholders at the post-conviction stage of ICJ, in section 3. Here I suggest specific activities for ICTs at each of the four post-conviction stages that would enhance their ability to contribute to local peace and reconciliation.

1. Enhancing sociological legitimacy and peace and reconciliation through interaction with local stakeholders at the post-conviction stage

Chapters I and II determined that sociological legitimacy requires dialogue between ICTs and the conflict-affected society, in order for them to gain sociological legitimacy. But dialogue is not only important between an ICT and its local stakeholders; it is similarly crucial to restoring trust, as evidence of positive peace.³ ICTs can be important dialogue-facilitators between parties for the purposes of promoting peace and reconciliation, whilst simultaneously boosting their interaction with local stakeholders in order to enhance sociological legitimacy.⁴

In this regard, whilst ICTs cannot and should not advance “any particular moral view” when it comes to the question of diverging opinions,⁵ they can nonetheless be used as a “theater for the clash of ideas.”⁶ Rather than shying away from debate, ICTs “should foster debate, about past crimes as well as about appropriate forms of justice”⁷ because such debate is useful not only as an educational tool but could also assist the court in making future decisions.⁸ In this way, ICTs could also contribute to reconciliation, by bringing perceptions out into the open and

³ See chapter V for more discussion on this. For example, see Julija Bogoeva, ‘Prosecuting War Criminals as the Basis for Reconciliation Policy’ (2015) FICHL Policy Brief Series No. 42, 2.

⁴ *Guidance Note of the Secretary-General United Nations Approach to Transitional Justice* (United Nations 2010) 9.

⁵ Mirjan R Damaška, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago Kent Law Review* 329, 346.

⁶ Mark J Osiel, *Mass Atrocity, Collective Memory and the Law* (Routledge 1999) 290.

⁷ Marlies Glasius, ‘Do International Criminal Courts Require Democratic Legitimacy?’ (2012) 23(1) *EJIL* 43, 65; see also Matthew Saul, ‘Local Ownership of the International Criminal Tribunal for Rwanda: Restorative and Retributive Effects’ (2012) 12 *ICLR* 427, 453.

⁸ *ibid* Glasius 65.

creating a forum for conflicting views, which is particularly important where reconciliation is understood as a process. The alternative, no interaction between previously warring individuals and communities is not conducive to reconciliation.

Thus, as a way of encouraging dialogue and debate, and in response to the fact that one of the key reasons modern ICTs lack local support is their failure to communicate and interact with their local stakeholders,⁹ the most logical action to take in order to enhance sociological legitimacy is through an engagement framework with effective two-way communication.¹⁰ By “engagement” I mean involving local stakeholders more actively in the criminal justice process and specifically at the post-conviction stage, both by information-giving and, more importantly, hearing and giving weight to their needs and expectations. Considering these expectations does not mean realising them all but respecting them and recognising the fact that they exist. Whilst courts need to be proactive facilitators, they can only assist different groups based on their willingness to reconcile with others, the choice and responsibility to reconcile lies with the individuals themselves and not the court. Local stakeholders are given an opportunity to participate but are not forced to do so. In this regard, some victims in the national context, would rather not comment on the suitability of a sentencing decision for example, instead preferring to leave such decisions to the judiciary.¹¹ The objective of engagement is not to place an additional burden on the victims or other interested parties, but to provide them with the opportunity to participate should they so desire.

By committing to an engagement framework that sets the parameters and objectives of *two-way* communication, ICTs would show more commitment to and understanding of local stakeholders. This understanding and volition to give local stakeholders a sense of ownership of the ICJ process would alleviate some of the concerns raised in Chapter III that ICTs are courts for the international community and unwilling to hear the view of local stakeholders, and enhance ICTs’ restorative potential argued in section 1 of Chapter IV.¹² Any engagement framework must be contextualised, multi-faceted and adaptable to changing contexts in

⁹ Frédéric Mégret, ‘The Legacy of the ICTY as Seen Through Some of its Actors and Observers’ (2011) 3 *Goettingen Journal of International Law* 1011, 1033; Elizabeth Neuffer, *The Keys to My Neighbour’s House: Seeking Justice in Bosnia and Rwanda* (Picador 2001) 371.

¹⁰ Yvonne M Dutton, ‘Bridging the Legitimacy Divide: The International Criminal Court’s Domestic Perception Challenge’ Forthcoming (2017) 56(1) *Columbia Journal of Transnational Law* 72, 87.

¹¹ Mina Rauschenbach and Damien Scalia, ‘Victims and international criminal justice: a vexed question?’ (2008) 90(870) *International Review of the Red Cross* 441, 445; Jo-Anne Wemmers, ‘Victim policy transfer: learning from each other’ (2005) 11(1) *European Journal on Criminal Policy and Research* 121.

¹² Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia* (Routledge 2014) 190.

recognition of the fact that sociological legitimacy is a dynamic concept that is constantly open to challenge from different stakeholders, meaning that ICTs must be flexible to adapt their legitimisation strategies to particular, changing contexts. Nevertheless, a base framework that promotes dialogue is primordial for ICTs to build upon, in order to enhance their reconciliatory impact on the ground. Dialogue at all levels is key to (re)establishing trust, and any mechanisms and tools that can be put in place to encourage dialogue are to be viewed positively. In this regard, I argued in the previous chapter that reconciliation requires the inclusion of a cross-section of individuals and communities within a conflict-affected society,¹³ rather than a focus on victims or the collective society, as suggested in Chapter IV.

This brings me to the question of why an engagement framework must be formalised for all ICTs, rather than leaving it for each ICT to decide on the role to be given to local stakeholders on a case-by-case basis. A formalised approach that applies to different ICTs provides transparency by informing all stakeholders from the outset what ICJ intends to do to contribute to local peace and reconciliation, and continuity in approach regardless of the ICT in question. Firstly, greater transparency increases the ability of ICTs to contribute to peace and reconciliation.¹⁴ An institution that provides for input from its stakeholders in a transparent manner is more likely to gain sociological legitimacy because it leaves less room for misinterpretation and increases the sense of ownership.¹⁵ Transparency leaves less room for misguided expectations and as a result, mistrust in the court.¹⁶ Part of this is managing expectations because by indicating what ICTs will aim to do and how, they give the means by which they can be judged;¹⁷ there is a danger of exceedingly high expectations and misunderstandings of an ICT that leaves it to each stakeholder to decide for themselves what the court will do and how.¹⁸

¹³ See section 1.2 of Chapter V for a discussion on this. For example, Henrique Carvalho and Anna Chamberlen, 'Why Punishment Pleases: Punitive Feelings in a World of Hostile Solidarity' (2018) 20(2) *Punishment & Society* 1; Róisín Mulgrew, *Towards the Development of the International Penal System* (CUP 2013) 229.

¹⁴ Olga Kavran, 'Public Proceedings, Outreach and Reconciliation' (2015) FICHL Policy Brief Series No. 40, 4.

¹⁵ Susan Marks, 'Democracy and International Governance' in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University 2001) 53.

¹⁶ Lauren Gould, 'Communicating the ICC: Imagery and Image-Building in Uganda' (PhD thesis, Utrecht University 2016) 91; Joanna Nicholson, '“Too High,” “Too Low”, or “Just Fair Enough”? Finding Legitimacy Through the Accused’s Right to a Fair Trial' (2019) 17 *JICJ* 351, 366.

¹⁷ Friederike Mieth, *Acceptance of International Criminal Justice: A Review* (International Nuremberg Principles Academy 2016) 11 <<https://www.nurembergacademy.org/resources/acceptance-online-platform/publications/online-edited-volume/>> accessed 31 May 2021.

¹⁸ Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia* (n 12) 12, 59 and 197.

Secondly, a formalised engagement framework for different ICTs provides continuity. By this, I mean that a single, generalised framework that is applicable to different ICTs homogenises ICJ and its efforts to promote peace and reconciliation. Modern ICTs have the same macro- and micro-level objectives and face the same sort of challenges to their sociological legitimacy, regardless of the differences in the conflicts and conflict-affected societies they deal with. As such, there is good reason to suggest a single engagement framework for modern ICTs, meaning that this framework will be generalised rather than court specific. At the same time, I caution against a one-size-fits-all approach. Whilst it would be easier to have one approach that all ICTs can use in all cases, it would fit poorly with the contextualisation and flexibility needed in order to respond to different types of conflicts that could be the subject of international prosecution and the different conflict-affected societies concerned. Any engagement framework adopted must be amenable to adaptation to match the context of the conflict and the needs of the local stakeholders. Anything less would mean there is no honest consideration of the needs of local stakeholders, thereby bolstering the view of ICJ as an example of a few rich States judging the poorer.¹⁹

Therefore, the framework proposed in this chapter requires adaptation and contextualisation for each new international criminal court or tribunal that is established, as well as for different situations/cases before the ICC. The need for contextualisation and the means thereof is to be decided by the Principals (whether it is the President, Registrar or the Prosecutor) of the court in question. Nevertheless, where possible, I indicate the difference in approach to engagement depending on the type of court, conflict and society (for example, civil or international conflicts, *ad hoc* situation-specific courts on the one hand or wider-ranging ICC type institutions on the other, and the type of society). At the same time, this is a base engagement framework whose application I explain in the detail in the following chapter, using three specific cases.

Having suggested that a contextualised and adaptable engagement framework is the best means of promoting local peace and reconciliation for conflict-affected societies, the next section considers what contextualisation means, which will need to feed into the basic normative engagement framework I suggest in section 3.

¹⁹ Barrie Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning' (2019) 32 LJIL 851, 865.

2. Contextualisation: understanding the causes of conflict

Chapter V suggested that the type of violence and root causes of a conflict are important considerations in order to fully reckon with mass crimes and promote peace and reconciliation in way that is relevant to conflict-affected societies. By taking such factors into consideration, ICTs could make their engagement with local stakeholders contextualised and thereby more likely to be effective. The last chapter considered the types of violence – direct, physical interpersonal violence and structural violence. This chapter focuses on the second component of contextualisation: root causes of conflict, which ought to guide the relevant ICT when it considers the type of engagement to undertake with local stakeholders. There are many answers to the question of what causes war, from multiple disciplinary perspectives,²⁰ and any complete theory of war would need to draw on all of them. Such a discussion is beyond the parameters of this chapter, which is instead concerned with suggesting how context is significant to proposing how ICTs (present and future) should endeavour to contribute to peace and reconciliation. Every conflict is different and the politics leading to an intra-State war are likely to diverge from the reasons behind an inter-State one. Nevertheless, for the purposes of this chapter, it is sufficient to provide an overview of the different factors that are most common to conflicts worldwide.

There will often be several interconnected factors in any given conflict, just as there is often both physical and structural violence, but this does not preclude one or more factors from being more pertinent in some conflicts than in others. To facilitate an understanding of the different factors that help to explain the outbreak of conflict, it is helpful to divide them into two groups: “proximate” and “background.”²¹ The background reasons for conflict are the underlying differences that create fault lines that facilitate conflict; they cause lingering social fragility but are insufficient of themselves to cause conflict *per se*.²² In contrast, proximate reasons are more immediately linked to the outbreak of conflict. The two groups of reasons are not mutually

²⁰ Greg Cashman, *What Causes War? An Introduction to Theories of International Conflict* (2nd edn, Rowman and Littlefield 2004) 478; Jack S Levy, ‘Theories and causes of war’ in Christopher J Coyne and Rachel L Mathers (eds), *The Handbook on the Political Economy of War* (Edward Elgar Publishing 2011) 13.

²¹ Thomas Ohlson, ‘Understanding Causes of War and Peace’ (2008) 14(1) *European Journal of International Relations* 133.

²² Rogers Brubaker, ‘Religious Dimensions of Political Conflict and Violence’ (2015) 33(1) *Sociological Theory* 1, 3; Joseph Rothschild, *Ethnopolitics: A Conceptual Framework* (Columbia University Press 1981) 86; David Turton, ‘War and ethnicity: Global Connections and Local Violence in North East Africa and Former Yugoslavia’ (1997) 25(1) *Oxford Development Studies* 77, 88.

exclusive, and background reasons can become proximate reasons under certain conditions, as I explain below.

Common examples of background reasons for an intrastate conflict in particular are differences in social identifiers and existence of discrimination, although differences in social identity can also be a factor in interstate conflicts. Among such social identifiers are ethnicity, culture, “color, appearance, language, religion, some other indicator of common origin, or some combination thereof.”²³ Ethnicity and religion in particular are interconnected, and in some States are so closely related that were we to take away religion, ethnicity would have little meaning.²⁴ In those States, the national religion is an important social identifier, and part of belonging to State, therefore also linking it to nationalism. Sometimes, in States where there are differences in social identifiers, there may also be evidence of discriminatory practices against communities of a different ethnicity, religion, race or colour. In non-international conflicts, these background reasons are often manifested in a disparity between socio-economic, legal and political expectations and reality, which exacerbates the likelihood of conflict.²⁵ This indicates a weak State incapable of bringing different communities together to form a strong sense of belonging to the society, which makes conflict more likely to occur.²⁶

In contrast, common examples of proximate reasons for conflict include political and economic gain. Political gain can be maintaining or gaining political power, most obviously in the event of a *coup d'état*.²⁷ Examples include the Rwandan genocide, where the government in a State believes that the only way to maintain power is to wage war, and where other parties vie for power.²⁸ This is evidence of a weak State where those in power are brought into question, in response to which the State might “politicize identity and fuel group-based loyalties” – the background reasons for conflict - to ensure it retains its authority.²⁹ By contrast, economic gain will be for elites but potentially also for certain wider communities too. Economic gain as a

²³ Donald Horowitz, *Ethnic Groups in Conflict* (University of California Press 1985) 17-18.

²⁴ Rebecca Y Kim, ‘Religion and Ethnicity: Theoretical Connections’ (2011) 2 *Religions* 312.

²⁵ Ohlson (n 21) 137.

²⁶ *ibid.*

²⁷ Brubaker (n 22) 4; Turton (n 22) 81.

²⁸ Joel H Feigenbaum, ‘How Puppet Masters Create Genocide: A Study in the State-Sponsored Killings in Rwanda and Cambodia (2012) 7(1) *University of Miami National Security and Armed Conflict Law Review* 176, 187-188; Ariel I Ahram, ‘The Role of State-Sponsored Militias in Genocide’ (2014) 26(3) *Terrorism and Political Violence* 488, 489-490 and 499; Henry K Kopel, ‘The Case for Sanctioning State Sponsors of Genocide Incitement’ (2016) 49(2) *Cornell International Law Journal* 415, 434.

²⁹ Ohlson (n 21) 137; Horowitz (n 23); Chaim Kaufmann, ‘Possible and Impossible Solutions to Ethnic Civil Wars’ (1996) 20(4) *International Security* 136; Roland Paris, *At War's End: Building Peace after Civil Conflict* (CUP 2004); Crawford Young, ‘Explaining the Conflict Potential of Ethnicity’, in John Darby and Roger Mac Ginty (eds), *Contemporary Peacemaking: Conflict, Violence and Peace Processes* (Palgrave Macmillan 2002).

proximate reason for conflict can mean the economic benefits for certain individuals or groups in waging war, seen for example in war-profiteering or opportunism. Alternatively, it can also refer to the economic benefit of transferring discriminatory practices or marginalising a different group than one's own. Rather than being based on ideological differences between the victimiser and the victim, the victimiser uses the conflict as an opportunity to gain economic benefit.

Despite such conflicts being more about these proximate reasons than the background ones, the State or other party waging war will rely on the differences in social identifiers to justify the use of violence. The background reasons – the underlying differences between States or communities within a State - are capitalised upon to make conflict appear inevitable.³⁰ Social identifiers are politicised and violence is justified and encouraged, mobilising individuals along ethnic or religious lines (depending on the conflict).³¹ Where the conflict is intra-State, this involves encouraging separation on ethnic terms: ethno-nationalism, which is a key form of politicising ethnicity, and is evident in the former Yugoslavia.³² In order to be convincing, these narratives have to convince their audiences not only that differences exist between them and the 'other', but also that these differences preclude peaceful coexistence.³³ To this end, evidence of historical violence is used particularly frequently by political leaders to feed resentment and fear of the other; fear that the past will repeat itself. In such circumstances, the argument is that peaceful co-existence is impossible.³⁴ A recurring element of making conflicts appear inevitable by politicising inter-group differences is dehumanising the other.³⁵ This dehumanisation of the rival group (whether it is a national, ethnic, religious or other), facilitates committing atrocious crimes against them, as they are not deemed equally worthy of respect as the in-group.³⁶ The recurrence to State-owned or loyal media is primordial in facilitating

³⁰ Turton (n 22) 91.

³¹ *ibid* 81; Ohlson (n 21) 138.

³² Stefan Wolff, 'Managing Ethno-national Conflict: Towards an Analytical Framework' (2011) 49(2) *Commonwealth and Comparative Politics* 162; Christian Scherrer, *Structural Prevention of Ethnic Violence* (Palgrave Macmillan 2002) 17.

³³ Nicholas Sambanis, 'Do Ethnic and Nonethnic Civil Wars Have the Same Causes? A Theoretical and Empirical Inquiry (Part 1)' (2001) 45(3) *The Journal of Conflict Resolution* 259, 261.

³⁴ *ibid* 263.

³⁵ Nour Kteily, Gordon Hodson and Emile Bruneau, 'They See Us as Less Than Human: Metadehumanization Predicts Intergroup Conflict via Reciprocal Dehumanization' (2016) 110(3) *Journal of Personality and Social Psychology* 343; Tage S Rai, Piercarlo Valdesolo and Jesse Graham, 'Dehumanization Increases Instrumental Violence, but not Moral Violence' (2017) 114(32) *Proceedings of the National Academy of Sciences of the United States of America* 8511.

³⁶ Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori and Ayelet Gundar, 'A Sense of Self-perceived Collective Victimhood in Intractable Conflicts' (2009) 91(874) *International Review of the Red Cross* 229, 256.

widespread dissemination of propaganda and encouraging a state of fear and hatred in the masses.³⁷

These proximate reasons are the ones that most immediately lead to conflict; that the mere existence of differences in social identifiers and/or marginalization or discrimination, is not of itself sufficient to explain conflict. Whilst a State may define itself partly through the predominant religion of its citizens for example, this is unlikely to be the only pertinent factor in the decision to enter into conflict.³⁸ After all, many countries exist peacefully in geographic proximity with States made up of different ethnic, religious, or racial majority groups, and many States around the world contain large communities of different ethnicities, religions or races. Similarly, although ethnic, racial or religious violence is often linked to discriminatory practices and marginalisation or exclusion of a particular community in a State, not all States that have such discriminatory policies are at war.³⁹ Instead, whilst what are termed religious or ethnic conflicts do involve parties that identify themselves in religious or ethnic (among other) terms, the stakes fought over are often neither ethnic nor religious.⁴⁰

It is not so much the “content” of the differences that explains conflict, but the context in which they are expressed, particularly by the State.⁴¹ Differences in social identifiers gain in significance when they overlap, for instance where ethnicity and class or ethnicity and nationality, converge – thus mobilising or politicising the identifier(s).⁴² Where certain ethnic groups have a higher-class status than others, this creates a fault line for conflict because of the discrimination in socio-economic or political terms of an ethnic group over another. Similarly, where ethnicity or religion becomes the dominant factor in defining nationalism, it gains importance. Where there is evidence of this overlap between social identifiers and socio-

³⁷ Marko Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (2016) 47 *Georgetown Journal of International Law* 1321, 1344; Vesna Pesić, *Serbian Nationalism and the Origins of the Yugoslav Crisis* (United States Institute of Peace 1996) 2; Gordana Rabrenović, ‘The Dissolution of Yugoslavia: Ethnicity, Nationalism and Exclusionary Communities (1997) 22(1) *Dialectical Anthropology* 95, 99; Jean-Germain Gros, ‘Towards a taxonomy of failed states in the New World Order: Somalia, Liberia, Rwanda and Haiti’ (1996) 17(3) *Third World Quarterly* 455, 460; Helen M Hintjens, ‘Explaining the 1994 genocide in Rwanda’ (1999) 37(2) *The Journal of Modern African Studies* 241, 243-244; Mahmood Mamdani, ‘From Conquest to Consent as the Basis of State Formation: Reflections on Rwanda’ (1996) 216 *New Leaf Review* 3; *Broadcasting Genocide: Censorship, propaganda & state-sponsored violence in Rwanda* (Article19 1996) 105 <<https://www.article19.org/data/files/pdfs/publications/rwanda-broadcasting-genocide.pdf>> accessed 31 May 2021.

³⁸ Turton (n 22) 91.

³⁹ Ohlson (n 21) 138.

⁴⁰ Brubaker (n 22) 4; Richard Jenkins, *Rethinking Ethnicity: Arguments and Explorations* (Sage Publishing 1997), 121.

⁴¹ Brubaker (n 22) 3; Rothschild (n 22) 86.

⁴² Sambanis (n 33) 263.

economic means or rights and the State, background reasons become more proximate factors of conflict.⁴³ In making ethnicity a factor that impacts how limited economic and political resources are distributed, for example, by giving certain communities greater rights and opportunities to find employment or housing than others, the State links ethnicity to how resources are distributed, thereby creating competition.⁴⁴ The competition for resources such as employment, education or socio-economic or political rights can then become objects fought over in the name of ethnicity or religion.⁴⁵ Similarly, background reasons can become more proximate where there is a sudden change to the State's legitimacy - a weakening of the State. For instance, sudden and marked marginalisation of one group can build resentment and bring any differences to the forefront, making background reasons particularly pertinent to the outbreak of conflict. Notably, any social identifiers can be politicised by the State in such a way.⁴⁶ Similarly, both personal and structural violence (in this instance, the marginalisation is structural violence) - can be legitimised in reference to ethnicity, religion or language, for instance.⁴⁷ This is where the reasons behind conflict and in particular the way in which it is justified links to the type of violence committed.

Both background and proximate reasons must be understood by ICTs if they are truly to comprehend what the conflict-affected society needs in order to start the peace and reconciliation process, and how ICTs can contribute to the process. Thus, background reasons are important because if courts are to rebuild ties and restore relations between warring parties, this includes understanding where fears exist between communities, so as to encourage trust building between them. It is critical for ICTs to understand which social identifier is used to justify a particular conflict, in order to decide with whom to engage in contributing to peace and reconciliation. Background reasons tell us whether to include religious or other leaders in engagement activities, and which ethnic, linguistic, racial, or religious communities need to be

⁴³ Brubaker (n 22) 3.

⁴⁴ Joane Nagel, 'Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture' (1994) 41(1) *Social Problems* 152, 158; Turton (n 22) 81-82. For more on ethnic mobilisation and resource competition see Leo Depres, 'Towards a Theory of Ethnic Phenomena' in Leo Depres (ed), *Ethnicity and Resource Competition* (Mouton Publishers 1975) 209; Crawford Young, *The Politics of Cultural Pluralism* (University of Wisconsin Press 1976) 98; Michael T Hannan, 'The Dynamics of Ethnic Boundaries in Modern States' in John W Meyer and Michael T Hannan (eds), *National Development and the World System* (Chicago University Press 1979) 253; Rothschild (n 22).

⁴⁵ David A Lake and Donald Rothchild, 'Containing Fear: The Origins and Management of Ethnic Conflict' in Michael E Brown, Owen R Cote, Sean M Lynn-Jones, Steven E Miller (eds), *Theories of War and Peace: An International Security Reader* (MIT Press 1998) 296; Susan Olzak, 'Contemporary Ethnic Mobilization' (1983) 9 *Annual Review of Sociology* 355, 368.

⁴⁶ Rothschild (n 22) 98.

⁴⁷ Galtung, 'Cultural Violence' (n 6) 294.

incorporated into the peace and reconciliation process to address the underlying causes of the conflict. Moreover, where a State defines itself on its ethnicity or religion, an understanding of this and its implications on peace and reconciliation efforts will help a court to avoid appearing foreign and irrelevant to the conflict-affected society. Thus, for example, including religious leaders or community leaders of different ethnicities might be more important in some States than others and serve as a demonstration that the ICT holds an understanding of the conflict-affected State.

Overall, this discussion has illustrated the most common background and proximate reasons that explain conflict and emphasised the need to contextualise conflict responses to ensure they are as relevant to the conflict-affected society as possible. Based on these factors for ICTs' consideration when deciding how and with whom to engage, the next section proposes a normative framework for engagement with local stakeholders at the different post-conviction stages.

3. A normative engagement framework as a way of enhancing sociological legitimacy during the post-conviction practices of ICTs

3.1 Definitions and timing

The engagement 'framework' presented here is intended to serve as a guidebook to engaging with local stakeholders at the post-conviction stage, using existing communication strategies such as that of the ICC and the Chicago Principles on Post-Conflict Justice.⁴⁸ It is not a finished product intended to be used by ICTs as a one-size-fits-all document. Instead, it is a toolbox, which establishes the basis, need and possible parameters of engagement, which require evaluation and adaptation. In this regard, a shorter, simplified summary of the framework should be shared with stakeholders wherever it is deployed, so that there is clarity and transparency and for the sake of managing expectations.

Any approach that aims to contribute to local peace and reconciliation must not be half-hearted but intentional and clear, contextualised and comprehensive, thus making the ICT's efforts measurable. One of the shortcomings of ICTs' attempts to contribute to peace and reconciliation is their ambiguity when it comes to specifying how they intend to promote these

⁴⁸ Daniel Rothenberg, Etelle Higonnet, M. Cherif Bassiouni, and Michael Hanna, *The Chicago Principles on Post-Conflict Justice* (International Human Rights Law Institute 2007).

broader objectives.⁴⁹ In order to counter this, any framework for engagement must provide possible methods of engagement with local stakeholders, in order to be taken seriously by these stakeholders and the international community and prove different to the *status quo*. These methods of engagement will of course need to be further refined and contextualised for each conflict situation.⁵⁰

As discussed above, the aims of such a framework are to bring the work of institutions of ICJ closer to their local stakeholders and make them more accessible and transparent. In doing so, ICTs would enhance their sociological legitimacy and thereby, be better able to achieve their macro-level objectives. As a starting point, ICTs need to communicate to their local stakeholders from the outset that they will not aim to *achieve* reconciliation but to contribute thereto; that it is both a process and an outcome; and that their role in this reconciliation process is but one response that needs to be strengthened by other mechanisms. The manner in which this is communicated will depend on the conflict-affected society, but the most common type of media used in that State should be adopted by the court so as to reach the biggest audience. It is important to make communication, especially when it is limited to information-giving, as widely accessible as possible and in as many forms as possible.

Before proposing engagement activities, it is important to recognise that any engagement framework must be integrated, introduced as early as possible and comprehensive. Firstly, it must delineate where responsibility for engagement lies within a court. This framework is intended to help to coordinate the work of the different organs of an ICT, and to ensure that their activities feed into the objectives of the ICT as a whole.⁵¹ There must be an integrated approach to engagement, where the different roles of the various organs of an ICT are recognised and specified, which will lead to sending key, consistent messages to local stakeholders as to how the ICT views its responsibilities towards them. Without this level of governance planning, the roles and responsibilities would not be defined, and it would be near impossible to hold ICTs accountable for their macro-level objectives and measure their

⁴⁹ See discussion in section 2.1.1 in Chapter III. Janine Natalya Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) 20 (2) EJIL 415, 421; Sara Parker, 'The International Criminal Tribunal for the Former Yugoslavia: The Promise and Reality of Reconciliation in Croatia' (2009) 15 (2) Peace and Conflict Studies 80, 84; Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1(1) JICJ 64, 69.

⁵⁰ Chapter VII returns to this point in more detail.

⁵¹ Cf. 'Integrated Strategy for External Relations' (Public Information and Outreach) 1 <https://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf> accessed 31 May 2021; Marie-Claude Jean-Baptiste, 'Role of the International Criminal Court in Preventing Mass Atrocity: Lessons from the Central African Republic' (2019) FICHL Policy Brief Series no. 97, 4.

achievement. A framework that lacks clear lines of responsibility might appear as mere rhetoric and instead of promoting sociological legitimacy, might exacerbate tensions between the ICT and local stakeholders.

Therefore, there must be a role for the entire ICT, including the judiciary, Presidency and the Registry and Outreach Offices in particular, if engagement is to mean more than information giving. The judiciary and Presidency have key roles in engaging with local stakeholders as they are the decision-makers, where the Registry of a court is a facilitator. The role of the international judiciary is not an extension of domestic judiciary but includes a broader role, that of working to achieve the ICT's broader objectives. ICTs are *sui generis* institutions as I argued in section 2 of Chapter I, and, as such, international judges' responsibilities are also linked to promoting the courts' broader objectives and cannot be limited to the work of domestic judges. One of the risks of substantive engagement with local stakeholders is the fear of the judiciary that such efforts might interfere with their independence, so one of the first tasks in drawing up such a plan is for internal communication within the ICT to reassure the judiciary that their independence will not be infringed upon. The role of the judiciary in engagement should thus be restricted to giving information on the ICJ process and the court's mandate.⁵²

Secondly, as this is something the ICT will be ultimately judged on by its local (and international) stakeholders, setting the parameters by which it can be judged is primordial even before the post-conviction stage of proceedings. It must be undertaken by ICTs from the start of proceedings, or in the case of an *ad hoc* tribunal, from inception. Early engagement will encourage buy-in from local stakeholders and can encourage these stakeholders to trust the ICT when it invariably makes decisions that do not fit with their understanding of the conflict. This includes communicating directly with stakeholders in an honest manner on the objectives of engagement and the intended benefits both for the local stakeholders and the ICT.

Thirdly, the framework must be comprehensive meaning it should be aimed at promoting all of the different levels of reconciliation – individual, community, societal and political. This includes considering which relationships ICTs are attempting to restore because conflict-affected societies can exhibit weak relationships on many levels: victim to offender, neighbour to neighbour, community to community and all of these with the government and State, for

⁵² *International Crimes, Local Justice A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (Open Society Foundations 2011) 34.

example. Attempting to restore any of these relationships will need different approaches. Depending on the type of relationship we are concerned with reconciling, the context of the pre-conflict society and the root causes of the conflict, the appropriate approach to engagement will differ. It is often the case that ICTs will be working to promote all levels of reconciliation simultaneously, although they will not necessarily be harmonious.⁵³ Often the ways of promoting these different types of reconciliation will contradict one another, yet it is vital to retain a perspective of all of the different levels of reconciliation, as they all ultimately feed into one another.⁵⁴

As reconciliation requires inclusion of a cross-section of individuals, and as the conflict-affected society is unlikely to be homogenous, collaborative or harmonious, it is important to reach as many individuals as possible and truly work on restoring different relationships. Thus, the stakeholders to be involved in the process include: victims; all of the different ethnic/religious, etc. groups (as relevant) prevalent in that society, including minority groups; bystanders; civil society groups; local NGOs; the political parties/government of the conflict-affected State; the media; and religious leaders, particularly where they play a prominent role in the society.

The framework suggested below is organised by the different post-conviction stages, and within these stages, divided into the different levels of reconciliation - individual, community, societal and political reconciliation. The reason for organising the framework in this way is to emphasise the importance of delineating the different stages of the post-conviction process, as the level of engagement and the individuals or groups with whom ICTs will need to engage will differ depending on the post-conviction stage. The type of engagement appropriate at the sentencing stage, for example, will not be the same as the type of engagement most suitable at the stage of early release of a convicted individual. Throughout, I suggest that ICTs should engage with their local stakeholders based on the type of reconciliation and the individuals concerned. Thus, for example, reconciliation efforts at the societal level focus on building trust and encouraging activities and opportunities that strengthen the identification with and belonging to a society. For some conflict-affected societies, this will be particularly relevant, where warring parties have to co-exist in a multicultural society. In a non-international conflict, this will be both particularly challenging and important because the notion of a single society

⁵³ Geneviève Parent, 'Reconciliation and Justice after Genocide: A Theoretical Exploration' (2010) 5(3) *Genocide Studies and Prevention: International Journal* 277, 280.

⁵⁴ *ibid.*

to which the different ethnic, religious or other groups belong will have been eroded by the conflict.

3.2 Post-conviction practices and engagement explained

This section considers the four different post-conviction stages,⁵⁵ including where local stakeholders lack information thereby making engagement particularly beneficial and proposes activities that ICTs should undertake in order to improve their sociological legitimacy at this crucial phase of ICJ.

Post-conviction stage 1: Sentencing the individual to imprisonment

Immediately following a conviction by the two *ad hoc* tribunals and the ICC, the relevant court renders punishment in the form of a sentence of imprisonment, whether for a fixed term or for a term of life-imprisonment.⁵⁶ The *ad hoc* tribunals and the Mechanism have no maximum imposable fixed-term sentence. In practice, fixed-term sentences imposed by the ICTY range from six⁵⁷ to forty years' imprisonment,⁵⁸ whilst sentences rendered by the ICTR range from six⁵⁹ to forty-five years' imprisonment.⁶⁰ The *ad hoc* tribunals have rendered five and seventeen life sentences respectively. The ICC, in contrast, is restricted to imposing either: a fixed-term sentence of up to thirty years' imprisonment; or, in exceptional circumstances, life imprisonment.⁶¹ So far, it has rendered sentences against five individuals, with the highest sentence being eighteen years' imprisonment.⁶²

⁵⁵ There is some repetition in this section, as many of the practices of the *ad hoc* tribunals and the ICC with regard to the four post-conviction stages have already been discussed in section 2.2 of Chapter II. Whilst I have attempted to keep any repetition to a minimum, I feel this slight repetition is needed to ensure the reader does not have to revert back to Chapter II to understand each post-conviction stage.

⁵⁶ Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (adopted on 11 February 1994 and last amended on 8 July 2015) IT/32/Rev. 50 (ICTY RPE) Rule 101; Rules of Procedure and Evidence of the International Tribunal for Rwanda (adopted 29 June 1995, as last amended on 13 May 2015) (ICTR RPE) Rule 10. Mechanism: UNSC Res 1966 Statute of the International Residual Mechanism for Criminal Tribunals (22 December 2010) S/RES/1966 (Mechanism Statute) Article 22. ICC: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute) Article 77.

⁵⁷ Imposed on Dražen Erdemović (Appeals Judgment) IT-96-22-A (7 October 1997).

⁵⁸ Imposed on Milomir Stakić (Judgment) IT-97-24-A (22 March 2006) and Goran Jelisić (Judgment) IT-95-10-A (5 July 2001).

⁵⁹ Imposed on Michel Bagaragaza (Judgment) ICTR-05-86 (17 November 2009).

⁶⁰ Imposed on Juneval Kajelijeli (Judgment) ICTR-98-44A (23 May 2005)

⁶¹ Rome Statute (n 56) Article 77(1).

⁶² Imposed on Jean-Pierre Bemba Gombo (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08 (21 June 2016).

This range of sentences available to ICTs is unknown to their local stakeholders, as they are only found in the core documents of the court in question, which are understandably not read by the general public. As such, local stakeholders are often shocked by the sentencing decisions rendered in specific cases, which is at least partly due to a lack of understanding as to the impossible sentences.⁶³ This includes the impossibility of an ICT rendering a death sentence, which is sometimes incomprehensible for certain victims. As such, engagement with local stakeholders that permits them to better understand sentencing practices of an ICT in a given case is to be welcomed. Whilst information-giving alone is insufficient to promote sociological legitimacy, it is nevertheless useful.

Any factors that guide judges in deciding on a sentence, as discussed in section 2 of Chapter II, are useful indicators similarly for local stakeholders, in order to manage expectations. This might include explaining where an international sentencing decision is not compatible with the local sentencing practice, particularly for the *ad hoc* tribunals who should have “recourse to the general practice regarding prison sentences in the courts” of the former Yugoslavia and Rwanda respectively.”⁶⁴ Unsurprisingly, as a global international court, the ICC does not have such a provision, which means that it can deal with individuals from different conflicts and different States, whilst treating them in the same manner in terms of sentencing, meaning this is not as relevant a point to the permanent court.⁶⁵

Victim participation at the sentencing stage can be useful to the criminal justice process as well as for their own healing, because victims may provide important factual information which may otherwise be inaccessible to the court, particularly in view of the disruptive and damaging nature of mass atrocities and the conditions they occur in. The advantages and disadvantages of giving victims such a role in ICJ have been much discussed.⁶⁶ Nevertheless, international law is now clear that victims have a role to play in proceedings and criminal justice must also

⁶³ Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005) 142.

⁶⁴ Mechanism Statute (n 56) Article 22.

⁶⁵ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing 2008) 1420 and 1423.

⁶⁶ See for example Ralph Henham, ‘Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research’ (2007) 5 JICJ 757, 758; Mark A Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 206; Laurel E Fletcher and Harvey M Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24 HRQ 573, 638-639; Janine Natalya Clark, ‘The Three Rs: Retributive Justice, Restorative Justice, and Reconciliation’ (2008) 11(4) Contemporary Justice Review 331, 345; and cf. Christine Van den Wyngaert Hon, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2011) 44 Case Western Reserve Journal of International Law 475, 495-496.

work towards satisfying the victims and giving them justice and a sense of their worth back.⁶⁷ Although only a subset of the local stakeholder group, victims are significant as the individuals to whom the international crimes caused the most harm. As such, it would be desirable to invite victims to hearings and when decisions are made (wherever and to the extent possible, considering the large number of victims of international crimes), and encouraging them to make impact statements. By allowing victims to make written statements, the ICT would be encouraging ownership of the criminal justice process among victims, and giving the judiciary the final say as to how much consideration to give to such statements, in respect of their normative legitimacy and need to respect the rights of the offender to a fair and speedy trial. The court would have to determine the probative value of these statements as part of its engagement strategy, rather than deciding on their value on an *ad hoc*, case-by-case basis.

Providing financial assistance in order to attend the proceedings is particularly important because the three ICTs I have focused on in this thesis are all outside the territory of the conflict-affected State. The inclusion of victims is important in providing them justice as well as to ensure victims gain an understanding of the limits of the court in terms of sentencing, giving them more realistic expectations of the outcome, and involving them in the process by inviting them to witness this stage of proceedings.⁶⁸ It also ensures that victims' voice is not overvalued, as victims are only one subset of the local stakeholder group, and it is important to recognise that community and societal reconciliation requires broader involvement of the conflict-affected society.

Moreover, choosing who to engage with to promote individual reconciliation during this post-conviction stage requires determining who counts as a 'victim'. The term is not necessarily as evident as it might first appear; depending on the culture in question, the term victim might also be extended to the immediate family and the community they belong to.⁶⁹ In order to ensure that ICTs truly do meet the expectations of victims, and are contextualised and have an impact on the ground, they must be willing to adapt to the society in question. Consequently, this could mean demonstrating flexibility and providing for greater inclusion of individuals in its proceedings, to the extent possible, particularly where the State in question is collectivist.

⁶⁷ On victims' rights, see for example M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2) Human Rights Law Review 203.

⁶⁸ E.g. Clark, 'The Three Rs: Retributive Justice, Restorative Justice, and Reconciliation' (n 66) 345; Drumbl, *Atrocity, Punishment and International Law* (n 66) 206; Fletcher and Weinstein (n 66) 638-639; Henham, 'Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research' (n 66) 758.

⁶⁹ Rauschenbach and Scalia (n11) 454.

By collectivist, I mean a State where people identify themselves more as members of a particular community or society, than as individuals. For example, Croatia, Serbia and both East and West Africa are generally rather collectivistic States, meaning that people firstly identify themselves as belonging to a larger collective society,⁷⁰ and in such a context, it would be important to extend the meaning of victim more broadly to reflect the society.

Another method of engagement with victims at the sentencing stage is by the court providing for the establishment of an advisory penal board, whose membership would be decided on based on the court and case in question, but which would include victims among its members. This would require amending the Rome Statute of the ICC, and as such, would be politically more challenging to achieve. Nevertheless, if possible, it would allow for equal treatment of convicted individuals and allow them to foresee the law in terms of sentencing. At the same time, it would give victims the chance to substantively participate in the proceedings, through a representative or representatives. This method has the advantage of an advisory board including broader membership besides victims, and thus better represent the conflict-affected society as a stakeholder, rather than just the victims.

Whilst the need to engage with victims throughout the criminal justice process is recognised by international and national law, the same is not true at the community level. It is more difficult to envisage engaging more broadly with a community during sentencing, firstly because it requires the inclusion of a larger, more disparate number of individuals, and secondly, because a community is not directly affected by the crimes, so its role in proceedings is more questionable. Indeed, once again courts must be cautious when engaging with communities at the sentencing stage, in order not to make the criminal justice process seem biased, thereby damaging both its normative and sociological legitimacy. Nevertheless, in order to promote community and societal level reconciliation, it is important to include a wide range of actors from the conflict-affected society in sentencing decision-making. Although I in no way call for local stakeholders to make sentencing decisions, the decisions taken by the international judiciary must be context-appropriate, because local stakeholders will best know the situation on the ground, which would help situate ICTs' decisions, thereby making ICTs more effective in achieving their macro-level objectives. Consulting with local stakeholders will not only give

⁷⁰ For example, Hofstede Insights <<https://www.hofstede-insights.com/country-comparison/croatia/>>; <<https://www.hofstede-insights.com/country-comparison/serbia/>>; <<https://www.hofstede-insights.com/country-comparison/kenya/>>; and <<https://www.hofstede-insights.com/country-comparison/ghana/>> accessed 31 May 2021.

them a chance to voice their opinions, expectations and concerns but it will also give them the sense of ownership of the ICJ process.

Information-giving is an important first step to encouraging dialogue, for example by organising field visits in the conflict-affected State where communities can gather to watch or listen to sentencing being streamed from the court, with court officers there to explain and answer questions. As information-giving is insufficient if not followed up with greater inclusion of the same communities to encourage local ownership, such events should be seen as a starting point from which to incorporate more substantive engagement of local stakeholders. Thus, another option for promoting reconciliation at the community level is including individuals from different communities in the penal advisory board, suggested above for individual reconciliation. However, this is unlikely to function in all societies in practice because putting community members belonging to the same community as the offender alongside victim communities for the purpose of advising on the sentence of a convicted individual is more likely to promote friction and tension than harmony and reconciliation. The relevance of this type of engagement would very much depend on the type of conflict (whether civil or international) and the type of society in question (whether predominantly collectivist or individualist). Where the State in question is more collectivist than individualist, it is particularly important to engage at the community level and a penal advisory board for example could be a good opportunity for dialogue. In such a way, the relevant court would demonstrate an understanding of the importance of community cohesion and belonging in the conflict-affected society and adapt their engagement strategy accordingly.

The first way in which ICTs should attempt to promote political reconciliation at the sentencing stage is by responding to local media reports that misrepresent or manipulate the work of the court. Handling misinformation and propaganda head on is a lesson learnt from the first *ad hoc* tribunal, but it is of even more importance in countries where there is little media freedom and a very strong narrative on the conflict and its causes by the new government, as is the case in Rwanda. The court's role is significant as it should act as a facilitator, bringing different parties together and encouraging them to work towards a political agreement. This is where capacity-building is important.⁷¹ In terms of building partnerships, the relevant ICT could capitalise on existing work of the United Nations in ensuring unbiased media channels exist, for example using NGOs such as *Fondation Hirondelle*. The United Nations has collaborated with this

⁷¹ *Guidance Note of the Secretary-General United Nations Approach to Transitional Justice* (n 4) 9.

NGO in establishing media channels in the Democratic Republic of the Congo for example.⁷² As well as relying on such independent means of reporting, ICTs should encourage local media outlets to report on the sentence in an informative way by providing opportunities to visit the court in question, to attend sentencing hearings and thus make the court's work more visible to the conflict-affected society. For example, publicising apologies of convicted individuals (or, in the case of interstate conflicts, apologies from one government to another, or one community to another) can be crucial to trigger reconciliation. Media can be in different forms and depending on the type of society, it might be appropriate to include written media, television or radio broadcasts (thus for example, in Rwanda most stakeholders receive information on the ICTR and now the Mechanism solely through radio broadcasts). In deciding on engagement methods, courts must focus and “support the types of media that are most accessible to affected populations.”⁷³

Moreover, meetings with top-level politicians (where appropriate) should be organised to encourage dialogue. Whilst ICTs must remain impartial, encouraging dialogue could provide the impetus for public apologies and recognition of crimes. This can also be understood as a training opportunity for local politicians, religious leaders (highly influential in some States) “regarding mass violence and psychological trauma” which is “also imperative” to reconciliation.⁷⁴ Thus, with politicians and other authoritative local figures the court should respond to local media reports that misrepresent or manipulate the work of the court and act as a facilitator, bringing different parties together and encouraging them to work towards a political agreement. Part of what the court can do is to maximise accountability so that political elites do not eschew or deny their responsibilities and repeat the same rhetoric that perpetuates the conflict and victims' wounds and negates the potential for reconciliation.

⁷² Pierre-Olivier Francois, ‘Last Station Before Hell: United Nations Peacekeepers’ in Robin Andersen and Pumaka L de Silva (eds), *Routledge Companion to Media and Humanitarian Action* (Routledge 2017) 433; Sofia José Santos, ‘Media para a paz e peacebuilding: uma crítica à intervenção internacional’ (2010) 8(2) *Universitas Relacoes Internacionais Brasilia* 137; Monroe E Price and Nicole Strelau, ‘Media and Transitional Justice: Toward a Systemic Approach’ (2012) 6(1) *International Journal of Communication* 1077; Maria-Soleil Frère, ‘After the Hate Media: Regulation in the DRC, Burundi and Rwanda’ (2009) 5(3) *Global Media and Communication* 327.

⁷³ *International Crimes, Local Justice A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (n 52) 172.

⁷⁴ Karen Brouneus, *Reconciliation – Theory and Practice for Development Cooperation* (SIDA 2003) 33-34 <http://www.sida.se/contentassets/d2894b9dc8be4a47aa28918da8186b47/reconciliation---theory-and-practice-for-development-cooperation_1724.pdf> accessed 31 May 2021.

Post-conviction stage 2: Designating the Enforcement State

Once their convictions and sentences are made final, Mechanism and ICC convicted individuals are transferred to an Enforcement State to serve their sentences.⁷⁵ Notably, before this transfer, the Mechanism, much the same as its predecessors, organises a pre-transfer meeting (attended by the offender, the tribunal Principals and representatives of the Enforcement State) which is intended to prepare the convicted person for the transfer to a prison.⁷⁶ The pre-transfer meeting is particularly useful for internationally convicted individuals who have often never seen the inside of a prison before, as well as to prepare the prison authorities of the Enforcement State. Whilst it is not clear whether the ICC also carries out such a practice, it is safe to assume it prepares the offender in some way practically towards the transfer to a prison setting in a second country.

This is an internal practice that takes place without the knowledge of the local stakeholders or victims in particular. It is a practice the Mechanism deems important only to the offender in question, the prison authorities of the Enforcement State and the international court in question. However, it is a practice that would benefit from more transparency and inclusion from local stakeholders, who would often welcome being more informed and involved in this stage of the post-conviction process.⁷⁷ It is therefore an opportunity for interested individuals from the local stakeholders to ask any questions they have about enforcement. Providing details on how an Enforcement State is chosen would be a useful starting point for engagement, as it remains a post-conviction process that is largely exclusive to those willing to read and able to understand the court's legal texts. In terms of the *ad hoc* tribunals' practice, the Registrar of the Mechanism approaches a State that has expressed their readiness to enforce the sentence of a convicted individual, requesting that they enforce the sentence of the particular convicted individual in question, and the President that confers the responsibility to designate the Enforcement State.⁷⁸ At the ICC, it is slightly different with the President designating an Enforcement State from the list of those States that have indicated their willingness to enforce ICC sentences.⁷⁹ However, signing an enforcement agreement does not oblige a State to enforce a particular

⁷⁵ Mechanism Statute (n 56) Article 25; Rome Statute (n 56) Article 103.

⁷⁶ Information not publicly available but obtained while at the Mechanism in 2013-2015.

⁷⁷ *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court* (Human Rights Center, University of California Berkeley 2015) 44.

⁷⁸ Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his or her Sentence of Imprisonment (MICT/2 Rev. 1).

⁷⁹ These are the following States Parties: Andorra, Czech Republic, Honduras, Liechtenstein, Lithuania, Luxembourg, Slovakia, Spain and Switzerland.

sentence, it merely expresses a general willingness to enforce the sentences of that court. This means that the court in question must specifically request that State to enforce a sentence, once final. This allows for the ICC to conclude *ad hoc* agreements for enforcement, with a State that has not already expressed their general interest in enforcement.⁸⁰ Once a State responds positively, the transfer of the convicted individual to the Enforcement State is organised by commercial air transport, where appropriate, with police escort. The factors to be taken into consideration when designating an Enforcement State have been discussed in section 2.2 of Chapter Two, but it is notable that under the Rome Statute of the ICC, the ICC President *must* seek the views of the offender, although the weight to be given to these views is not specified.⁸¹ Just as with sentencing ranges, local stakeholders tend to be ignorant of these factors, and often question the designation of an Enforcement State.

In terms of engagement at this second post-conviction stage, when deciding on the Enforcement State for the convicted individual, reconciliation at the individual level should be promoted by inviting victims to comment on the choice of Enforcement State. This might seem counterintuitive and impractical, but it is critical because victims might reside in the country in question, having sought refugee status as a result of the conflict, for example. Failing to include victims at this stage might mean that they find out that having had to flee the conflict to another State, the convicted individual is serving their sentence in the same State, without the victims having been informed thereof. As such, giving victims the opportunity to comment on the effects that moving a convicted individual to a particular Enforcement State might have on them is important. In the case of the ICC, which seems to prefer enforcement in the State the crimes were committed,⁸² this is particularly important. On the one hand, the fact that the offender is serving their sentence in their State of nationality and where the crimes were committed has the potential to give local stakeholders a sense of ownership and increase the chances of rehabilitation and resocialisation, because they would be serving their sentence in the country they would most likely be reintegrated into upon release, thus facilitating resocialisation.⁸³ On the other hand, it potentially raises a question as to whether the sentence

⁸⁰ The ICC has signed two such *ad hoc* agreements with the DRC for Thomas Lubanga Dyilo: *Prosecutor v Lubanga Dyilo* (Decision Designating a State of Enforcement) ICC-01/04-01/06 (8 December 2015); and, Germain Katanga: *Prosecutor v Katanga* (Decision Designating a State of Enforcement) ICC-01/04-01/07 (8 December 2015).

⁸¹ Michael Stiel and Carl-Friedrich Stuckenberg, 'Article 103 - Applicable Law: The Rome Statute' in Mark Klamburg (ed), *The Commentary on the Law of the International Criminal Court* (TOAEP 2017).

⁸² See Thomas Lubanga Dyilo and Germain Katanga enforcement decisions for example (n 80).

⁸³ On this see for example *Handbook on the International Transfer of Sentenced Persons* (United Nations Office of Drugs and Crime 2012).

will be enforced in a fair manner, if the offender is viewed as a local hero, for instance, or indeed if they are vilified and subjected to inhumane or particularly discriminatory conditions.⁸⁴ If this is the case, the victims would place less trust in the Court, thereby undermining sociological legitimacy.⁸⁵ It is for this reason that the two *ad hoc* tribunals have not designated the States of the former Yugoslavia as Enforcement States, despite Serbia and Croatia repeatedly requesting to enforce specific sentences.⁸⁶ Explaining the reasons behind such a practice of not transferring prisoners to the conflict-affected State (such as the States of the former Yugoslavia for example), and gaining the views of the local stakeholders thereon would be beneficial to promoting reconciliation on the ground, particularly as it is a matter of particular interest to local media. Whilst engaging in such a conversation will probably not change the minds of the local stakeholders, it will give both this group and the international court a better understanding of each other, rather than leaving it for the local media to take its own spin on the practice of the court and the justifications therefor.

In order to ensure the security of the offender, details on the Enforcement State designated for a particular offender's sentence and specific details thereon are kept confidential at least until the transfer is made. In practice, it can take a few months for the designation decision to be declassified. As such, local stakeholders often remain unaware an offender has been transferred to an Enforcement State, unless the news is covered by the local media. This is one area where ICTs must make more effort to inform local stakeholders as soon as possible, rather than leaving it up to the local media to shape local stakeholder opinions with their often-biased views.

Moreover, as an often-forgotten member of the local stakeholder group, the convicted individual should be actively engaged with to have their counsel present when giving their views on designation of an Enforcement State. The designation decision and the pre-transfer meeting are important to prepare the convicted individual for transfer and integration into prison, and as I have already said, offenders need to be included in the peace and reconciliation process. As such, they should be systematically encouraged to have their counsel present at

⁸⁴ Stiel and Stuckenberg (n 81).

⁸⁵ Tracy Isaacs, 'International Criminal Courts and Political Reconciliation' (2016) 10 *Criminal Law and Philosophy* 133, 139.

⁸⁶ See for example 'Srbija će tražiti da haški osuđenici kaznu služe u Srbiji' *NI* (15 June 2019) <<http://rs.n1info.com/Vesti/a492091/Haski-osudjenici-da-sluze-kaznu-u-Srbiji.html>> accessed 31 May 2021.

any such meetings, so that their questions and concerns are addressed.⁸⁷ This is more the case for the *ad hoc* tribunals or other such courts that exclude the possibility of the State in which the crimes were committed being designated an Enforcement State, because it will be a foreign country and system for the offender. As these offenders will be judged on their ability to integrate into their new environment, *inter alia*, they should be given every opportunity to inform themselves.

Promoting community-level reconciliation at this second stage of post-conviction proceedings is similarly challenging as in the first, because it is neither practical nor desirable for whole communities to weigh in on designation of an Enforcement State. Whilst a board of interested community members from different communities could be envisaged, ICTs have little choice in the Enforcement State they can designate, as it relies on the cooperation of States, and as such, neither the State nor the communities in question would often be able to decide on the Enforcement State. Such a practice could also potentially dissuade States from agreeing to enforce international sentences if they are to be scrutinised in such a way. Instead, unclassified information on enforcement should be made available and widely disseminated among different communities, in order to ensure that people feel part of the criminal justice system and that it also belongs to them, rather than being a foreign imposition that has little meaning to their lives.

At the societal level, engagement should take the form of townhall meetings, where individuals can raise their questions and concerns while professionals from the ICT are there to respond. Civil society organisation representatives, if they exist and play a key role in the conflict-affected State, would be particularly significant participants that could pass on the message of the court to the conflict-affected society. Individuals from both conflicting groups (ethnic, religious, etc.) should be included in this process, recognising that this is difficult where there is a question of security and safety of all those involved if the situation remains volatile. This gives a chance to ask questions, and voice concerns or opinions in a neutral setting. A report on the meeting should be made so that information is available court-wide on the opinions and concerns of the conflict-affected society. Care should be taken to maintain fairness for the convict in terms of not unduly influencing the judiciary in their decision-making, but they are already allowed to consider victims' views in the Rome Statute of the ICC so this should not

⁸⁷ Martin Petrov and Dejana Radisavljević, 'Post-Conviction Issues: Enforcement of Sentences and other Residual Responsibilities in Colleen Rohan and Gentian Zyberi (eds), *The Role of the Defence in International Criminal Justice*' (CUP 2017) 347.

be an issue. Important points could be shared by a subsequent internal meeting with the presidency, who can decide whether to share the information with the relevant chamber if this is appropriate. This would allow the ICT to get the conflict-affected society's views on the designation of the Enforcement State without involving them directly, as this is not a post-conviction area that the society can realistically be involved in substantially.

Engagement at the political level is also important at this stage as the State might want the convicted individual to serve their sentence in their State of nationality. Engaging with the political leaders is not necessarily to convince them - which is highly unlikely - but the electorate that the court is being transparent recognises its responsibilities towards its local stakeholders. In the case of the ICC, enforcement in the State where the crimes were committed might be preferred by the court, which also makes it important to discuss at the political level, the importance of equal and fair treatment that respects both the rights of the convicted individual and the victims. Furthering political reconciliation means relying on the outreach office, the Registry and sometimes the Registrar specifically, because it allows the court to retain its neutrality whilst nevertheless communicating with political elites to promote political reconciliation. In order to encourage faith in the rule of law, ICTs should "support initiatives for increased awareness among top-level leaders regarding the importance of official self-reflection and acknowledgement of past atrocity committed by the State."⁸⁸ To this end, whilst remaining impartial, ICTs should encourage dialogue and official recognition of wrongdoing, thereby making it more difficult to deny crimes. Meetings should be organised with top-level politicians and brainstorming "workshops" with mid-level actors such as civil society organisations, religious actors and leaders and the media, who can give ICTs more insight on ways of engaging with actors at other levels and encourage fairer reporting of their work.⁸⁹ After all, their views on the conflict and future prospects for peace greatly affect the chances of promoting reconciliation on the ground, and their support can trickle down to other levels, where there is trust in these elites.⁹⁰

⁸⁸ Brouneus (n 74) 26.

⁸⁹ *ibid* 34; Colleen Murphy, 'Political Reconciliation and International Criminal Trials' in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (CUP 2010) 238.

⁹⁰ David Bloomfield, Tesera Barnes and Luc Huyse, *Reconciliation After Violent Conflict* (International Institute for Democracy and Electoral Assistance 2003), 21; Brouneus (n 74) 33-34.

Post-conviction stage 3: Deciding the applicable prison regime

The third post-conviction stage is deciding on the imprisonment regime that will apply to the international offender. As per the agreement between Enforcement States and the *ad hoc* tribunals or the ICC, the internationally convicted individual is subject to the prison regime of the Enforcement State, subject to the supervision of the ICT. As the conditions of imprisonment depend entirely on the State in which the sentence is being served, internationally convicted individuals will not necessarily serve their sentences under the same or even similar conditions.⁹¹ In view of the discrepancies between prison regimes, and whilst there is no talk of an international prison to house all internationally convicted individuals in the same conditions, it would be useful to provide local stakeholders information and gauge their views thereon. This is particularly important as the reports of the ICRC or CPT prepared for the Mechanism or the ICC on the conditions of imprisonment (discussed in section 2.2 of Chapter II) are not made public, leaving it to (frequently biased) local media to report thereon.⁹²

Community level reconciliation during this post-conviction stage could be enhanced by the Registry conducting field visits to villages and towns in the conflict-affected States, accompanied by authorities from the relevant Enforcement States, where prison conditions and the specific regime relating to international prisoners is explained to local stakeholders. Wherever possible, prison officials should be included in these field visits to local stakeholders in order to promote better understanding of prison conditions. The prison authorities of the Enforcement State could explain the prison regime and dispel myths about prison conditions, which could be a vital learning tool for local stakeholders and provide an alternative to the incendiary reports in local media.

These meetings could be held either with community leaders or higher-level meetings that will be mediatized. In terms of engaging with the media, journalists should be invited to the court and given presentations by the court's Registry and Presidency on the designation process, the

⁹¹ See section 2.2 of Chapter II for a discussion.

⁹² Nancy Amoury Combs, 'Prosecutor v. Biljana Plavšić: Case No. IT-00-39&40/1-S' (2003) 97 AJIL 929, 936; Ivana Denisov, 'Serbian Media & the International Criminal Tribunal for the Former Yugoslavia' (LLM, University of Toronto 2012) 14 and 28; Roland Kostic, *Ambivalent Peace: External Peacebuilding, Threatened Identity and Reconciliation In Bosnia and Herzegovina* (Uppsala University 2007), 268; Mark A Drumb, 'A Hard Look at the Soft Theory of International Criminal Law' in Leila Nadya Sadat and Michael P. Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Koninklijke Brill 2008) 12; Barbora Holá and Hollie Nyseth Brehm, 'Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts' (2006) 3 Genocide Studies and Prevention: An International Journal 59, 62.

reasons behind the designation of the particular enforcement State, the prison regime specifically applicable to the convicted person in question. Engaging with the media in such a transparent manner minimises chances of false claims in the news, and although it will not be able to stop such propaganda being published, it will at least give the opportunity to other media outlets to provide accurate, complete information to counter the misinformation.

As an area of ICTs' work that is largely under the remit of national prison authorities, it would be difficult to give local stakeholders a role in decision-making at this stage. Instead, courts could focus on debunking myths relating to prison conditions and responding to misinformation. In this endeavour, courts should focus on engaging with local media, by informing them broadly on the prison regime applicable to the convicted individual in question and providing opportunities for interviews for example. Engaging with the media in such a transparent manner minimises chances of false claims in the news, and although it will not be able to stop such propaganda being published, it will at least give the opportunity to other media outlets to provide accurate, complete information to counter the misinformation. This in turn can promote greater understanding and thereby collective, albeit thin, reconciliation.

Post-conviction stage 4: Deciding on early release

Individuals convicted by the *ad hoc* tribunals and the ICC become eligible for early release upon having served two-thirds of their sentence,⁹³ or having served 30 years of a life sentence at the Mechanism⁹⁴ and having served 25 years of a life sentence at the ICC.⁹⁵ At the Mechanism, the question of early release is decided exclusively by the President, whilst at the ICC only early release is provided for and it is a decision that is to be made by a panel of three judges.⁹⁶ This provision of requiring the decision to be made by a panel of judges rather than solely by the President (although at the Mechanism, the President is obliged to consult with the sentencing judges in the case⁹⁷), potentially means there is broader discussion of the suitability of early release in any given case.⁹⁸

⁹³ *Prosecutor v Bisengimana* (Decision of the President on Early Release of Paul Bisengimana and Motion to File a Public Redacted Application) MICT-12-07 (11 December 2012); Rome Statute (n 56) Article 110(3).

⁹⁴ Public Redacted Decision on the Early Release of Stanislav Galić MICT-14-83-ES (26 June 2019).

⁹⁵ Rome Statute (n 56) Article 110(3).

⁹⁶ Rules of Procedure and Evidence of the International Criminal Court (adopted by the Assembly of State Parties 3-10 September 2002) ICC-ASP/1/3 and Corr.1 Rule 224(1).

⁹⁷ Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism (MICT/3/Rev.2) para 7.

⁹⁸ J. Choi, 'Early Release in International Criminal Law' (2014) 123 *Yale Law Journal* 1784, 1806.

To mitigate the potential negative consequences of release, particularly where there is continuing denial and a return to the conflict-affected society, there should be engagement with local stakeholders to ensure they feel ownership of the criminal justice process, even when their views might not be given considerable weight. At the individual level, the ICC is already required to consult with victims and victim groups when deciding on the early release of a convicted individual.⁹⁹ However, even at the ICC, where there is more victim participation than there was at the *ad hoc* tribunals (and currently the Mechanism), communication between the offender and the victim is only carried out through a representative of the victim, and this lack of interaction makes the communication less effective in healing relationships.¹⁰⁰

In response, victims and other interested and affected individuals should systematically be invited to meetings with the Registry of the court in question, which would facilitate their participation in the decision-making process. Mediation/conferencing between individual victims and offenders is potentially a good opportunity to see whether the offender is rehabilitated. Understandably, this will not always be appropriate or beneficial to reconciliation, for instance, where there is continuing denial of guilt on the offender's part.¹⁰¹ It would be important to prepare victims for such meetings, should they wish to participate, in order to ensure they are aware of the distinct possibility that the offender continues to deny their crimes and instead might even place blame on the victims.¹⁰² Should they be interested but not ready to meet with the offender themselves, a representative can meet with the offender (for example a family member or another person the victim is close to), with the victim listening in from another room.¹⁰³ This provides both the victims and the offenders to talk about their experiences without the confrontation of having to meet face to face, which might make it easier to talk. Engagement can also be encouraged through an advisory board, composed of individuals who know the situation on the ground and have a better view of the potential impact of the prisoner's release into the conflict-affected society than the international court is likely to know.

⁹⁹ ICC RPE (n 96) Rule 224(1).

¹⁰⁰ Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' (2017) 5(2) *Restorative Justice* 198, 210.

¹⁰¹ Dejana Radisavljević, 'The ICTY and the Balancing Act: Reconciliation as Rehabilitation' in Juan Pablo Perez-Leon-Acevedo and Joanna Nicholson (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing their Rights* (Routledge 2020) 139.

¹⁰² Rauschenbach and Scalia (n11) 446.

¹⁰³ Garbett (n 100) 204.

In sum, at all of the above post-conviction stages, ICTs should continue engaging at all levels once a decision has been made, as much as possible. This includes informing not only victims but civil society and local NGOs (as relevant) of the decision, and giving them the opportunity to ask questions, make comments and voice their concerns. In contrast to what ICTs have done so far, information needs to be adapted to the audience; courts must consider the knowledge held about the tribunal or court in question and the level of literacy of its audience.¹⁰⁴ These courts tend to make very lengthy judgments in legalistic language that is neither attractive nor accessible to its local stakeholders. Moreover, information should be followed up by townhall meetings once the decision has been made in order to encourage inter community discussions and an opportunity to provide information, hear views and respond to questions and criticisms. ICTs should see engagement as an opportunity to learn more about the impact of the court's work on the ground, on those for whom their sentences mean the most. Finally, in order to learn from past engagement, internal opportunities to discuss feedback from local stakeholders should be actively sought. In such a way, ICTs will convince their local stakeholders of their objective to make a difference for these individuals, and thereby further the promotion of local peace and reconciliation.

Conclusion

This chapter has argued for engagement with local stakeholders in order to enhance ICTs' sociological legitimacy in the form of a normative engagement framework across different ICTs. This engagement with local stakeholders must be contextualised to fit with the root causes of a conflict, and in this regard, I have discussed common background and proximate causes of conflict which must be understood and recognised by ICTs if their engagement methods are to be relevant to the conflict-affected society.

The ultimate aim of this chapter has been to present the parameters of an engagement framework with local stakeholders specifically at the post-conviction stage, discussing each of the four stages and within these stages, suggesting specific engagement methods to promote individual, community, societal and political reconciliation. In presenting my engagement framework, I emphasised the need to include local stakeholders beyond information giving. Engagement is to mean communication with local stakeholders that allows the stakeholder group not only to learn about the court's work but to feel ownership of and feed into its work.

¹⁰⁴ *International Crimes, Local Justice A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (n 52) 37.

The key difference then between outreach and engagement as presented in this framework is that the latter is two-way communication. The framework presented in this chapter is intended to serve as a guidebook to engaging with local stakeholders at the post-conviction stage. It should be seen as a dynamic document which needs regular evaluation and adaptation to fit with the changing needs of conflict-affected societies.

Having suggested a basic engagement framework for ICTs, and the need for contextualisation depending on the type of conflict and the conflict-affected society in question, the following chapter will test the framework by demonstrating how it could have been used in three specific cases.

CHAPTER VII - Testing the normative engagement framework with existing sentences

Introduction

The post-conviction framework for engagement with local stakeholders proposed in the previous chapter was based on a number of common denominators between ICTs and conflicts, but it remained rather generalised and I explained the need to contextualise and adapt it for each court and situation. In this chapter, I demonstrate how the engagement framework should be contextualised in practice by applying it to three specific cases before the two *ad hoc* tribunals and the International Criminal Court. This assessment of how engagement *should* have been undertaken in three specific cases in order to contribute to peace and reconciliation is a speculative exercise conducted with the benefit of hindsight, but one based on my argument throughout that the current state of practice in ICJ is inadequate a response to mass conflict, ineffective in promoting local peace and reconciliation, largely due to the failure of all three courts' outreach programmes to convince their local stakeholders of their relevance.

In order to be able to apply my framework to these three cases and suggest modes of engagement specific to them, I prepare the basis by considering the contexts behind each of the conflicts. Thus, in section 1, I discuss the types of violence and root causes of the conflicts in the former Yugoslavia, Rwanda and Mali (as the most recent situation to lead to an individual being sentenced by the ICC, at the time of writing), including the differences and similarities between them. This section uncovers several common denominators across the three conflicts, which will bolster my argument that whilst each conflict is different, there are overlapping factors ICTs should consider when planning engagement activities. Similarly, it further supports the argument for a single engagement framework that can be applied by different ICTs, dealing with different conflict-affected societies and types of conflicts. Having provided the basis for contextualisation by understanding the conflicts in question, in section 2, I introduce three specific cases at each of the courts. Section 2 discusses the circumstances, local reception and reconciliatory impact of each case, before briefly considering specific failures of the ICTs in two of these cases, which further bolsters the need for an engagement framework as early as possible, rather than taking a piecemeal approach to outreach. The preceding discussion on root causes, reconciliatory potential and specific failures of ICTs brings me to suggest, in section 3,

how contextualised engagement could have been undertaken in these three cases and the potential impact this would have had on the ground.

1. Contextualisation in practice: the conflicts in former Yugoslavia, Rwanda and Mali

Chapter V suggested that reconciliation must be contextualised to have meaning, which means considering the root causes of conflict and types of violence committed. These factors should assist ICTs in planning engagement strategies for each situation. Thus, sections 1.1 to 1.3 examine the root causes behind the conflicts in the former Yugoslavia, Rwanda and Mali, before discussing, in section 1.4, the differences and similarities between how the conflicts were rationalised and facilitated. The differences demonstrate the complexity of examining the causes of war and how it is rationalised for law-abiding citizens who quickly become international criminals. The similarities, on the other hand, support the argument that there is good reason to apply a single engagement framework for ICTs working in the context of these different conflicts.

1.1 The former Yugoslavia

The dissolution of the former Yugoslavia led to what the ICTY characterises as an international armed conflict, with elements of a non-international conflict in Bosnia and Herzegovina.¹ At its apex, the war in Bosnia and Herzegovina culminated in the genocide of 8000 Bosnian Muslim boys and men at the hands of the Bosnian Serb Army (VRS).² In order to understand the context of the dissolution of the State and the ensuing conflict in the former Yugoslavia, several background and proximate reasons are particularly important: religion; ethno-nationalist politics; economic and political gain.

The former Yugoslavia was comprised of peoples from different religious and ethno-nationalist backgrounds, and Bosnia and Herzegovina in particular is a perfect example of a multi-religious, multi-ethnic State.³ Under secular socialist rule, religion was severely controlled in the former Yugoslavia, in an attempt to stifle “opposition that sought to reinforce the link

¹ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 77.

² *Prosecutor v Krstić* (Trial Judgment) ICTY-98-33-T (2 August 2001).

³ According to the 2013 census in Bosnia and Herzegovina 50.1% of the population are Bosniaks, 30.8% are Serbs and 15.4% are Croats <<http://www.statistika.ba/?lang=en>> accessed 31 May 2021.

between religion and nationalism,”⁴ particularly in Croatia and Serbia. The role of religion and ethno-nationalism grew as political parties fought for power upon the socialist leader’s death in 1980; among these actors were church leaders who saw reinforcing the relevance of religion to nationality as a way of cementing and enhancing their power in society.⁵ These factors make the particular circumstances – the religious and ethnic make-up - of the former Yugoslavia crucial to understanding the ensuing conflict because they made the State fragile.

During the conflict in the 1990s, the rhetoric of ethnic and religious differences in the former Yugoslavia, particularly between the Croats, Serbs and Muslims was particularly potent.⁶ The breakup of Yugoslavia was along ethnic lines, most notably with ethnic Serbs being expelled from their homes in Croatia, and the division of territory in Bosnia and Herzegovina.⁷ Often the territory-grabbing meant that the multi-ethnic, multi-religious “human fabric of villages and towns” was targeted by the military and paramilitary groups.⁸ The ethnic mobilisation by political and military actors in the former Yugoslavia gave one’s ethnicity and religion greater significance than it previously held, because ethnicity was intertwined with the nation.⁹ It is this overlap between ethnicity or religion with the State that politicises these background factors and brings them to the forefront in explaining conflict, as discussed in section 2 of Chapter VI. In the former Yugoslavia, splitting the country along ethnic lines politicised some of the key social identifiers in the country.

However, despite its prominence in war rhetoric and the justifications under which the war was fought, prior to the conflict of the 1990s, ethnicity was not more important than other social identifiers in the former Yugoslavia, including one’s class, whether one lived in rural or urban environments and the political party one supported.¹⁰ Moreover, despite differences in religion and the ethno-nationalist groups that individuals identified with, the different communities in the former Yugoslavia were not always clearly delineated and many identified as Yugoslavs,

⁴ Pamela Ballinger and Kristen Ghodsee, ‘Socialist Secularism Religion, Modernity, and Muslim Women’s Emancipation in Bulgaria and Yugoslavia: 1945-1991’ (2007) 21 *East European Politics and Societies* 681, 693.

⁵ Marjan Smrke and Samo Uhan, ‘Atheism in Post-Socialist Conditions: The Case of Slovenia’ (2012) 49(3) *Teorija in praksa* 492, 495-496.

⁶ Secretary of State Warren Christopher, ‘New Steps Toward Conflict Resolution in the Former Yugoslavia’ (Opening statement at a news conference, Washington DC 10 February 1993) published in US Department of State Dispatch 4 No. 7 (15 February 1993) 81.

⁷ This has been established by the ICTY in numerous cases, most recently in *Prosecutor v Mladić* (Trial Judgment) IT-09-92-T (22 November 2017).

⁸ Catherine Baker, *The Yugoslav Wars of the 1990s* (Palgrave Macmillan 2015) 130.

⁹ Nicholas Sambanis and Moses Shayo, ‘Social Identification and Ethnic Conflict’ (2013) 107(2) *American Political Science Review* 294, 318.

¹⁰ Roger Petersen, *Understanding Ethnic Violence: Fear, Hatred, and Resentment in Twentieth-Century Eastern Europe* (CUP 2002) 208-210.

rather than Serbs, Croats or Bosniaks. Both pre- and post-conflict, there is evidence of a shared language and culture, at least in Bosnia and Herzegovina, Croatia and Serbia, intermarriages were common and up until the 1980s different communities in the former Yugoslavia were deliberately and closely interwoven.¹¹ These factors all contradict the war rhetoric of political elites in the region that the communities were inherently different and irreconcilable. In fact, although differences in social identifiers between the peoples in the former Yugoslavia was significant, and whilst ethno-nationalism grew in the former Yugoslavia, there was a reluctance among many to fight their neighbours.¹² Desertions in the different armies formed in the former Yugoslavia were not uncommon, and some individuals fought for an army of a different ethnic make-up to their own, meaning they were not fighting on ethnic grounds.¹³

Furthermore, whilst warring parties in the former Yugoslavia practiced different religions, the war was not “fundamentally about religion;” religion was a means to an end: territory grabbing.¹⁴ Although differences existed between the communities, as suggested above, these are background factors that are insufficient to cause conflict. Instead, whilst the wars separated communities by ethnicity and religion, the conflict was closely linked to ethnic mobilisation and manipulation as well as acts of opportunism from individual politicians, supported by the dissemination of misinformation and propaganda by State-owned and sponsored media.¹⁵ The war rhetoric of key political leaders, warning of an upcoming attack by one’s ethnically or religiously different neighbours scared many individuals into fighting in pre-emptive self-defence. References to previous conflicts particularly between the Croats and the Serbs, during the Second World War were instrumental to scaremongering individuals and convincing them to accept the murder of their neighbours, or sometimes even to assist in locating and shooting them.¹⁶ The use of propaganda by State-owned or -sponsored media was widespread in the

¹¹ Baker (n 11) 127. This is also evident in the way ICTY approached the question of language, naming it Bosnian/Croatian/Serbian, with interpreters and translators from all three countries being used. Numerous studies have demonstrated that Croatian, Serbian and Serbo-Croatian are mutually understood with little differences between them, including John Frederick Bailyn, ‘To What Degree are Croatian and Serbian the Same Language? Evidence from a Translation Study’ (2010) 18(2) *Journal of Slavic Linguistics* 181.

¹² Aleksandra Milićević, ‘Joining Serbia’s Wars: Volunteer and Draft-Dodgers, 1991–1995’ (PhD, thesis UCLA 2004) 16; Sambanis and Shayo (n 9) 317.

¹³ Robert Lučić, ‘Dead Heroes and Living Deserters: the Yugoslav People’s Army and the Public of Valjevo, Serbia, on the Verge of War 1991’ (2015) 43(5) *Nationalities Papers* 735.

¹⁴ Brubaker (n 22) 4; Jenkins (n 40); Joane Nagel, ‘Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture’ (1994) 41(1) *Social Problems* 152, 159.

¹⁵ Vesna Pešić, *Serbian Nationalism and the Origins of the Yugoslav Crisis* (United States Institute of Peace 1996) 2; Gordana Rabrenović, ‘The Dissolution of Yugoslavia: Ethnicity, Nationalism and Exclusionary Communities’ (1997) 22(1) *Dialectical Anthropology* 95, 99.

¹⁶ Stipe Odak and Adriana Benčić, ‘Jasenovac – A Past that does not Pass: The Presence of Jasenovac in Croatian and Serbian Collective Memory of Conflict’ (2016) 30(4) *East European Politics and Societies and Cultures* 805; Valère Philip Gagnon Junior, ‘Ethnic Nationalism and International Conflict: The Case of Serbia’ (1994-1995)

former Yugoslavia and instrumental in convincing individuals that coexistence was impossible because of past atrocities committed against them and the imminent threat of repeat atrocities.¹⁷

The ethno-nationalist politics in evidence in the former Yugoslavia effectively destroyed the Yugoslav identity, replaced with a renewed importance of one's ethno-nationalist group and religion, which served to exacerbate fear of the 'other.'¹⁸ Notably, the nationalistic rhetoric of many politicians at the time was more a means to maintaining and consolidating power than an end in itself, further illustrating the significance of proximate reasons such as personal gain over differences between communities.¹⁹ One of the means used by political elites to scare people and achieve their objectives of gaining territory was to use paramilitary groups,²⁰ which were rampant during the wars in the former Yugoslavia. These groups were crucial in practicing and supporting elite instrumentalisation of ethnicity by carrying out attacks on civilians based solely on their ethnicity or religion. The presence of these paramilitary groups often changed the behaviour of ordinary citizens who went from living peacefully with their neighbours to outright hostility and violence; the war seemed inevitable and inescapable.²¹ The manipulation and instrumentalisation of history and historic atrocities, politicisation of ethnicity and the widespread use of paramilitaries to spread fear and commit atrocities the State did not want to be associated with, led many to capture, torture and kill the neighbours they had up until then lived alongside peacefully.

These different reasons for the conflict are meaningful factors for the ICTY and the Mechanism when attempting peace and reconciliation. In order for such efforts to be contextualised and thereby more likely to be effective. In particular, the politicisation of ethnicity and religion and the political and economic gains of waging war are notable considerations because they demonstrate the role of factors other than a 'clash of cultures' which makes conflict appear inevitable. Where conflict appears inevitable due to differences between communities, it

19(3) *International Security* 130, 164; Tom Gallagher, 'My neighbour my enemy: the manipulation of ethnic identity and the origins and conduct of war in Yugoslavia', in David Turton (ed), *War and Ethnicity: Global Connections and Local Violence* (University of Rochester Press 1997), 55.

¹⁷ David Turton, 'War and ethnicity: Global connections and local violence in North East Africa and former Yugoslavia' (1997) 25(1) *Oxford Development Studies* 77, 83; *ibid* Gallagher.

¹⁸ 'About the ICTY: The Conflicts' <<https://www.icty.org/en/about/what-former-yugoslavia/conflicts>> accessed 31 May 2021.

¹⁹ Sambanis and Shayo (n 9) 317; Rogers Brubaker, 'Myths and Misconceptions in the Study of Nationalism' in John Hall (ed), *The State of the Nation: Ernest Gellner and the Theory of Nationalism* (CUP 1998) 289.

²⁰ Rui De Figueiredo and Barry Weingast, 'The Rationality of Fear: Political Opportunism and Ethnic Conflict' in Barbara Walter and Jack Snyder (eds), *Civil Wars, Insecurity, and Intervention* (Columbia University Press 1999) 261; John Mueller, 'The Banality of "Ethnic War"' (2000) 25(1) *International Security* 42, 47.

²¹ Sambanis and Shayo (n 9) 318; Anna Husarska, 'Rocks-Road Warrior' *New Republic* (4 December 1995), 16-17.

similarly renders efforts at conflict resolution or reconciliation seem pointless, and as such, a more nuanced understanding of conflict needs to be communicated to local stakeholders. At the same time, the existence of ethnic and religious differences between communities is a key consideration when planning engagement activities particularly in Bosnia because it will be necessary to include different ethnic and religious communities together if the ICTY or now the Mechanism is to promote community or societal reconciliation. Knowing which ties have been broken – in this case between three different ethnic/religious groups – is useful information for the ICTY or the Mechanism when contributing to peace and reconciliation at collective levels.

1.2 Rwanda

Whereas the conflict in the former Yugoslavia lasted several years and has elements of both a national and international conflict, the Rwandan genocide is more easily defined. The genocide was non-international, being organised by the Rwandan government. Over the course of 100 days, approximately 800,000 individuals, mostly belonging to the Tutsi community (but also some members of the Twa or moderate Hutu minority) were killed.²² The genocide started with the shooting down of the then-President's plane, which quickly escalated into mass murder, with neighbour killing neighbour. The violence was committed by unprecedented numbers of civilians, using simple, unsophisticated, make-shift weapons.²³ The State's role was crucial in the genocide, because it was planned and executed by the government, using State funds and the army, and facilitated using State-sponsored media.²⁴ In order to understand what led to the genocide, ethnicity is a key background factor, rendered significant by economic and social differences between communities. At the same time, the political gain of conflict is a proximate reason, greatly facilitated and aided by the media.

In Rwanda, much the same as in the former Yugoslavia, ethnicity and historical mistrust were recurring justifications for resorting to violence, albeit in different ways and to different extents.

²² Philipp Schulz, 'Discussing community-based outreach activities by the International Criminal Tribunal for Rwanda, *Journal of Eastern African Studies*' (2017) 11(2) *Journal of Eastern African Studies* 347, 349.

²³ Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press 2006) 1.

²⁴ Jean-Germain Gros, 'Towards a taxonomy of failed states in the New World Order: Somalia, Liberia, Rwanda and Haiti' (1996) 17(3) *Third World Quarterly* 455, 460; Helen M Hintjens, 'Explaining the 1994 genocide in Rwanda' (1999) 37(2) *The Journal of Modern African Studies* 241, 243-244; Mahmood Mamdani, 'From Conquest to Consent as the Basis of State Formation: Reflections on Rwanda' (1996) 216 *New Leaf Review* 3; *Broadcasting Genocide: Censorship, propaganda & state-sponsored violence in Rwanda* (Article19 1996) 105 <<https://www.article19.org/data/files/pdfs/publications/rwanda-broadcasting-genocide.pdf>> accessed 31 May 2021.

The genocide is often described as an ethnic clash between the Hutu and the Tutsi communities due to their irreconcilable differences, and certainly ethnicity is a significant factor in the violence committed in 1994 because a whole ethnic community was targeted, with the intention to destroy it. However, compared to the situation in the former Yugoslavia, prior to Rwanda's colonisation, ethnicity was a fluid term which was based not on lineage or heritage but economic means. Rwanda's colonisers introduced a static understanding of ethnicity, which meant that it was inherited and could no longer be transcended if you had the socio-economic means.²⁵ Since the introduction of a static understanding of ethnicity, there was clear economic and social disparity between these two main communities in Rwanda, because the Tutsi as a group were privileged by the colonisers, often benefiting from a higher social status, and being more likely to be educated, employed and living in better conditions than the Hutus.²⁶ This static division among ethnic lines and the ensuing socio-economic differences between the communities resulted in less interaction between the Tutsis and the Hutus, which in turn contributed to resentment and tension between communities.²⁷ This gave clear material aspects to ethnicity, partly explaining its relevance to the outbreak of violence.

Ethnicity was also mobilised and politicised by key political figures. More proximate a reason for the genocide was the government's fear of losing support, and as its means of maintaining power, it sought the elimination of its perceived ethnic enemy, a community to whom its greatest political opponents also belonged.²⁸ The long-term socio-economic disparity between communities provided a justification for the government's actions, who claimed the Hutu right to take back their land, their power, and their status.²⁹ Whilst the socio-economic divide between Tutsi and Hutu communities is insufficient to explain the genocide, it was a significant background reason exploited by political elites, along with references to historical in-fighting, that encouraged neighbour to fight neighbour.³⁰ Elite mobilisation of ethnicity involved scaremongering that a Tutsi uprising was being prepared by the Rwandan Patriotic Front (RPF), which would put the Hutu community in danger.³¹ Along with pre-emptive self-defence, part of the propaganda and misinformation circulated in Rwanda included portraying the Tutsi community as foreign invaders on land that is rightfully Hutu, with the intention of further

²⁵ Erin Jessee, *Negotiating Genocide in Rwanda: The Politics of History* (Palgrave Macmillan 2017) 5.

²⁶ Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Hurst Publishers 1995) 123; Rachel Van de Meeren, 'Three decades in exile: Rwandan refugees 1960-90' (1996) 9(3) *Journal of Refugee Studies* 252, 258.

²⁷ David E Kiwuwa, *Ethnic Politics and Democratic Transition in Rwanda* (Routledge 2012), 67.

²⁸ Hintjens (n 24) 249.

²⁹ *ibid* and 263.

³⁰ Sambanis and Shayo (n 9).

³¹ *Broadcasting Genocide: Censorship, propaganda & state-sponsored violence in Rwanda 1990-1994* (n 24) 59.

raising tensions.³² This collective victimisation and fear of the other fed ethno-nationalist politics,³³ which in order to be as widespread as possible, the government relied on the media.

The majority of the Rwandan population relied on radio broadcasts for their information, given the high rate of illiteracy in the country and the large proportion of the population that lived in rural areas. The government made use of this to spread its message particularly through extremist radio channels such as the *Radio Télévision Libre Mille-Collines* (hereinafter ‘RTLMC’).³⁴ RTLMC was the most popular, including among the Rwandan military, and in particular encouraged the dehumanisation of the ethnic ‘other’ and insisted on their extermination. Whilst in theory an independent radio station, it was loyal to the government and spread misinformation bolstering the government’s rhetoric.³⁵ RTLMC in particular, alongside other media channels such as popular newspapers, turned background reasons for conflict into proximate ones by exploiting “deep-rooted ethnic fears to create a situation in which radical measures - genocide - were seen to be the only solution.”³⁶

Radio broadcasts such as those by RTLMC did more than spread hateful propaganda and misinformation about an imminent attack by the ‘other’, heightening fear to a level that meant violence was deemed inevitable. RTLMC had an instrumental role in the genocide by announcing on air the names of specific individuals (members of the Tutsi community and those of the political opposition) who should be targeted, where they were hiding and calling for their murder, which was quickly followed by an attack by the local militia.³⁷ Thus, whilst the media did not cause the conflict in Rwanda, it did exacerbate it. The hold that the government had on particularly popular radio stations meant that they became tools used by the government not only to spread ethnic hatred and fear but to ensure the genocide was as complete as possible.

³² *The Rwandan Genocide: How It Was Prepared* (Human Rights Watch 2006) 6 <<https://www.hrw.org/legacy/backgrounder/africa/rwanda0406/rwanda0406.pdf>> accessed 31 May 2021; Mahmood Mamdani, *When Victims become Killers: Colonialism, Nativism and the Genocide in Rwanda* (Princeton University Press 2001).

³³ Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori and Ayelet Gundar, ‘A sense of self-perceived Collective victimhood in intractable conflicts’ (2009) 91(874) *International Review of the Red Cross* 229, 238; Hintjens (n 24) 249.

³⁴ Prunier (n 26) 133.

³⁵ Hintjens (n 24) 266.

³⁶ *Broadcasting Genocide: Censorship, propaganda & state-sponsored violence in Rwanda* (n 24) 108.

³⁷ Hintjens (n 24) 269; *Broadcasting Genocide: Censorship, propaganda & state-sponsored violence in Rwanda* (n 24) 101.

In sum, all of the above-discussed factors provide context to the genocide in Rwanda and ought to be taken into consideration when planning engagement with local stakeholders. Alongside these factors, there are numerous similarities between the Hutu and Tutsi communities, and intermarriages were not uncommon, which is an important fact when considering the saliency of ethnicity and ethnic differences as an explanation of the genocide. As I suggested in the case of the former Yugoslavia, such similarities are not relevant to considering the context of the conflict, but it is a meaningful consideration when considering how to promote reconciliation because it provides an opportunity for dialogue by exposing the role of manipulation and mobilisation in the outbreak of violence. In emphasising and explaining the instrumental role of State-loyal media in propagating misinformation on the inevitability of an imminent attack by the Tutsi community, and focusing on the many similarities between the communities, we can encourage inter-ethnic dialogue and the pave the way for sustainable peace.³⁸

1.3 Mali

The conflict in Mali is ongoing and non-international, best understood as “a series of interlinked micro-conflicts involving local, national, regional and international actors,”³⁹ with violence both between the State and armed rebel groups, as well between different rebel groups. Due to its geographic position, North Mali has seen cycles of violence, often influenced by foreign fighters coming from neighbouring, conflict-affected States such as Libya.⁴⁰ This recent conflict started in the beginning of 2012, when different rebel groups fought to seize land, leading to a violent reaction by the government and a subsequent military *coup d'état*, which led to sanctions by the Economic Community of West African States against the State.⁴¹ This *coup d'état* created a gap as the State withdrew, leaving the region particularly vulnerable to rebel groups,⁴² and two armed groups – the (secular) *Mouvement national de libération de l'Azawad* (MNLA) and Ansar Dine, a religious group - united to seize territory and take over

³⁸ Lyndsay McLean Hilker, ‘Rwanda's ‘Hutsi’: Intersections of Ethnicity and Violence in the Lives of Youth of ‘Mixed’ Heritage’ (2012) 19(2) *Identities: Global Studies in Culture and Power* 229.

³⁹ Richard Reeve, *Mali on the brink Insights from local peacebuilders on the causes of violent conflict and the prospects for peace* (Peace Direct 2018) 8 <https://reliefweb.int/sites/reliefweb.int/files/resources/P772-PD-Mali-LVP-Report-ENG_WEB.pdf> accessed 31 May 2021.

⁴⁰ Sebastian A Green Martinez, ‘Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?’ (2015) 13 *JICJ* 1073, 1075; *Mali Conflict and Aftermath: Compendium of Human Rights Watch Reporting 2012-2017* (Human Rights Watch 2017) 162.

⁴¹ *Mali: Five Months of Crisis* (Amnesty International 2012) 5.

⁴² *Mali: Eviter l'escalade* (International Crisis Group, Report No. 189 – 18 July 2012) 18; *Gender Report Card on the International Criminal Court* (Women's Initiatives for Gender Justice 2018) 46 <https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf> accessed 31 May 2021.

three cities in North Mali.⁴³ Shortly after the independence of North Mali was announced, the MNLA lost control of the territory to Ansar Dine, who imposed Sharia law on the same three cities' inhabitants.⁴⁴

The situation in Mali is a particularly complex one, particularly because of the fighting between groups and the State as well as in-group fighting, and the existence of a number of interlinked factors that led to the recent cycle of violence since 2012. The background reasons in the conflict are ethnicity and religion, brought to the forefront by socio-economic disparity and State failure, whilst the economic and political benefit of the conflict are more proximate reasons. Ethnicity and religion are particularly pertinent background factors in the conflict in Mali, as North Mali is an ethnically rich region of the country with many different communities and numerous indigenous languages spoken. Additionally, whilst Mali is a secular State, 95% of its population identifies as Muslim and a small minority as Christian.⁴⁵ Compared to multi-ethnic, multi-religious Bosnia and Herzegovina for example, the salience of religion in Mali comes not from religiously different communities coexisting, but how to practice one religion – Islam. Moreover, the significance of ethnicity and religion to the violence in 2012 comes partly from the fact MNLA and Ansar Dine are predominantly made up of one ethnic group: the Tuareg, and partly because Ansar Dine is a radical Islamist group whose objective was the imposition of Sharia law in North Mali. The pertinence of religion is further evidenced in the crimes investigated by the ICC, which include religious persecution and destruction of religious and historic monuments.⁴⁶

Whilst religion was one of the stated objectives of Ansar Dine, it was not the only stake in the conflict and not one shared by all of the other rebel groups, including by MNLA.⁴⁷ Furthermore, although it is evident that ethnicity and religion were important background factors, the question remains as to what brought these social identifiers to the forefront in the conflict, in a secular country where the majority practiced the same religion. In order to understand the proliferation and success of the armed rebel groups, it is crucial to understand that ethnicity and religion were given material aspects in Mali prior to the outbreak of conflict

⁴³ Susanna D Wing, *'Special Report: Mali's Precarious Democracy and the Causes of Conflict'* (United States Institute of Peace 2013) 2.

⁴⁴ *Gender Report Card on the International Criminal Court* (n 42) 98.

⁴⁵ Grégory Chauzal and Thibault van Damme, *The Roots of Mali's Conflict: Moving Beyond the 2012 Crisis* (CRU Report March 2015) 56.

⁴⁶ *Gender Report Card on the International Criminal Court* (n 42) 98; *Mali: Five Months of Crisis* (n 41).

⁴⁷ *War Crimes in North Mali* (International Federation for Human Rights 2012) 7 <<https://www.fidh.org/IMG/pdf/mali592ang.pdf>> accessed 31 May 2021.

through long-term socio-economic and political disparity between North and South Mali, which saw the marginalisation of North Mali by the State.⁴⁸ The North-South divide present in Mali dates back to the start of France’s colonisation of the State, in which the political elites encouraged “aggressive unity,” which involved marginalisation, both economically and politically of communities in the North, principally the Tuareg.⁴⁹ These practices included giving certain groups preferential treatment, thereby creating divisions between communities so that they would not unite against the State.⁵⁰ The State’s “divide-and-rule” approach to governance was aimed at quietening in particular Tuareg calls for independence, but instead created further resentment with other ethnic groups in North Mali.⁵¹ The lack of investment in North Mali in terms of education, sanitation and infrastructure, for example, have meant that the State is largely absent in North Mali, despite decentralisation efforts in the early 1990s.⁵² This has led to a lack of legitimacy for the State in North Mali, and has further entrenched calls for independence and inter-ethnic tensions. By creating a situation where groups had to vie over resources, the State effectively exacerbated inter-ethnic tensions, rather than promoting national unity.⁵³

This failure of the State to provide for the North created resentment and made the population in the North particularly vulnerable to foreign influence and armed rebel groups, which filled the gap created by the government’s absence, “offering some form of security, system of order and means of income” not provided by the State.⁵⁴ Among the foreign groups investing in

⁴⁸ Signe Marie Cold-Ravnkilde, *War and Peace in Mali: Background and Perspectives* (Danish Institute for International Studies Report 2013:33) 36-37; Baz Lecocq, Gregory Mann, Bruce Whitehouse, Dida Badi, Lotte Pelckmans, Nadia Belalimat, Bruce Hall and Wolfram Lacher, ‘One Hippopotamus and Eight Blind Analysts: A Multivocal Analysis of the 2012 Political Crisis in the Divided Republic of Mali - Extended Editors Cut’ (2013) 40(137) *Review of African Political Economy* 343.

⁴⁹ Chauzal and van Damme (n 45) 17; Thomas Krings, ‘Marginalisation and Revolt among the Tuareg in Mali and Niger’ (1995) 36(1) *GeoJournal* 57.

⁵⁰ Susanna D Wing, *Special Report: Mali’s Precarious Democracy and the Causes of Conflict* (United States Institute of Peace 2013), 30.

⁵¹ David J Francis, *The Regional Impact of the Armed Conflict and French Intervention in Mali* (Norwegian Peacebuilding Resource Centre 2013) 4 <http://www.operationspaix.net/DATA/DOCUMENT/7911~v~The_regional_impact_of_the_armed_conflict_and_French_intervention_in_Mali.pdf> accessed 31 May 2021; Wing (n 50) 5; Matthias Basedau and Johanna Schaefer-Kehnert, ‘Religious Discrimination and Religious Armed Conflict in Sub-Saharan Africa: an Obvious Relationship?’ in Jonathan Fox, (ed), *The Correlates of Religion and State* (Routledge 2019) 37.

⁵² Helen N Boyle, ‘Between Secular Public Schools and Qur’anic Private Schools: the Growing Educational Presence of Malian Medersas’ (2014) 12(2) *The Review of Faith and International Affairs* 16; Cold-Ravnkilde (n 48) 19. In particular, public schooling has proven largely ineffective in the North, while private schooling inaccessible to poorer sections of the population.

⁵³ Eric Wulf and Farley Mesko, *Guide to a Post-Conflict Mali* (c4ads 2013) 9 <<https://static1.squarespace.com/static/566ef8b4d8af107232d5358a/t/56af8ac2b209430ed4794712/1454344904029/Guide+to+Post-Conflict+M%20ali.pdf>> accessed 31 May 2021.

⁵⁴ Cold-Ravnkilde (n 48) 36; Wing (n 50), *Special Report: Mali’s Precarious Democracy and the Causes of Conflict* (United States Institute of Peace 2013), 36; Basedau and Schaefer-Kehnert (n 51) 29-46.

North Mali were also groups with religious affiliations. Many of these groups “spread their own version of Islam within the north,” offering religious schools that were accessible to even the poorest sections of the population and where they taught a different way of practicing Islam that was not necessarily compatible with the way it had been practiced in Mali beforehand.⁵⁵ This focus on religion and religious schools, in a secular country forged an even bigger disparity between the North and South, particularly as the religious schools taught in Arabic, while the Southern schools taught in French.⁵⁶ It also created tensions and fears between communities, particularly between the North and the South, that the laic nature of the State was in danger of being overturned with the emphasis on religion and religious schools, and a move towards teaching children Arabic rather than French. The reliance on religion and foreign influence further entrenched mistrust and divisions between the North and (the predominantly laic) South in Mali, with the South emphasising the State secularism and fearing any signs of mixing the State with religion.⁵⁷

Moreover, following the *coup d'état*, government forces left North Mali, thereby leaving the population vulnerable to attacks by armed rebel groups and with little choice but to accept their presence if they were to survive.⁵⁸ These rebel groups were violent towards the population and attacks including persecution, rape and sexual slavery were not uncommon.⁵⁹ Nevertheless, some rebel armed groups also provided amenities that the Malian State omitted to provide its citizens.⁶⁰ This explains somewhat how such groups gained local acceptance other than through causing fear, by making themselves indispensable to ordinary citizens. Once the rebel groups seized territory, they controlled the lives of the citizens in all aspects, including religious. Their resources meant that the armed groups could place pressure on locals in North Mali to exchange amenities for information on those who they deemed had acted sinfully in not following the stricter rules now to be applied to everyday life, as defined by the armed group, further

⁵⁵ Chauzal and van Damme (n 45) 9.

⁵⁶ *ibid* 23.

⁵⁷ Tone Sommerfelt and Kristin Jesnes, *Laïcité' in Southern Mali: Current public discussions on secularism and religious freedom* (Fafo Report 2015:05) 10; Chauzal and van Damme (n 45) 9.

⁵⁸ ‘Prosecutor v. Ahmad Al Faqi Al Mahdi International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage’ (2017) 130 *Harvard Law Review* 1978, 1979; Green Martinez (n 40) 1075.

⁵⁹ ‘Situation in Mali: Article 53(1) Report’ (16 January 2013) <https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf>; *Prosecutor v Ag Mahmoud* (Case Information Sheet) <<https://www.icc-cpi.int/CaseInformationSheets/al-hassanEng.pdf>> accessed 31 May 2021.

⁶⁰ *War Crimes in North Mali* (n 47) 7.

cementing the material aspects bestowed upon religion by linking it to basic amenities and rewards.⁶¹

Economic gain for the armed rebel groups' members, mainly through controlling trafficking routes, and the political gain in ensuring greater rights particularly for the Tuareg community were instrumental proximate reasons for the conflict. Aside from religious conviction in some cases, one of the motivating factors for individuals joining armed rebel groups in North Mali was personal economic gain. The socio-economic marginalisation in North Mali meant there was little opportunity to earn a living, and trafficking with armed rebel groups provided the means of earning an income. The significance of controlling trafficking routes and gaining territory in the North is demonstrated in the fact that despite the diverging ideologies of different factions, joint attacks by different armed groups occurred, further demonstrating that economic gain was a more proximate reason for the conflict.⁶² As such opportunistic economic benefit from trafficking was an important element of the conflict.

Overall, what this state of affairs in Mali illustrates is the role of State absence in the North, socio-economic and political marginalisation of the population in the North and the consequent proliferation of armed rebel groups who controlled the region through trafficking. Trafficking in particular was made possible in part because of the State's absence, with armed rebel groups taking advantage of the fact that there was a state of lawlessness. Thus, while religion was an important objective for some armed rebel groups (such as Ansar Dine), for others it was merely a means to the end of gaining territory in North Mali. Whilst the State's absence after the *coup d'état* alone cannot explain the conflict, it further entrenched the long-term socio-economic marginalisation of the North and created the opportunity for outside interference, and facilitated the existence and proliferation of armed rebel groups, who in turn provided an alternative for the poorer sections of the population in particular.⁶³ These are important factors for the ICC to take into consideration when deciding with whom to engage in order to contribute to peace and reconciliation, because they underscore the need to promote dialogue between the State and communities in the North, and rebuild ties at a political level. Similarly, the ethnic and religious

⁶¹ These included for examples women having to change their dress code by covering themselves, forbidding music and books that were not religious, closing bars, forbidding alcohol and cigarettes and forbidding individuals of the opposite sex to interact unless married, *Mali: Five Months of Crisis* (n 41).

⁶² *War Crimes in North Mali* (n 47) 5 ; Kalilou Sidibé, *Security Management in Northern Mali: Criminal Networks and Conflict Resolution Mechanisms* (Institute of Development Studies Report 2013:77).

⁶³ Basedau and Schaefer-Kehnert (n 51) 29-46.

character of the conflict makes it important to include a cross-section of ethnic and religious communities in engagement in order to promote societal reconciliation in Mali.

1.4 Differences and similarities between the three conflicts

Having briefly discussed all three conflicts and the root causes thereof, I focus now on the differences and similarities between them to bolster my argument for a single, contextualised engagement framework in response to different conflicts.

Among the differences between the situations in the former Yugoslavia, Rwanda and Mali, is the nature of their situations (international or non-international conflicts; post-conflict or ongoing) and how an ICT came to be seized of situation. Thus, whilst the *ad hoc* tribunals were created at the behest of the Security Council, the Malian situation was referred to the ICC by the Malian government.⁶⁴ Accordingly, the State referral, and the fact that the conflict was between the State and armed rebel groups in the North, might well be more supportive of the court and facilitate prosecutions than was the case for the ICTY and ICTR.⁶⁵ A further difference is the role of the State. The violence in the former Yugoslavia was committed with the help of the State, through the Yugoslav People's Army, in financing war efforts in Croatia and Bosnia and Herzegovina.⁶⁶ For example, individuals belonging to the State Security Service in Serbia have been convicted by the ICTY for their involvement in the conflict.⁶⁷ Similarly, the violence in Rwanda was State-sponsored and organised, and the government since the genocide has ensured that the local understanding of the genocide matches its own interests, prohibiting all discussion of ethnicity.⁶⁸

In contrast, the role of the State in Mali is more nuanced as the violence committed is by armed rebel groups rather than the State, but the proliferation of such groups was directly related to the State's absence. The State's long-term marginalisation of the North exacerbated tensions and created the background reasons for conflict, without which armed rebel groups could not

⁶⁴ Referral letter by the Government of Mali <<https://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>> accessed 31 May 2021.

⁶⁵ As discussed in previous chapters, Rwanda was initially supportive of the establishment of the ICTR but has since often hampered its work by *inter alia* making it difficult for witnesses to testify in front of the tribunal.

⁶⁶ 'About the ICTY: The Conflicts' (n 18).

⁶⁷ Jovica Stanišić and Franko Simatović (MICT-15-96) are being retried by the Mechanism.

⁶⁸ Susanne Buckley-Zistel, 'Nation, Narration, Unification? The Politics of History Teaching after the Rwandan Genocide' (2009) 11(1) *Journal of Genocide Research* 31, 42-43; Johanna Mannergren Selimović, 'Gender, Narrative and Affect: Top-down Politics of Commemoration in Post-Genocide Rwanda' (2020) 13(2) *Memory Studies* 131, 136; Fanie du Toit, *Reconciliation and Transitional Justice: The Case of Rwanda's Gacaca Courts* (Institute for Justice and Reconciliation 2011) 7.

have been as successful. The dynamics of this conflict and its aftermath therefore differs from those in the former Yugoslavia and Rwanda. Understanding the influence of the State in a conflict is crucial for any effort at contributing to peace and reconciliation, because it has an impact on how the international tribunal or court is likely to be portrayed locally (as is the case in the former Yugoslavia, where the ICTY has faced repeated criticism by local politicians).⁶⁹ This factor informs the court whether certain decisions or cases are more likely to be contentious with the government for example, where it discredits the government's stance on the conflict and those most responsible for it. Thus, for example, the ICTY has faced criticism from Croatia and Serbia in particular, in response to the Tribunal's prosecution of certain Croats or Serbs. As discussed throughout, criticism is not surprising where it runs counter to the State's vision of the conflict and perpetrators where the political elites in the present are the same individuals in power during the war and is a limitation of ICTs beyond their control.

At the same time, there are also similarities between the conflicts, among which are: ethnicity and religion as background reasons, and the material aspects bestowed upon these social identifiers which meant groups competing for resources; and, economic and political gain as proximate reasons. Albeit in different ways and to different extents, ethnicity was important in all three conflicts, and in the former Yugoslavia and Mali, religion was a similarly crucial background factor which was manipulated and mobilised by the political elites. Whilst in the former Yugoslavia and Rwanda it was the State that mobilised ethnicity, in Mali, the State politicised ethnicity by marginalising the Tuareg community, among others, and primarily the armed rebel groups that bestowed significance on religion through for example religious groups offering access to education and employment.

Although the roles of the State differ in the former Yugoslavia, Rwanda and Mali, in all three, the State played an important role in encouraging and supporting the conflicts.⁷⁰ Efforts to obtain territory through a mobilisation of ethnicity or religion was facilitated either by an omnipresent State (in Rwanda), with strong nationalism and a fear of the other, or by the lack of a strong, inclusive State (the former Yugoslavia and Mali), as well as an effective propaganda machine (particularly in Rwanda). As I have suggested, the failure of the State can

⁶⁹ See for example Marko Milanović, 'Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences' (2016) 47 *Georgetown Journal of International Law* 1321, 1370; Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 *JICJ* 950, 953.

⁷⁰ David Turton, 'War and Ethnicity: Global Connections and Local Violence in North East Africa and Former Yugoslavia' (1997) 25(1) *Oxford Development Studies* 77, 88.

be an important factor in the outbreak of conflict. The failure of the State was evident in the former Yugoslavia, in that the conflict was a result of attempts at separation from the State of Yugoslavia and led to its dissolution. Similarly, the State in Mali failed to include the North and provide for it, making the region more vulnerable to outside influence and armed rebel groups who provided basic amenities instead of the State. In Rwanda, by contrast, the State was strong but its ethnocratic rule meant there was significant division between groups, particularly as there was a clear socio-economic divide between ethnic groups and evidence of discrimination, which in turn caused resentment.

In this sense, all three conflicts are examples of the communities that were previously victimised or marginalised becoming the instigators of conflict, termed as the “victim-to-victimiser cycle.” In Rwanda this was evident in the marginalised and previously attacked Hutus at the hands of the Tutsis becoming the attackers themselves.⁷¹ In Yugoslavia, the case was more nuanced as there were crimes committed by both Serbs and Croats in the Second World War, and each believed the other would attack them once again, therefore leading individuals to attack in the belief that they would be attacked themselves. In Mali, the marginalised communities formed armed rebel groups to counter their long-term lack of inclusion in the State. In the former Yugoslavia and Rwanda, in particular, this transformation from a victim to an attacker, a ‘victimiser,’ was encouraged by the local politicians, religious leaders and the media, and could not have been as successful or widespread without their involvement.⁷²

Furthermore, the types of violence in question in all three conflicts are both personal (particularly in the former Yugoslavia and Mali) due to the large-scale physical violence committed against civilians, and structural in terms of the violence being State-sponsored and institutionalised or due to long-term marginalisation.⁷³ As I suggested in Chapter V, in response to such large-scale personal and structural violence, ICTs must capture the different types of violence and their impact on both individual victims and the larger society, to make

⁷¹ Bar-Tal, Chernyak-Hai, Schori and Gundar (n 33) 256; ‘RTL, la quintessence d’un complot diabolique pour exterminer les Tutsi’ *Igihe* (10 April 2020) <<https://igihe.com/amakuru/u-rwanda/article/rtlm-ikivumbikisho-cy-umugambi-mubisha-wo-kurimbura-abatutsi>> accessed 31 May 2021.

⁷² Sambanis and Shayo (n 9) 318.

⁷³ Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (Kumarian 1998).

sure that the triggers of violence are addressed. The root causes of the conflict, as well as the types of violence in evidence, are an important consideration in conflict resolution.⁷⁴

Accordingly, in the following section, I suggest the implications of the root causes and types of violence in evidence in the former Yugoslavia, Rwanda and Mali (including these differences and similarities), for ICTs in attempting to promote reconciliation and planning engagement strategies.

2. Implications of contextualisation for promoting reconciliation in the former Yugoslavia, Rwanda and Mali

I have argued above that the causes of conflict are multifactorial, and that the conflicts in the former Yugoslavia, Rwanda and Mali in particular share a number of similarities and differences,⁷⁵ including in the role of the State in the conflict. These factors can assist ICTs in deciding which types of reconciliation to focus on in a particular situation and the individuals/communities to include in their efforts.

Based on the above discussed causes of conflict, in the former Yugoslavia (particularly in Bosnia and Herzegovina as a multi-ethnic, multi-religious State), it would be important to focus on restoring inter-community relations, particularly between the different ethnic and religious groups, whether between countries (e.g. between Croatia and Serbia) or within them (e.g. within Bosnia and Herzegovina). In Rwanda, it would be important to focus on restoring relations between the Hutus and the Tutsis, particularly at the inter-community and political levels to ensure that the disparity between the groups in economic and social terms is addressed. In Mali, considering the fact that the underlying issue is primarily economic and social disparity between the North and the South, with long-term marginalisation of the State, I suggest that political reconciliation where the communities in the North are included in decision-making and feel part of the society is a prerequisite for the other levels of reconciliation to be promoted. As the North-South divide is particularly pertinent to the outbreak of conflict, efforts should be made to encourage dialogue and understanding on both sides. The aim would be to encourage reconciliation between different regions of the country and between the North and the State. I argued in the preceding chapter that furthering political reconciliation requires of the ICC to

⁷⁴ Ehito Kimura, 'Justice and Reconciliation in Southeast Asia and Beyond' in Chaiwat Satha-Anand and Olivier Urbain (eds), *The Promise of Reconciliation? Examining Violent and Nonviolent Effects on Asian Conflicts* (Routledge 2017).

⁷⁵ In all three conflicts, ethnicity is a factor, and in the former Yugoslavia and Mali this includes religion. It is mobilisation of ethnicity in particular, which makes it more immediately a factor to conflict.

“support initiatives for increased awareness among top-level leaders regarding the importance of official self-reflection and acknowledgement,” which in the case of Mali requires acknowledging and addressing long-term marginalisation.⁷⁶

Moreover, I have argued in previous chapters that a multi-level understanding of reconciliation requires inclusion of different individuals or communities, to ensure individuals, communities, mid and high-level actors in the society are reached. A comprehensive understanding of engagement to promote reconciliation makes for an inclusive approach, which stands in stark contrast to the marginalisation and discrimination often found in conflict and promotes hopes of a shared peaceful future. The alternative, focus on victims alone for example, fails to respond to the destructive nature of international crimes on the entire society, and as such means peace is unstable.⁷⁷ Nevertheless, particular communities or actors will need to be included more in one case than another, based on the identified background and proximate factors of conflict, so as to ensure that reconciliation efforts focus on restoring the ties broken and are contextualised and culturally relevant.

Thus, in the former Yugoslavia and Mali, as religion is a pertinent factor, religious leaders should be involved in engagement methods; particularly as religious leaders have proven important political actors in Mali’s past, which should be capitalised on to promote reconciliation.⁷⁸ Similarly, in Croatia, Serbia, and Bosnia and Herzegovina, religion is closely intertwined with the nation State, and as such religious leaders are always involved in political questions and must be included in reconciliation efforts in order to make sure that efforts of the Tribunal reach the widest audience. However, the *ad hoc* tribunals must recognise that religious leaders were also actors in the conflict, which is a relevant consideration when deciding with whom exactly to engage and how, so as to ensure the tribunal remains impartial and not seen to be taking a side in the war.

In Rwanda, the question of religion is not as important as it was the ethnic background of the Tutsi and Hutu that was politicised in the lead up to and during the genocide, and as such dialogue should be promoted particularly between these two communities. In such a

⁷⁶ Karen Brouneus, *Reconciliation – Theory and Practice for Development Cooperation* (SIDA 2003) 26 <http://www.sida.se/contentassets/d2894b9dc8be4a47aa28918da8186b47/reconciliation---theory-and-practice-for-development-cooperation_1724.pdf> accessed 31 May 2021.

⁷⁷ Frédéric Mégret, ‘The Legacy of the ICTY as Seen Through Some of its Actors and Observers’ (2011) 3 *Goettingen Journal of International Law* 1011, 1035; Henrique Carvalho and Anna Chamberlen, ‘Why Punishment Pleases: Punitive Feelings in a World of Hostile Solidarity’ (2018) 20(2) *Punishment & Society* 1; Róisín Mulgrew, *Towards the Development of the International Penal System* (CUP 2013), 229.

⁷⁸ Chauzal and van Damme (n 45) 56.

hierarchical, closed community, this dialogue might first be attempted through community leaders before being opened-up to broader participation once the Tribunal has earned the trust of local stakeholders. The role of the media in inciting genocide was crucial, and accordingly, the Tribunal should extend its engagement to local media in an attempt to promote more informative and unbiased information giving in Rwanda. At the same time, it must be recognised that decades after the genocide, Rwandan media is restricted and there is strong censorship, where journalists are fearful of discussing the genocide because of legislation that strongly punishes spreading of any material that could cause ethnic division, thus making it difficult to discuss the genocide openly.⁷⁹ This provides a challenging background against which the ICTR must encourage dialogue.

Finally, the State can hamper a court's work by criticising it locally and making it difficult to obtain information or witnesses. This is a further limitation on the court's ability to contribute to peace and reconciliation and should be recognised as such. Compared to the case in the former Yugoslavia, the rhetoric and politics in post-conflict Rwanda are markedly different from the war rhetoric disseminated prior to and during the genocide. Since the genocide, there is an official narrative explaining the genocide and official repression of identifying to an ethnic group. The government, by encouraging national identification, as opposed to identification with an ethnic community, is attempting to prevent the recurrence of ethnic violence.⁸⁰ Although, as discussed above, the genocide cannot be explained simply as ethnic violence, the support of the Government and the post-genocide situation is an important consideration for an ICT.

Overall, the discussion on the contexts behind the three conflicts in section 1 and the implications thereof on reconciliation efforts in this section, have provided the basis for contextualising reconciliation efforts. These are important considerations for ICTs when they plan how to tailor the engagement framework with local stakeholders for different conflicts. Having laid the groundwork for tailoring my engagement framework, I next focus on three specific cases at these ICTs, before suggesting how engagement should have been undertaken in each of them.

⁷⁹ *Legacy of Rwanda genocide includes media restrictions, self-censorship* (Committee to Protect Journalists 2014) <<https://cpj.org/reports/2014/12/legacy-of-rwanda-genocide-includes-media-restricti/>> accessed 31 May 2021.

⁸⁰ Phil Clark, 'Negotiating Reconciliation in Rwanda: Popular Challenges to the Official Discourse of Post-Genocide National Unity' (2014) 8(4) *Journal of Intervention and Statebuilding* 303.

3. Applicability of engagement framework to three cases before the *ad hoc* tribunals and ICC

Each case before an ICT is unique, with its own challenges and reconciliatory potential, warranting particular types of engagement at specific post-conviction stages. As such, this section introduces three specific cases before the *ad hoc* tribunals and the ICC, to which I apply my post-conviction engagement framework in section 4 of this chapter.⁸¹ These three cases have been chosen because they illustrate the different factors relevant to the three conflicts and had particular reconciliatory potential for the conflict-affected society if capitalised upon by the relevant ICT. In the case of the ICTY and ICC, they also demonstrate clear failures in communication, making contextualised and timely engagement all the more important.

3.1 *Prosecutor v Dražen Erdemović*

The first case I consider is that of the *Prosecutor v Dražen Erdemović*, the first individual to be convicted by the ICTY. Erdemović, an ethnic Croat married to an ethnic Serb, was 25 years old when he was arrested in the former Yugoslavia and transferred to the custody of the ICTY.⁸² He pleaded guilty to murder as a crime against humanity, and was sentenced to ten years' imprisonment, for having killed some 70 civilians.⁸³ His sentence was later reduced to five years' imprisonment by a second Trial Chamber.⁸⁴ Erdemović made a full account of his crimes and admitted to having fought first in the VRS, before deserting, joining the Croatian Defence Council and finally returning to the VRS where he committed the crimes of which he was convicted. Having been convicted and sentenced, Erdemović was transferred to Norway to serve his sentence, and was the first ICTY convict to be granted early release upon having served two-thirds of his sentence.⁸⁵ In contrast to most ICTY convicts, Erdemović did not return to Bosnia and Herzegovina, instead entering the ICTY witness protection programme, having provided the Tribunal with key testimony in a number of high-profile cases.⁸⁶

⁸¹ *Prosecutor v Dražen Erdemović; Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze; and Prosecutor v Ahmad Al Faqi Al Mahdi.*

⁸² *Prosecutor v Erdemović* (Case Information Sheet) <https://www.icty.org/x/cases/erdemovic/cis/en/cis_erdemovic_en.pdf> accessed 31 May 2021.

⁸³ *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T (29 November 1996).

⁸⁴ *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-Tbis (5 March 1998).

⁸⁵ (Order Issuing a Public Redacted Version of Decision of the President on Early Release of Dražen Erdemović) IT-96-22-ES (15 July 2008).

⁸⁶ Barbora Holá and Joris van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview' (2014) 12 JICJ 109, 110.

This early case of the ICTY is a good example of the multifactorial roots of the conflict in the former Yugoslavia. This was an individual who fought on opposing sides in the conflict and had asked to join the 10th Sabotage Detachment of the VRS (in part) because it included members of different ethnicities and initially only involved conducting renaissance missions rather than engaging in combat.⁸⁷ Moreover, Erdemović committed crimes for the VRS despite being an ethnic Croat, was an example of intermarriage and readily admitted his crimes even before the ICTY issued an arrest warrant for him. In short, this was an individual that did not fit the war rhetoric of the political elites that the conflict was fought on ethnic and religious grounds, and that co-existence between the Croats, Serbs and Bosniaks was impossible.

Furthermore, this case provides insight on opportunism and economic gain as proximate reasons for the conflict, partly because Erdemović admitted to charging Serb individuals to assist them in fleeing from danger zones and partly because he has testified on numerous occasions that his commander and others were promised monetary rewards for murdering Bosniak civilians.⁸⁸ All of these factors provide a good opportunity to illustrate the different factors involved in the cause of the conflict, and to underscore with local stakeholders the prevalence of manipulation by political elites. Erdemović certainly did not appear to fight for ethnic or religious reasons and has claimed that he felt no hatred for other ethnic groups. These facts provided meaningful opportunities for the ICTY to explain the multifactorial roots of the conflict in the former Yugoslavia, using Erdemović's case as one example, which may well have more reconciliatory potential than most cases because of his guilty plea and apology to the victims.

As the first conviction of the ICTY, local stakeholders were interested in the case and local media reported on Erdemović, although the Tribunal was criticised for making its first conviction one of a low-ranking 'small fish' with no command responsibility.⁸⁹ Erdemović's guilty plea was high-profile, partly because he was the first individual before the ICTY to admit his guilt and partly because his guilty plea was associated with a reduced sentence, which was

⁸⁷ *Prosecutor v Erdemović* (n 83).

⁸⁸ 'Erdemović: Pelemišu obećana nagrada za streljanje' *RTS* (3 July 2013) <<https://www.rts.rs/page/stories/sr/story/135/hronika/1353500/erdemovic-pelemisu-obecana-nagrada-za-streljanje-.html>>; 'Hag: Svjedok Tužilaštva ubio 1200 ljudi' *RTVBN* (3 July 2013) <<https://www.rtvbn.com/13194/hag-svjedok-tuzilastva-ubio-2000-ljudi>> accessed 31 May 2021.

⁸⁹ 'Srebrenički "vrhunski svedok": Poražavajuća istina o Haškom Tribunalu' *Nova Srpska Politička Misao* (2 February 2011) <<http://www.nspm.rs/hronika/edvard-herman-srebrenicki-vrhunski-svedok.html?alphabet=l>> accessed 31 May 2021.

deemed incommensurate with the crimes he had committed.⁹⁰ It is not uncommon for victim groups to be unsatisfied with the length of sentences of imprisonment rendered by the ICTY, which is one of the reasons for their lack of trust in the tribunal. Moreover, Erdemović's confessions had implications on other prosecutions as he provided details on others involved in the crimes, including those with command responsibility. This, and his subsequent testimony at high-profile trials of ethnic Serbs, caused outrage in the Serbian media which did not accept the responsibility of Serbian military and political figures in the crimes committed by the VRS, to which Erdemović testified.⁹¹ As such an early case in the mandate of the ICTY, this was an opportunity for the Tribunal to inform its local stakeholders first hand, rather than leaving this responsibility with the local media, which was still loyal to the political elites active in the war.

3.2 Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze: the 'media case'

The second case referred to here is that of Nahimana et al., the so-called 'media case', which is particularly instructive in demonstrating the importance of media in spreading propaganda to incite genocide. As suggested above, without media dissemination of misinformation, the genocide could not have been as widespread.

The 'media case' examined the role of three senior figures in the RTLMC and the Kangura newspaper in inciting the Rwandan genocide: Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze.⁹² These three individuals were convicted at first instance in 2003 for "genocide, incitement to genocide, conspiracy, and crimes against humanity, extermination and persecution," with Nahimana, and Ngeze receiving sentences of life imprisonment whilst Barayagwiza received a sentence of 35 years' imprisonment.⁹³ Upon appeal, the sentences of life imprisonment were reduced to 30 years' imprisonment, and Barayagwiza's sentence was reduced to 32 years' imprisonment.⁹⁴ Unlike Erdemović, Nahimana, Ngeze and Barayagwiza

⁹⁰ Diane Orentlicher, *Some Kind of Justice: the ICTY's impact in Bosnia and Serbia* (OUP 2018), 145; Diane Orentlicher, *That Someone Guilty be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Initiative 2010) 14.

⁹¹ Dragan Vujičić, 'Svedočenje ratnog zločinca' *Novosti* (25 July 2015) <https://www.novosti.rs/dodatni_sadržaj/clanci.119.html:559312-Svedocenje-ratnog-zlocinca> accessed 31 May 2021.

⁹² ICTR Press Release: 'Three Media Leaders Convicted for Genocide' (3 December 2003) <<https://unictr.irmct.org/en/news/three-media-leaders-convicted-genocide>> accessed 31 May 2021.

⁹³ *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Judgment and Sentence) ICTR-99-52-T (3 December 2003).

⁹⁴ *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Appeals Judgment) ICTR-99-52-A (28 November 2007). All three individuals were acquitted of conspiracy to commit genocide, extermination as a crime against humanity and the genocide charges with respect to their involvement with RTLMC and Kangura. Barayagwiza was also acquitted of incitement to commit genocide

pleaded not guilty to all charges. Upon conviction, they were transferred either to Mali or Benin to serve their sentences.⁹⁵ Nahimana is the only of the three individuals forming the ‘media case’ to have been granted early release, by the Mechanism’s President in 2016.⁹⁶ Jean-Bosco Barayagwiza died whilst in prison, and Hassan Ngeze was denied early release in 2018.⁹⁷

RTLMC was a highly popular radio station in Rwanda at the time, partly because of its “street-wise” tone targeting the youth, and partly because it was one of the few radio stations to broadcast in Kinyarwanda rather than French.⁹⁸ These factors gave the radio station a much larger audience and made it seem closer to its listeners, which served to gain their trust and facilitated in convincing their listeners of the hateful messages they spread in the lead-up and during the genocide. The *Kangura* was an extremist newspaper, most known for publishing a document – the ‘Ten Commandments’ - that underscored and exacerbated the scaremongering and ethnic mobilisation in existence in the lead up to and during the genocide. The document set out to discredit Tutsis, called on all Hutus to break ties with the Tutsi community, including in business ventures and personal relations, urging them to take back their land, their women and their power, and in so doing to feel no sympathy for the Tutsis, which led some men to kill their wives.⁹⁹ More than calling on the Hutu community to unite against the Tutsi enemy, the newspaper made clear that anyone who did not respect the commandments was a traitor, exacerbating the ‘us and them’ war rhetoric. Moreover, Ngeze admitted that he received from the local authorities lists of individuals who were suspected of joining the RPF and who should therefore be exterminated, which he published; the lists often included innocent individuals and children.¹⁰⁰

All of these facts make it a landmark case which dealt not with a military or political figure but those tasked with informing the public, which they instead manipulated and mobilised with the intent to destroy an ethnic group. Accordingly, it had reconciliatory potential because it demonstrated the instrumental role of the media in scaremongering and mobilising ethnicity to

⁹⁵ *Prosecutor v Nahimana* (Decision on the Enforcement of Sentence) ICTR-99-52 (3 November 2008).

⁹⁶ *Prosecutor v Nahimana* (Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana) MICT-13-37-ES.1 (5 December 2016).

⁹⁷ The Decision is not available on the Tribunal’s website but the President’s acknowledgment of the request by Ngeze <<https://jr.ad.irmct.org/view.htm?r=241721&s=>> accessed 31 May 2021.

⁹⁸ *Broadcasting Genocide: Censorship, propaganda & state-sponsored violence in Rwanda* (n 24) 86.

⁹⁹ *Kangura* (No. 6, December 1990) <https://genocidearchiverwanda.org.rw/index.php/Kangura_No_6> accessed 31 May 2021. For a discussion on this see: Ron Davidson, ‘The International Criminal Tribunal for Rwanda’s Decision in *The Prosecutor v. Ferdinand Nahimana et al.: The Past, Present, and Future of International Incitement Law*’ (2004) 7 LJIL 505, 507; *Prosecutor v Nahimana* (Decision on the Enforcement of Sentence) (n 95).

¹⁰⁰ *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Judgment and Sentence) (n93) paras 198-201.

encourage civilians to murder their neighbours. This dimension provided an opportunity for the ICTR to send a message to local stakeholders that those inciting genocide would be held accountable, in addition to direct perpetrators. It also demonstrates the significance and power of communication, for good or bad ends because the hatred disseminated by these individuals and their methods of media were critically important in inciting thousands of individuals to kill their neighbours, broadcasting information on those in hiding and calling for their murder. Moreover, the case illustrates the importance of the State in the genocide, given that RTLMC was sponsored by the government and in the case of Kangura, provided lists of individuals to be killed. Similar to the significance of the Erdemović case, the media case bolsters the understanding that ethnic differences are insufficient to explain the conflict, and as such, reconciliation is possible.

As regards local reception, this prosecution was the first of its kind in prosecuting key figures in the media for their role in inciting genocide. The Rwandan government had a keen interest in the prosecution of this case, which was evidenced in the pressure placed on the ICTR by government officials threatening to suspend cooperation with the Tribunal as a result of the Appeal Chamber's initial Decision rejecting the indictment.¹⁰¹ The sentences rendered in this case were lengthy, and as such were not subject to local contentions that they were too lenient and incommensurate with the crimes committed. However, Nahimana's release was contentious¹⁰² and, although he was not successful, Ngeze's application for early release was met with even more outrage both in the local news media and by the Rwandan government.¹⁰³ The backlash was such that the Security Council asked the Tribunal to find an "appropriate solution,"¹⁰⁴ which has resulted in a practice that subsequent early releases by the Mechanism are conditional on good behaviour.¹⁰⁵ The particularly negative reactions to early release in the

¹⁰¹ This pressure of the Rwandan Government was detailed in *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Appeals Judgment) (n 94) para 30.

¹⁰² 'Kurekura Nahimana na Rukundo ni ugukemukira abarokotse Jenoside-IBUKA' *Kigali Today* (20 December 2016) <<https://www.kigalitoday.com/amakuru/amakuru-mu-rwanda/article/kurekura-nahimana-na-rukundo-ni-uguhemukira-abarokotse-jenoside-ibuka>>; 'U Rwanda rwamaganye irekurwa rya Rukundo na Nahimana bahamijwe ibyaha bya Jenoside' *Umuryango* (16 December 2016) <<https://umuryango.rw/amakuru/mu-rwanda/ubutabera/article/u-rwanda-rwamaganye-irekurwa-rya-rukundo-na-nahimana-bahamijwe-ibyaha-bya#!>> accessed 31 May 2021.

¹⁰³ Barbora Holá, 'Early Release of ICTR Convicts: the Practice Beyond the Outrage' *Justice Info* (5 July 2019) <<https://www.justiceinfo.net/en/tribunals/ictr/41861-early-release-of-ictr-convicts-the-practice-beyond-the-outrage.html>> accessed 31 May 2021.

¹⁰⁴ *ibid.*

¹⁰⁵ *Prosecutor v Simba* (Public Redacted Version of the 7 January 2019 Decision of the President on the Early Release of Aloys Simba) MICT-14-62-ES.1 (7 January 2019). The first conditional early release was granted for health reasons to Ljubiša Beara in *Prosecutor v Beara* (Public Redacted Version of the 7 February 2017 Decision of the President on the Early Release of Ljubiša Beara) MICT-15-85-ES.3 (16 June 2017). Among the conditions

media case further underscore the need to engage with local stakeholders to manage expectations, explain the court's work and give them a greater substantive role in making such decisions (as I suggest in section 3 below), insofar as is possible, in order to contribute to peace and reconciliation.

3.3 Prosecutor v Ahmad Al Faqi Al Mahdi

In 2016, the ICC rendered its first conviction in relation to the conflict in Mali, convicting Ahmad Al Faqi Al Mahdi “as co-perpetrator, of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion and UNESCO heritage sites, including nine mausoleums and one mosque in Timbuktu”¹⁰⁶ and sentenced him to nine years’ imprisonment.¹⁰⁷ Al Mahdi pleaded guilty, and claimed that he advised against destruction of the mausoleums, although once the order was given he did not hesitate to carry it out.¹⁰⁸ Al Mahdi committed these crimes as an influential member in the Ansar Dine rebel group, where he led the morality brigade (tasked with verifying whether the new rules imposed on inhabitants of Timbuktu were being followed by the population and punishing those that had acted ‘sinfully’) because of his education and expertise on Islam.¹⁰⁹ Upon conviction, Al Mahdi was transferred to the United Kingdom to serve his sentence,¹¹⁰ and will be eligible for early release in 2021, upon having served two-thirds of his sentence.¹¹¹

I discuss this particular case primarily because it is the only conviction of the ICC in relation to the conflict in Mali at the time of writing, but also because it illustrates the multi-factorial roots of the conflict in Mali, and provided an opportunity for the ICC as the first case with a guilty plea. Al Mahdi’s actions were undoubtedly religiously motivated, as Ansar Dine sought to impose Sharia law on North Mali, he was convicted for destruction of religious monuments; and maintains that Mali should be governed “according to the precepts of Islam.”¹¹²

are not having any contact with victims, discussing or denying the genocide, behaving “honourably and peacefully” and not reoffending.

¹⁰⁶ *Prosecutor v Al Mahdi* (Case Information Sheet) <<https://www.icc-cpi.int/CaseInformationSheets/Al-MahdiEng.pdf>> accessed 31 May 2021.

¹⁰⁷ *Prosecutor v Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) para 109.

¹⁰⁸ *ibid* para 89.

¹⁰⁹ Paige Casaly, ‘Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law’ (2016) 14(5) JICJ 1199, 1210-1211; Chauzal and van Damme (n 45) 11; *Prosecutor v Al Mahdi* (Judgment and Sentence) (n 107).

¹¹⁰ Press Release: ‘Ahmad Al Faqi Al Mahdi transferred to UK prison facility to serve sentence’ (3 May 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1451>> accessed 31 May 2021.

¹¹¹ According to the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 (Rome Statute) Article 110(3).

¹¹² Transcript of Al Mahdi’s Statement of guilt <<https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-Mahdi-Admission-of-guilt-transcript-ENG.pdf>>; Anissa Barrak, ‘Ahmad Al Faqi Al Mahdi: “I plead guilty”’ *UNESCO*

Notwithstanding, Al Mahdi motivated by factors beyond religion to join a rebel armed group, as a long-standing member of a secular armed rebel group (MNLA), only joining Ansar Dine once the group had seized territory from the MNLA.¹¹³ Other relevant factors include the fact that Al Mahdi fled from North Mali with his family due to the instability of the region and the marginalisation of the Tuareg community in particular in the North, growing up in different refugee camps before returning to Mali. The marginalisation of the North is thus a germane factor to explain Al Mahdi's subsequent actions upon return to Mali. Moreover, he claims to have joined Ansar Dine because he was influenced by its charismatic leader and quickly became disillusioned with the group because his fellow members had an inferior understanding of how Sharia law should be implemented in Mali, which led to orders for crimes to be committed, further demonstrating his ideological divisions with the group.¹¹⁴ Accordingly, these factors demonstrate that the conflict can only be understood in multifactorial terms, with religion, inter-ethnic conflict and socio-economic and political marginalisation in the North each playing a role in the outbreak of violence in 2012.

The ability of Al Mahdi's case to demonstrate the different factors that led to the conflict in Mali means it provides an important opportunity for the ICC in its promotion of peace and reconciliation on the ground. In particular, it demonstrates that the conflict was not an inevitable, ethno-religious one but also largely due to socio-economic and political marginalisation, making reconciliation more feasible because there is nothing that makes coexistence within the same State inherently impossible. Such a realisation and a focus on rebuilding ties between communities could promote trust in particular between different communities in the North and South, as well as between different communities in the North, as a component of reconciliation. This is particularly important in Mali, as section 1.2.3 above discussed, because of the existence of fear between communities based on religion.

Similarly, this was a landmark case in being the first conviction for destruction of cultural heritage as a war crime.¹¹⁵ The fact that the monuments destroyed by Ansar Dine and Al Mahdi held not only religious significance but were of greater cultural relevance for residents means their destruction harmed the community on different levels and more profoundly, intertwined

(October-December 2017) <<https://en.unesco.org/courier/2017-october-december/ahmad-al-faqi-al-mahdi-i-plead-guilty>> accessed 31 May 2021; Tim Jan Roetman, Marie Migeon and Véronique Dudouet, *Salafi jihadi armed groups and conflict (de-)escalation: The case of Ansar Dine in Mali* (Berghof Report 2019), 8.

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ Barrak (n 112).

as the monuments were with the community's sense of identity.¹¹⁶ As such, the court could use this case as an opportunity to promote societal reconciliation, by capitalising on the case of an individual who admitted his guilt and whose case illustrates the complicated nature of the conflict in Mali. This in turn can help to break hatred between different ethnic communities and prepare the ground for reconciliation between communities, through greater understanding of the reasons that led to Al Mahdi's destruction of the monuments.

As regards local reception, the prosecution and conviction of Al Mahdi was widely reported in Mali and throughout the region in West Africa, and was also supported by the government, who referred the situation to the ICC for investigation.¹¹⁷ However, victim groups considered the sentence imposed too lenient in light of the impact that the destruction had on the community.¹¹⁸ In a similar vein to the criticisms in relation to the Erdemović case, a popular Malian newspaper reported that as a small fish in the conflict, Al Mahdi's conviction was insufficient to render justice, and an excuse not to prosecute those in command, who really made the decisions to commit the crimes for which Al Mahdi was convicted, as well as other crimes in North Mali.¹¹⁹ Accordingly, the newspaper denounced the ICC's failure to render justice for victims who needed to see those in command held responsible.¹²⁰ Moreover, despite the reconciliatory potential of Al Mahdi's guilty plea and apology to the victims, several Malian newspapers reported that the statement was devoid of sincerity and read out without feeling. Instead of being a source for promoting reconciliation, the statement was received as another ruse from a terrorist whose views had not changed, but who had been convinced by his counsel that this was the only way to get a reduced sentence at the ICC.¹²¹ As a rare case of an

¹¹⁶ *Prosecutor v Al Mahdi* (Judgment and Sentence) (n 107) para 34.

¹¹⁷ 'CPI: Neuf ans de réclusion criminelle pour Al Mahdi' *Journal du Mali* (27 September 2016) <<https://www.journaldumali.com/2016/09/27/cpi-neuf-ans-de-reclusion-criminelle-al-mahdi/>>; 'Condamnation de Ahmad Al Faqi Al Mahdi par la CPI : Le Mali salue un verdict qui fera date' *ABamako* (22 September 2016) <<http://news.abamako.com/h/147862.html>> accessed 31 May 2021.

¹¹⁸ (Public redacted version of "Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation" dated 2 December 2016 (ICC-01/12-01/15-190-Conf)) ICC-01/12/01/15 (3 January 2017) para 41; 'Maliens dissatisfied with light sentence for Islamist who desecrated Timbuktu' *DW* (28 September 2016) <<https://www.dw.com/en/maliens-dissatisfied-with-light-sentence-for-islamist-who-desecrated-timbuktu/a-35912148>> accessed 31 May 2021.

¹¹⁹ 'Un autre menu fretin à la CPI' *Mali 24 Info* (9 April 2018) <<https://mali24.info/un-autre-menu-fretin-a-la-cpi/>> accessed 31 May 2021.

¹²⁰ *ibid.*

¹²¹ 'Ahmad Al Faqi Al Mahdi devant la CPI : Un repentir sans sincérité' *ABamako* (23 August 2016) <<http://news.abamako.com/h/138353.html>>; 'Procès Al Mahdi à la CPI : fin des audiences, verdict attendu le 27 septembre prochain' *Journal du Mali* (25 August 2016) <<https://www.journaldumali.com/2016/08/25/proces-al-mahdi-a-cpi-fin-audiences-verdict-attendu-27-septembre-prochain/>>; 'Mali : Tombouctou pardonnera-t-elle à Ahmad al-Mahdi pour la destruction de ses mausolées?' *Jeune Afrique* (25 August 2016) <<https://www.jeuneafrique.com/351813/societe/mali-tombouctou-pardonna-t-a-ahmad-al-mahdi-destruction->

individual who readily admitted his guilt, the ICC should have capitalised on it by promoting it to local stakeholders. This was an opportunity for the ICC to respond to local mistrust of Al Mahdi's prosecution and his statement of guilt by providing proactive and reactive information thereon and giving local stakeholders an active role in the different decision-making processes post-conviction to enhance trust in the court.

Overall, whilst Erdemović, Nahimana et al. and Al Mahdi were three distinct cases, in terms of the type of individual convicted, the crimes committed and the conflicts to which they related, the above discussion has uncovered several commonalities. All three cases support the understanding that the conflicts were multi-factorial, and each of the cases was subjected to significant local media interest. Much of the media coverage in the conflict-affected societies of these cases was critical of the relevant court's work, and victims in all three cases were dissatisfied with the post-conviction practice of the relevant ICT. Whilst criticism was in some cases focused on the length of the sentence or the possibility of bringing the sentence to an end prematurely, much of the push-back against the courts was emphasised during their post-conviction practices. Despite the keen interest of the local media and victim communities in these cases, the ICTY and ICC in particular made several failures to communicate with their local stakeholders, as this next subsection discusses.

3.4 Failures of the courts to promote their work

Chapter II discussed the extra-judicial efforts of the two *ad hoc* tribunals in the form of Outreach Programmes broadly. As outreach efforts are rarely (if ever) focused on a particular case, it is impossible to know whether the Erdemović, Nahimana et al. and/or Al Mahdi cases were specifically explained to local stakeholders, or indeed whether there was any engagement with local stakeholders particularly concerning these cases. As such, I do not discuss the outreach activities of the ICTY, ICTR and the ICC again.

However, there are two notable points relating to outreach specifically in the Erdemović and Al Mahdi cases. Specifically, as regards the Erdemović case, the ICTY has yet to publish the Decision designating an Enforcement State on its website, demonstrating a lack of one-way information, the details of which can instead only be found in the local media. This is unfortunate given the danger involved in ICTs, and in particular the ICTY, leaving it to the

de-mausolees/"; 'Focus : Ahmad al-Mahdi : un pantin devant la CPI' *ABamako* (27 August 2016) <<http://news.abamako.com/h/138666.html>> accessed 31 May 2021.

local media to inform local stakeholders of their work. Considering Erdemović's subsequent testimony in numerous cases before the ICTY, which helped to establish the facts of what happened in the conflict, it would have been important to include information on his conviction on the website, where the facts could be published in an unbiased manner. Instead, local media continues to make references to the Erdemović case, which remain unchecked or corrected by the ICTY. Similarly, the ICC in particular has missed an opportunity to inform about its outreach efforts in Mali, because there is no information thereon on the Court's website. The Malian Government's referral and the Court's investigation began in 2012, and the Court has tended to start its outreach activities during the trial phase,¹²² yet there is no information on outreach activities conducted in Mali. This is unfortunate and suggests that the ICC has not learned lessons from previous cases and situations before it relating to the need for effective information-giving and communication with its local stakeholders. These failures further illustrate that outreach efforts were sporadic and half-hearted attempts in these two cases as well as in general, which explains the failure to convince local stakeholders of their work.¹²³

In sum, having discussed the three cases, their illustration of the root causes of the three conflicts, local reception and reconciliatory impact, as well as the failures specific to the ICTY and ICC, the next section suggests what the ICTs *should* have done in terms of engagement.

4. Normative engagement framework in practice

This section uses the different engagement activities suggested in the previous chapter and applies them to the Erdemović, Nahimana et al. and Al Mahdi cases. Whilst some suggestions to undertake these various engagement methods will be somewhat similar, their aims and audiences will differ based on the factors leading to the conflict in question, the society and the post-conviction stage of the ICT, as discussed below.

In terms of organisation, for the sake of consistency, I maintain below the same approach taken in the preceding chapter and consider each of the four post-conviction stages in turn, starting with the sentencing of the convicted individual.

¹²² *Public Information and Outreach Engaging with Communities: Report of activities in the situation related countries Period: From January 2011 - October 2014* (ICC 2014) <https://iccforum.com/media/background/outreach/2014-11-17_Public_Information_and_Outreach-Engaging_with_Communities-Advance_Copy.pdf> accessed 31 May 2021.

¹²³ Mégret (n 77) 1040; Dejana Radisavljević and Martin Petrov, 'Srebrenica and genocide denial in the former Yugoslavia: What has the ICTY done to address it?' in Paul Behrens, Olaf Jensen, Nicholas Terry (eds), *Holocaust and Genocide Denial: A Contextual Perspective* (Routledge 2017) 153.

Post-conviction stage 1: Sentencing the individual to imprisonment

The Statutes of the *ad hoc* tribunals state that when making a sentencing decision “the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of” the former Yugoslavia and Rwanda respectively.¹²⁴ However, the Trial Chamber in Erdemović and Nahimana et al. did not make reference to the penalty imposable in Yugoslavia or Rwanda for such crimes, and have rarely done so since. I have previously argued that where sentences are particularly contentious, as in Erdemović and Al Mahdi, it is all the more important to explain the rationale behind the decision and to engage with local stakeholders to allow them to ask questions and give their opinions directly to the tribunal or court in question. In such a way the ICTs would not leave whole sections of the local stakeholder group uninformed, relying instead on local media which is often used more to serve the purposes of a political party than the needs of justice. Direct discussion of the sentence might have proven particularly useful in Erdemović’s case because, although the ICTY Trial Chamber did not take the sentencing practice in the former Yugoslavia into consideration, the sentence rendered was actually within the sentencing range in Yugoslavia.¹²⁵

Alongside this rather passive form of engagement, individual reconciliation should be promoted through greater involvement of victims, such as victim statements and mediation between the victims and the convicted individual. The direct victims involved in the three cases discussed above should be encouraged to meet with the Registrar of the relevant court (and the members of his or her Office) in order to ask questions and to have the process, the probative value of their statements and the sentencing decision explained to them. In the interests of inclusiveness, such meetings should be organised in the former Yugoslavia, Rwanda and Mali to the maximum practicable extent, and victims’ expenses to travel to the city in which the meeting is to take place should be paid by the ICT. Certainly, as the number of victims in the Nahimana et al. and Al Mahdi cases is much greater than those in Erdemović, it will be more practical for the ICC Registrar to go to the field, than the victims travelling to The Hague. Moreover, the question of who amounts to a victim should be considered rather broadly,

¹²⁴ Statute of the International Criminal Tribunal for the former Yugoslavia UNSC Res 827 (adopted 25 May 1993 as last amended on 7 July 2009) UN Doc S/RES/827 (ICTY Statute) Article 24(1); Statute of the International Criminal Tribunal for Rwanda UNSC Res 955 (adopted 8 November 1994 as last amended on 7 July 2009) UN Doc S/RES/955 (ICTR Statute) Article 23(1).

¹²⁵ Krivični zakon Savezne Republike Jugoslavije (“Službeni list SFRJ,” br.44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90- 1217, 45/90-1340, 54/90-1773 i "Službeni list SRJ", br. 35/92-651, 37/93-816, 24/94-273, 61/01 od 09.11) <http://adattar.adatbank.transindex.ro/Szerbia/Krivicni_zakon_Jugoslavije.pdf> accessed 31 May 2021.

especially where people identify themselves more as belonging to a community than as individuals. As I discussed in Chapter V, whatever ties or relationships are important in a State need to be considered if reconciliation is truly to be at all levels, particularly if they were capitalised upon for the sake of conflict. Thus, in the former Yugoslavia, Rwanda and Mali where community belonging is particularly strong and the State (and rebel armed groups in Mali) capitalised upon ethnic and religious differences between communities, it is all the more important to have an inclusive view of victims, to counter the marginalisation and division evident in the conflict.¹²⁶

A second form of active engagement method in order to promote individual reconciliation is mediation between the victims and the convicted individual(s). In Erdemović's and Al Mahdi's cases in particular, the ICTY and the ICC should have encouraged mediation between the two sentenced individuals with their victims' families. In these two cases, the victims' families might have been more open to meeting the convicted individuals than is the case with other international criminals, because of their guilty pleas and public apologies. Erdemović and Al Mahdi, in making their statements of guilt, were particularly well situated to comprehend the harm they caused and show a level of sympathy towards the victims. This would assist deeper reconciliation and could prove cathartic to victims, as it marks a disassociation with the type of 'us and them' rhetoric used in war by requiring consideration of the other as a person. In Mali, the restoration of ties would be between Al Mahdi and his fellow Malians, and in particular in Timbuktu where the crimes were committed, whilst in Erdemović, the ties between individuals from different ethnicities and religions (the Bosniak victims and an ethnic Croat, fighting for the Bosnian Serb Army) would be the focus.

The reconciliatory potential of such a practice was particularly present in Erdemović's case because his statements facilitated discovering what happened to certain victims and assisted in the prosecution and conviction of several high-ranking individuals. Whilst, as I noted above, victim groups were not convinced of Al Mahdi's public apology and thought him an opportunist rather than repentant, the opportunity to speak directly with victims could similarly serve to build trust, allowing Al Mahdi the opportunity to express his regret to the victims directly. In contrast, where there is no admission of guilt, such as Nahimana et al., I would not

¹²⁶ Hofstede Insights <<https://www.hofstede-insights.com/country-comparison/croatia/>>; <<https://www.hofstede-insights.com/country-comparison/serbia/>> accessed 31 May 2021.

suggest mediation as it is only likely to further traumatise the victims to listen to individuals who minimise their suffering and refuse to admit their responsibilities therefor.

At the community and societal level, important engagement tools include information-sharing and gathering opinions and questions on the ICTY, ICTR and the ICC, and these cases in particular. Where particularly rural communities are in question, such as in Rwanda and Mali, it is important to consider the mode of communication. Thus, for example, mobile telephone or internet connections will not always be widely available.¹²⁷ As such, only providing information on the court's website will be insufficient. Compared to the ICTY's engagement, the ICTR and the ICC should have focused on the radio as a communication tool, as the majority of the population in Rwanda and Mali rely on it for their information.¹²⁸

This communication via radio should have been supplemented by regular field visits to villages and towns. In Mali, where there is not necessarily a common language among all communities and many indigenous languages are spoken, it would be particularly pertinent to provide interpretation or local staff to ensure there is not a language barrier. In such a way, these courts could have encouraged participation and understanding on both sides by providing a space for dialogue, exchange of ideas and understandings in a safe area. As I argued in Chapter VI, dialogue at all levels is key to (re-)establishing trust, and field visits that encourage inter-ethnic or inter-community dialogue could have provided this opportunity. Rather than opening outreach centres to which local stakeholders can go, the ICTR and the ICC should go to the local stakeholders when a key decision is made, because this is both more accessible to the local stakeholders and rightly places the burden on the court to explain its work, rather than on local stakeholders to search for it. The fact that the situation in Mali is an ongoing conflict, with armed rebel groups retaining some control over the territory in question, emphasises that security is an important factor in organising field visits.¹²⁹ In response, where possible, the Court should turn to regional cooperation around Mali to ensure the security situation is stable as regional instability has played a crucial role in the conflict in Mali.¹³⁰ Moreover, the ICC

¹²⁷ Reeve (n 39) 35-36.

¹²⁸ Arthur Boutellis and Marie-Joelle Zahar, *A Process in Search of Peace: Lessons from the Inter-Malian Agreement* (International Peace Institute 2017) 34-35 <<https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/IPI-Rpt-Inter-Malian-Agreement.pdf>>; *Mali-Mètre: Enquête d'opinion « Que pensent les Maliens(ne)s? »* (Friedrich-Ebert-Stiftung Foundation 2018) <<http://www.fes-mali.org/index.php/mali-metre/25-malimetre/137-mali-metre-10>> accessed 31 May 2021.

¹²⁹ Reeve (n 39) 35; *Making the ICC relevant to affected communities*, (REDRESS Report prepared for the 6th Assembly of States Parties 28 November – 14 December 2007) <<https://www.legal-tools.org/doc/a637c0/pdf/>> accessed 31 May 2021.

¹³⁰ Cold-Ravnkilde (n 48) 42.

should capitalise on existing security forces such as the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) - a United Nations Peacekeeping mission, which was established in response to the instability and conflict in Mali in 2012.¹³¹ Collaboration with such forces could ensure the safety of participants and permit broader engagement even in situations where conflicts are ongoing.

Furthermore, the fact that the ongoing conflict in Mali involves in-fighting between different groups, as well as between these groups and the government, makes the promotion of peace and reconciliation at the community and societal levels particularly pertinent. Since most Malians live outside Bamako, and most of the conflict is in the North of the country, it would be important for the ICC to focus on the rural communities in order to empower them and to mark a step away from the marginalisation that was so instrumental to the outbreak of violence in North Mali.¹³² Repairing the marginalisation of certain sections of the population in political discourse at least in part through dialogue would go some way to restoring relations and would encourage a thicker understanding of reconciliation. The ICC should also consider existing ways that Malians meet to discuss and share opinions, such as ‘grins’ – a community group who meet to discuss political and economic issues informally.¹³³ Grins are a widely used form of civil participation in Mali and although they do not tend to mix individuals from different communities, are a contextualised manner in which discussions are approached in Mali. These should be capitalised on to make the engagement method of the ICC a culturally sensitive and relevant one.

As the context in Mali is very complicated, one institution such as the ICC will fail if it does not work together with other peace-building mechanisms, which can take into consideration the different political, social and ethnic factors relevant to the conflict. Consequently, strategic partnerships with local civil society organisations, NGOs, and youth groups would provide important aid to the ICC’s peace-building functions. In order to build societal and political reconciliation, the ICC must encourage dialogue between regional and national groups to effectively address the role that State absence and the North-South divide in Mali has played in the conflict. The aim of such engagement would be to encourage joint activities so that civil society organisations do not see the Government or governmental organisations through a

¹³¹ For information on MINUSMA see <<https://peacekeeping.un.org/en/mission/minusma>> accessed 31 May 2021.

¹³² Reeve (n 39)0 7.

¹³³ Chauzal and van Damme (n 45) 55; Jaimie Bleck and Philippe LeMay-Boucher, *Can Indigenous Associations Foster Trust, Tolerance, and Public Goods? Exploring the Role of Grins in Post-Conflict Mali* (USAID 2017).

solely negative lens. Although the Court can only have a limited impact in this regard as it must not appear to be impartial or working for the Government, in order to encouraging reconciliation at all levels means including political actors as well.¹³⁴ In a State such as Mali where State marginalisation and absence has fed the conflict, including these actors in the reconciliation process so that there is open dialogue is one way of building trust in the State and its institutions, leaving less space for rebel groups and outside influence as an alternative to the State.

Furthermore, inclusion of different communities is crucial in efforts aimed at community and societal reconciliation. As the conflict in the former Yugoslavia was both international and non-international, with ethnicity and religion as background factors therefor) the ICTY or the Mechanism should have engaged with individuals from the different States formed by the dissolution of Yugoslavia, as well as with individuals from different religions within multi-ethnic, multi-religious Bosnia and Herzegovina. In the case of the ICTY therefore, townhall meetings to discuss sentencing (in Erdemović or indeed in other subsequent cases) should involve individuals from all three main ethnic communities (Bosniaks, Croats and Serbs) so that the Tribunal can act as a facilitator, encouraging dialogue and provide a space and time thereof, for the communities to take advantage of or not. In such a way, the particularly strong war rhetoric of ethnic differences could be countered by an opportunity for these communities to meet and discuss something that likely interests them all in a safe environment. Similarly, since ethnicity was a background factor to the genocide in Rwanda, the two main ethnic communities will need to be included in engagement. In this regard, RTLMC's key audience was youth groups living in rural Rwanda, which should also be addressed by aiming to engage with younger generations. One idea for including Rwanda's youth in peace and reconciliation is by organising workshops encouraging them to ask questions in a creative and lucid manner and bring forward ideas for their communities.¹³⁵ In Mali, a religiously homogenous but particularly ethnically and culturally diverse State, it would be important to include different communities, even where there are linguistic differences (with which the Court must assist). These different groups should be brought together at a roundtable, in a culturally sensitive way, which in the case of Mali includes choosing the language in which workshops are held, given the linguistic diversity in the country.¹³⁶

¹³⁴ Reeve (n 39) 36.

¹³⁵ Wing (n 50) 13; Richard Reeve (n 39) 7.

¹³⁶ Reeve (n 39) 35.

In order to promote political reconciliation, early responses to misinformation and propaganda in the local media are primordial. Providing unbiased information and correcting misinformation leaves less space for denial of crimes or manipulation of a court's findings to suit a particular political party, for example. As courts aim to promote reconciliation through establishing the truth, the facts established must be communicated in order to be heard by local stakeholders. Efforts should include encouraging local media outlets to visit the courts and speak to their Principals (the Prosecutor, President and Registrar) once a sentencing decision has been taken, so that they can report back to their readers or listeners in a more informed manner, should they choose to do so. Considering Erdemović and Al Mahdi's plea agreements and the impact of their crimes on the victims, a statement from the Prosecutor explaining the reasoning behind the plea agreement, what can be gained from it, and its impact on sentencing would have enhanced understanding of local stakeholders and might have alleviated some of the negative reactions. This is particularly important for the ICC as Al Mahdi's statement of guilt was not well received. By proactively including actors in the local media, courts would spread their work to as large an audience as possible.

Moreover, in the case of the ICTR, the Rwandan government's keen interest in prosecution in *Nahimana et al.*¹³⁷ could have been used by the ICTR to enhance political reconciliation. Whilst the post-genocide government has an overly simplistic and binary view of the genocide (as being an ethnically led attack on the Tutsi community), their support for prosecution in the media case could have been used by the Tribunal to emphasise the role of the media in inciting the genocide. This in turn might promote reconciliation between the Hutu communities and the post-genocide government, as it would underscore the actions of specific individuals as opposed to an entire community. This could also serve to counteract collective blame, which is important for the reconciliation process, as argued throughout Chapters V and VI. Accordingly, the ICTR should have capitalised on this by informing local media outlets and political elites of updates on the case and encouraging their involvement in disseminating information more broadly. Nevertheless, I have argued before that when capitalising upon support of the government, ICTs must be careful not to confirm or pander to "inaccurate

¹³⁷ *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Appeals Judgment) (n 94) para 30.

internal narratives about victimhood,” but rather proactively manage the message about its work.¹³⁸

Such support from the Government is not always forthcoming, as for example in the former Yugoslavia. In such instances, engagement at the political level is complicated. Similarly, where the local media does not provide impartial and comprehensive information, for example because they are loyal to the political elite, ICTs should partner with UN peacekeeping missions and NGOs such as *Fondation Hirondelle*.¹³⁹ The ICC in particular could have relied on the support of the UN and this NGO in the DRC, where an independent radio station was created, alongside the press briefings it gave to this as well as other media outlets in specific cases.¹⁴⁰

As I argued in section 3.1 above, political reconciliation is primordial in Mali in order to address the long-term marginalisation of the North and restore ties between the State and the different communities in the North. In this sense, the ICC could act as a facilitator, encouraging dialogue between the different communities and government officials in a safe and neutral setting with ICC officials present, in order to encourage a political agreement.¹⁴¹ Al Mahdi’s case, conviction and sentencing in particular was an opportunity to start a dialogue because it provides for a focused discussion, rather than more ambitious and contentious discussions such as the overall context of the conflict. The success of such an endeavour would greatly depend on the willingness of the State to acknowledge its role and encourage dialogue in order to address its past mistakes in the North.

Post-conviction stage 2: Designating the Enforcement State

Having suggested the different engagement activities in relation to the sentencing of convicted individuals, I turn to the second post-conviction stage: designation of the Enforcement State. The lack of local understanding of this practice is exemplified in Mali, where one popular

¹³⁸ Bar-Tal, Chernyak-Hai, Schori and Gundar (n 33) 230; Stuart Ford, ‘A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms’ (2012) 45 *Vanderbilt Journal of Transnational Law* 405, 465-466.

¹³⁹ See section 2.2 of Chapter VI.

¹⁴⁰ See for example, *Public Information and Outreach in the Democratic Republic of the Congo Calendar of activities* (ICC November 2008) <<https://www.icc-cpi.int/NR/rdonlyres/A6D091B2-3CCC-4D37-93A0-DC95B6FE5960/279521/OutreachRARDC200811ENG.pdf>> and *Public Information and Outreach in the Democratic Republic of the Congo Calendar of activities* (ICC March 2009) <<https://www.icc-cpi.int/NR/rdonlyres/7BF1660D-6F95-4E9B-8D2E-31367DC22E7A/280826/OutreachRARDC200903ENG.pdf>> accessed 31 May 2021.

¹⁴¹ *Guidance Note of the Secretary-General United Nations Approach to Transitional Justice* (United Nations 2010) 9.

newspaper reported that Al Mahdi himself had yet not decided which State to serve his sentence in, despite it not being his decision.¹⁴² In response, what is needed is detailed and timely information. As a starting point, all of the Decisions relating to the designation of the Enforcement State in Erdemović, Nahimana et al. and Al Mahdi should have been made public as soon as possible in order to inform local stakeholders and give them a role in the criminal justice process. As these Decisions never state the prison in which the convicted individual is imprisoned, naming only the Enforcement State, there is no danger to him or her by making this Decision public, which, if necessary, can be redacted in order to be declassified. Thus, it is unfortunate that particularly in the case of Erdemović, the decision has yet to be made public, particularly as his case file on the Tribunal's website refers to the President's decision and the date thereof.¹⁴³ It is primordial to demystify the work of an ICT and ensure its work is understood by local stakeholders to minimise mistrust and perceptions of bias, which are counter-productive to a court's efforts to promote reconciliation.

In the previous chapter, I discussed the significance of pre-transfer meetings, which could also be useful to inform other local stakeholders such as victims and their communities of the decision and its meaning. Any such meetings would not be publicised. Nevertheless, if there was such a meeting in any of the three cases under discussion, victim groups should have had the opportunity to participate therein. Erdemović's case represented the first such transfer for the ICTY. As a result, it was particularly important for the Tribunal to explain to victim groups and the convicted individual how it reached its decision, on the basis of which factors, and what happens next. The Registrar organised and attended these meetings on behalf of the ICTY,¹⁴⁴ and as such the Registrar should have held a similar meeting with victim groups. Where appropriate (with agreement from both parties), the Registrar could also invite victim groups to the meeting with the convicted individual. In Rwanda and Mali, due to the large numbers of victims, it would be necessary to choose a cross-section of victims from different communities or from different regions, as a practical solution to what would otherwise be an unrealistic task. It is also important that the convicted individual is given the opportunity to have their counsel present during the pre-transfer meeting, and again this was particularly so in Erdemović's case as there was no precedent for him to rely on in understanding the process.

¹⁴² 'Mali: mais où ira Ahmas al-Mahdi?' *ABamako* (13 December 2016) <<http://news.abamako.com/h/147862.html>> accessed 31 May 2021.

¹⁴³ *Prosecutor v Erdemović* (Case Information Sheet) <https://www.icty.org/x/cases/erdemovic/cis/en/cis_erdemovic_en.pdf> accessed 31 May 2021.

¹⁴⁴ Information not publicly available but obtained while at the Mechanism in 2013-2015.

In Mali, the transfer to the UK means Al Mahdi's distance from his family is significant, and as such, he should have received the opportunity to discuss this with the Registrar before the transfer.

For all three courts, the decision designating the Enforcement State is made by the President, and not the Registrar (whose Office is usually the one tasked with coordinating outreach activities).¹⁴⁵ Thus, including the President in such a pre-transfer meeting would allow him or her to explain the factors taken into consideration when making the decision. There are a number of practical considerations such as where the meeting would be held and how it would be financed. Again, engagement should be understood as a core part of the court's mandate and funded accordingly. This does however have implications for the number of victims that can practically be invited to a pre-transfer, informative meeting, because it would be costly to pay the travel and expenses of victims from an affected State to the Netherlands or Tanzania. Alternatively, such a meeting could be held separately with the victims, allowing for greater victim participation because it would be organised in the regional office of the court, with the court paying for the cost of their Principals' travel.¹⁴⁶

In addition, it would be beneficial to allow victims the chance to participate in this decision-making process in writing. I discussed the advantage of written statements during sentencing in the first post-conviction stage, and such statements could also be useful at this second stage. It would have to be made clear to victims that they have an opportunity, with no obligation, to make any opinions they hold on the designation of the enforcement State in writing to the Registrar, who will transfer these statements to the President, before the decision is made. Should there be any costs incurred, these should be carried by the court, particularly for example the cost of translating the statements from local languages. There might also be a need for transcription for illiterate victims, and this possibility should be made clear to victims to encourage participation. Whilst the probative value of such statements should be decided on by the ICT, I would suggest that they be given less significance here than in the first post-

¹⁴⁵ ICC: Rules of Procedure and Evidence of the International Criminal Court (adopted by the Assembly of State Parties 3-10 September 2002) ICC-ASP/1/3 and Corr.1 Rule 199. ICTY: Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment (IT/137/Rev.1) 1 September 2009.- ICTR: Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment (23 September 2008). Mechanism: Practice Direction on the procedure for designation of the State in which a convicted person is to serve his or her sentence of imprisonment (MICT 2/Rev.1) 24 April 2014.

¹⁴⁶ A further alternative is virtual meetings, which would however be a highly impersonal manner to discuss such a sensitive topic and would also be impracticable considering the lack of widespread and reliable internet access for victims particularly across the more impoverished Mali and Rwanda.

conviction stage as courts are inherently limited in their choice of Enforcement States, relying on the willingness of States to enforce their sentences.

Substantive community and societal engagement during this post-conviction stage is somewhat more challenging. ICTs rely on the voluntary assistance of States to enforce their sentences, who are often reluctant to accept particular convicts, whether because they are high-profile or likely to cause friction in the prison of the Enforcement State, or due to the existence of political sensitivities in the State.¹⁴⁷ Nevertheless, these courts can and must make any such decisions public and widely disseminate them to relevant stakeholders. This is particularly important where the conflict-affected State expresses its desire to enforce the particular sentence or any individuals of its nationality. Serbia and Croatia, for example, have often expressed their desire to enforce sentences of the ICTY,¹⁴⁸ although this was not the case specifically with Erdemović, according to publicly available information.

As concerns Erdemović, I suggest that the case for not sending him to Bosnia and Herzegovina could easily have been made, considering the still unstable and ongoing peace process at the time of his sentencing. This is particularly the case given that he needed a protection service following his release from prison, as he was afraid for himself and family because of his guilty plea and assistance to the Prosecution.¹⁴⁹ Nevertheless, this practice of not sending individuals convicted by the ICTY and ICTR to a State from the former Yugoslavia and Rwanda, respectively, to serve their sentence has since become more questionable, in view of the fact that a number of cases have been transferred to a court in one of these countries to try individuals.¹⁵⁰ This discrepancy makes it all the more important for the Tribunals' Presidents to explain decisions because his/her silence leaves whole communities prey to local misrepresentations. The situation relating to Al Mahdi is somewhat particular because although the ICC has signed a bilateral agreement with Mali, Al Mahdi was transferred to the United Kingdom to serve his sentence. Accordingly, I suggest that the reasons behind not enforcing

¹⁴⁷ Thus, for example Radislav Krstić was sent to the United Kingdom of Great Britain and Northern Ireland, before being returned to ICTY custody after being stabbed by other inmates in the UK prison. This has been widely reported in the UK press, for example in 'Srebrenica general's attackers get life for revenge stabbing in prison' *The Guardian* (21 February 2011) <<https://www.theguardian.com/uk/2011/feb/21/srebrenica-general-revenge-prison-attack>> accessed 31 May 2021.

¹⁴⁸ See for example, 'Srbija će tražiti da haški osuđenici kaznu služe u Srbiji' *NI* (15 June 2019) <<http://rs.n1info.com/Vesti/a492091/Haski-osudjenici-da-sluze-kaznu-u-Srbiji.html>> accessed 31 May 2021.

¹⁴⁹ Holá and van Wijk (n 86) 110.

¹⁵⁰ Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (adopted on 11 February 1994 and last amended on 8 July 2015) IT/32/Rev. 50 (ICTY RPE) Rule 11*bis*.

his sentence in Mali despite the existence of an agreement should be explained to local stakeholders.¹⁵¹ Such an explanation could have pre-emptively dealt with questions to come from local stakeholders, and helped to defuse political tensions and grievances about the courts, furthering trust in the court and its transparency, which would have contributed to reconciliation.

Moreover, courts should give communities a chance to meet with officials from the Registry to ask questions and become better informed about the process, which should be organised in their communities and towns, during a townhall meeting, for example. As I suggested in the previous chapter, the court officials at the townhall could make a report on the outcomes of any such meeting, and the Registrar can report any questions or concerns raised therein to the President, for his or her information. This would enable genuine two-way communication of relevant information. In this regard, the security situation in Mali would again have to be considered, in view of the ongoing nature of the conflict. Where it would not be suitable for large gatherings, because of the difficulty of ensuring the safety and security of large numbers of people or the attention such gatherings might attract, gatherings with representatives of different communities could instead be arranged. Compared to the townhall meetings in the first post-conviction stage, these meetings would in particular bring together members of the media and mid-level actors, who could then disseminate information to their communities in a trickle-down effect.

Furthermore, political reconciliation can be advanced by engaging with the media, religious leaders and mid-level politicians, as an important and approachable section of the local stakeholder group. In Mali in particular, where religious leaders have sought to be included in national politics, it will be crucial to include them to ensure wider dissemination of the court's work and participation in the reconciliation process. Similarly, considering the highly influential nature of the media in Rwanda, it will be important to include media outlets and allow an opportunity to demonstrate that whilst the media in Rwanda were instrumental in inciting the genocide, it can also be used to promote reconciliation. As such, providing local media with information on transfers and encouraging discussions with mid-level politicians for

¹⁵¹ Accord entre la Cour pénale internationale et le gouvernement de la République du Mali concernant l'exécution des peines prononcées par la Cour (13 January 2012) ICC-PRES/11-01-12; Press Release : 'Mali becomes first African state to sign an agreement on the enforcement of sentences with the ICC' (20 January 2012) <<https://www.icc-cpi.int/Pages/item.aspx?name=mali+becomes+first+african+state+to+sign+an+agreement+on+the+enforcement+of+se&ln=en>> accessed 31 May 2021.

example, to explain the practice of the court in a given case, is an important engagement tool because it gives courts access to a much wider audience than they would have otherwise and a chance to also utilise the mode of communication so influential in the genocide for encouraging peace and reconciliation in the country. Such mid-level actors are particularly crucial where top-level politicians will not want to be seen to be cooperating with the tribunal, such as in Croatia and Serbia for example.¹⁵² Notably, these opportunities could also be used as a chance to brainstorm culturally sensitive and further contextualised ways to engage with actors at other levels, particularly where the local context is a complicated one such as in Mali.¹⁵³

Post-conviction stage 3: Deciding the applicable prison regime

The third post-conviction stage is deciding the applicable prison regime. As suggested in the previous chapter, this is a practice of ICTs that local stakeholders know the least about,¹⁵⁴ and yet it is one of the areas of its work that they criticise the most.¹⁵⁵

In Erdemović, Nahimana et al. and Al Mahdi, all of the individuals are serving or have served their sentences in relatively comfortable conditions – in Norway, the UK and a new prison facility in Benin, which stands in stark contrast to the conditions under which some victims might be living, particularly in Rwanda and Mali. Considering the strong feelings of collective victimisation in the former Yugoslavia and Rwanda of a whole community at the hands of Erdemović and Nahimana et al. (and the ethnic context in which their crimes were committed), this preferential treatment of the convicts is a further source of tension between communities where it appears the ICT is not acting impartially, and further entrenching the division between communities. Accordingly, the ICTY and the ICTR should have, at the very least, explained the conditions of imprisonment and why the court is obliged to respect minimum standards of imprisonment, even where these might be more comfortable than the living conditions of some victims.¹⁵⁶ This in turn, would build trust in the court and its transparency, although it can do

¹⁵² In the case of Croatia and Serbia for example, the political leaders continue the divisional nationalist rhetoric used prior to and during the war, and as such in order to save face and ensure they have the nationalistic vote in future elections, often delayed or refused to cooperate with the tribunal, particularly in handing over documents required as part of a trial or individuals for trial.

¹⁵³ Brouneus (n 74) 34.

¹⁵⁴ Holá and van Wijk (n 86) 119.

¹⁵⁵ Nancy Amoury Combs, 'Prosecutor v. Biljana Plavšić: Case No. IT-00-39&40/1-S' (2003) 97 AJIL 929, 936; Klaus Bachmann and Aleksandar Fatić, *The UN International Criminal Tribunals: Transition Without Justice?* (Routledge 2015) 93; Roland Kostic, *Ambivalent Peace: External Peacebuilding, Threatened Identity and Reconciliation in Bosnia and Herzegovina* (Uppsala University 2007) 268.

¹⁵⁶ United Nations, *Standard Minimum Rules for the Treatment of Prisoners* (30 August 1995); UNGA, *Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment* (9 December 1988)

nothing about the discrepancy in living conditions. Such explanations would at least provide context to the court's work for the victims and communities, thereby explaining certain decisions not as intentional favourable treatment of criminals over victims, but as an institution with its own limits and standards to abide by.

In the case of the ICTY, where there are convicts from different ethno-nationalist groups, it would be important for the Tribunal to explain why discrepancies between prison regimes exist. Specifically, in order to address the background reasons of the conflict in the former Yugoslavia, the Tribunal must explain that such discrepancies are not evidence of preferential treatment of one ethnic group over another but an example of the Tribunal's reliance on different States for enforcement. Similarly, the better conditions of imprisonment in Benin and Mali compared to the conditions of prisons in Rwanda (where national convicts are housed) might further the veracity of claims that Tutsis are more privileged than the Hutu, in victims' eyes, seeing the situation as "unfair."¹⁵⁷ It will be crucial for the ICTR to address this proactively by providing as much as detail and explanation as possible on prison conditions and the reasons therefor.

Similarly, in order to promote community or societal reconciliation, field visits should be conducted to explain applicable prison regimes. In the case of Nahimana et al. and the ICTR, this would not be difficult because the majority of ICTR prisoners serve their sentences in Mali or Benin, meaning that only the authorities of two States would need to be present. In contrast, for the ICTY whose convicts are more equally distributed among Enforcement States across Europe, this would be a more difficult activity to organise in terms of ensuring officials from all of the different Enforcement States participate. In such a case, meetings attended only by court officials and local stakeholders might be more reasonable. Moreover, where such field visits are cumbersome, in terms of having to make several field visits that are rather geographically distanced, holding one or two such meetings and ensuring it is transmitted through local media channels is an option. Where there are particularly large numbers of interested individuals, community leaders could participate on behalf of their communities. Where even this is not possible because of security considerations such as in Mali, more passive

UN Doc. A/RES/43/173; UNGA, *Basic Principles for the Treatment of Prisoners* (14 December 1990) UN Doc. A/RES/45/111.

¹⁵⁷ Tracy Isaacs, 'International Criminal Courts and Political Reconciliation' (2016) 10 *Criminal Law and Philosophy* 133, 139.

engagement should be undertaken through information sharing on the prison regime in very broad terms in printed media and on the radio.

Post-conviction stage 4: Deciding on early release

I turn now to the final and often most important post-conviction stage in terms of impact on peace and reconciliation: deciding on the early release of a convicted individual. In the three conflict-affected States focused on in this chapter, early release from imprisonment is conditional.¹⁵⁸ In view of this, it can be difficult for these local stakeholders to understand the process and the notion of early release as practiced by the ICTs. To minimise negative reactions at discovering in the local news that an individual has been released, the President and his Office should meet at least with victim groups to explain the decision and how it is made, recognising that whilst they will very likely still not support the release, they will at least understand the reasons as explained to them face to face. The court would at least demonstrate its commitment to local stakeholders, and explaining the limits of its work and the procedures it is bound to follow, the constrictions with which it has to work and the factors it takes into consideration when making a decision. This in turn would leave the victims less prone to biased media reports on the release.

At an individual level, where there is a recognition of guilt and signs of rehabilitation (such as is the case with Erdemović and Al Mahdi), mediation or conferencing between individual victims and convicted individuals is to be encouraged. Their guilty pleas and apologies to the victims could be a promising sign that the content of this sort of meeting need not necessarily be harmful to the victims. As I argued in Chapter V, such dialogue facilitates the building of trust where there is no denial of guilt and can further sympathy between the offender and the victim. In contrast to the mediation suggested in the first post-conviction stage, mediation at this stage would be aimed at testing whether the convicted individual has been rehabilitated and could reintegrate into society peacefully. Conferencing would offer the convicted individuals – Erdemović and Al Mahdi - an opportunity to demonstrate that they indeed do not hold ethnic or religious hatred of others but that the context of the conflict holds other reasons other than ethnic or religious differences. I also suggested in Chapter VI that where victims are

¹⁵⁸ Mali: Code de procédure pénale (Loi n°92-020 du 23 septembre 1992) <<http://ilo.org/dyn/natlex/docs/ELECTRONIC/64578/73898/F-784451298/MLI-64578.pdf>>. Yugoslavia: Krivici zakon Savezne Republike Jugoslavije (n 125). Rwanda: Code de procédure pénale (Official Gazette n° 27 of 08/07/2013) <<http://www.droit-afrique.com/upload/doc/rwanda/Rwanda-Code-2013-procedure-penale.pdf>> accessed 31 May 2021.

interested in the case, yet unprepared to meet with the convicted individual, a representative could do so on their behalf, with the victim listening in from another room.¹⁵⁹ Such an opportunity allows a type of conferencing minus the confrontational element, would make communication easier to envisage. In Erdemović's case (as he appears to have been in a protection programme upon release), this type of contact between his lawyer and the victim or another individual could have been organised, thus allowing the victims and the convicted individual a chance at mediation or conferencing without endangering the convicted individual's identity.

Whilst engagement through conferencing or mediation should have been considered by the ICTY and should still be considered by the ICC, it does not hold as much reconciliatory potential in the ICTR case because Nahimana refused to accept his responsibility. Mediation would also have been more challenging in a case such as Nahimana et al. case, for practical reasons. As Nahimana is not accused of killing anyone directly, but for the broadcasts from RTLMC, the victim group is bigger and more diverse, which would make it difficult to delineate who is a direct victim and to ensure the number of victims invited to mediation do not turn it into a townhall meeting because of the volume of people invited. This is something that courts should also take into consideration when planning engagement with local stakeholders in future cases.

Community level reconciliation can similarly be promoted by testing the convicted individual's rehabilitation and ability to reintegrate into society through an advisory board which would advise the President on the suitability of early release. In Mali, it would be a good way of recognising the complex nature of the conflict and the inability of the court to address it alone. Moreover, the board would need to include religious leaders, considering their pertinence in the country, and include individuals from different ethnic communities and living both in the North and South. In such a way, the ICC would be addressing the long-term marginalisation of the North, and North-South divide, and the importance of religion in the outbreak of the conflict. Similarly, in the former Yugoslavia, in order to address the background reasons of the conflict, it would be crucial to include individuals from different ethnic and religious backgrounds. In Rwanda, the inclusion of mid-level actors such as media and community leaders would give a role to individuals who in similar positions were instrumental during the genocide.

¹⁵⁹ Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' (2017) 5(2) Restorative Justice 198, 204.

These advisory boards would be beneficial in all cases, but particularly pertinent where the convicted individual will return to the conflict-affected State upon release. This is neither the case in Erdemović nor in Nahimana et al. Upon release, Erdemović did not return to Bosnia and Herzegovina, having entered the ICTY's witness protection programme. Whilst it is unclear where Nahimana settled upon his release, it is unlikely that he returned to Rwanda, considering the repressive political climate in Rwanda and the change in power since the genocide, which has made it difficult for *génocidaires* (or indeed individuals found innocent by the ICTR) to return to the country.¹⁶⁰ Indeed, since individuals convicted by the ICTR are often unsuccessful in their asylum applications to other countries, many are forced to live in a safe house in Tanzania.¹⁶¹ As Al Mahdi has yet to become eligible for early release, it is impossible to know whether he will return to Mali upon release, and as such, the ICC should prepare the conflict-affected society in case he does return to North Mali.

In sum, through these three case studies, I have emphasised the commonalities and factors that ICTs (present and future) should take into consideration when planning engagement with local stakeholders in other cases and conflicts. Among such factors is the pertinence of involving ethnic or religious leaders where ethnicity or religion are key background factors of the conflict; whether there is an admission of guilt and evidence of rehabilitation; whether certain court decisions have proven contentious locally; and the security situation in the State, to name but a few. All of the above discussed engagement methods should be undertaken as early as possible and ideally at the start of each post-conviction stage, although it will be important for courts to commit to engaging with local stakeholders throughout the enforcement of the sentence, and to a lesser extent, even upon release of the convicted individual. Engagement after the release of the convicted individual is particularly important in terms of responding to incorrect local media reports, which the court should react to publicly in order to correct the information. This section has tested the applicability of my framework to three specific cases but the considerations in suggesting engagement methods will be common to many conflicts and ICTs, present and future, and as such, I have also demonstrated the types of factors other courts should take into consideration.

¹⁶⁰ Holá and van Wijk (n 86) 130.

¹⁶¹ See section 1.3 of Chapter III on this.

Conclusion

This chapter has emphasised the significance of context to understanding conflict and contributing to peace and reconciliation and examined the different causes of the conflicts in the former Yugoslavia, Rwanda and Mali. These conflicts are very different, ranging from international to non-international armed conflicts, with the role of the State markedly diverging. Nevertheless, the discussion on rationalisations of conflict demonstrated points of commonality, including marginalisation, politicisation of social identifiers, and particularly in the former Yugoslavia and Rwanda, the pertinence of the media in disseminating propaganda and scaremongering. These commonalities between the conflicts paved the way for suggesting that peace and reconciliation could be promoted through the framework I suggested in the preceding chapter.

Accordingly, I demonstrated how the engagement framework with local stakeholders at the post-conviction stage of ICTs could be implemented in three specific cases - that of Erdemović, Nahimana et al., and Al Mahdi. The aim of the chapter was to illustrate the different concerns, priorities and engagement activities relevant to each of the three cases of the conflict-affected States, and how my framework could advance peace and reconciliation, on the basis of known shortcomings of the ICTY, ICTR and the ICC in outreach efforts to date. These are only three examples, and the discussion is of an illustrative nature because each conflict and each conviction will be different and require the court to adapt its engagement strategy to be more relevant to the conflict-affected society. Indeed, this chapter has argued that there are often common denominators between conflicts, further supporting the view that a single, generalised normative engagement framework should be used by all ICTs. The intention in discussing these three particular cases was to explain the factors that need to be taken into consideration, and with this in mind, how engagement should be undertaken in the future. Whilst the Mechanism or ICC (in Mali) no longer have an unprecedented opportunity as they are both well underway in their caseload, their work is far from over, meaning they can still engage more actively and comprehensively with their local stakeholders in future cases. This framework has provided some of the most relevant considerations for these and other courts in undertaking all-important engagement activities at the post-conviction stage. In order to maximise the potential of the engagement framework, the next step is consultation with ICTs and testing of the framework in current cases, where the impact of engagement could be measured without the benefit of hindsight.

CONCLUSION

This thesis has considered how international criminal courts and tribunals can be more effective in promoting local peace and reconciliation specifically as part of their post-conviction practices.

There is a recent proliferation of ICTs as well as hybrid or internationalised courts and tribunals, many of them with a conflict-specific mandate, although we also have a permanent International Criminal Court since 2012. The ICC's predecessors, the ICTY and ICTR, along with the International Mechanism for Criminal Tribunals, have sentenced well over 100 individuals to a sentence of imprisonment.¹ These courts have made reference to grandiose aims of contributing to local peace and reconciliation through their focus on individual criminal responsibility and punishment of individuals. Whilst maintaining that enactment of retributive justice would contribute to local peace and reconciliation, these courts have also made extra-judicial efforts with their local stakeholders to promote their work and encourage local acceptance – intending to enhance these courts' sociological legitimacy. Yet, the *ad hoc* tribunals have proven ineffective in making a positive impact on conflict-affected societies in the former Yugoslavia and Rwanda, where the societies are unconvinced by the Tribunals' relevance, and in the case of the ICTY continue to deny the facts established by the Tribunal. Despite the many years it took to negotiate the Rome Statute of the International Criminal Court, the international community has proven no more able to find a solution for ICJ to garner sociological legitimacy among local stakeholders. As a result, despite the laudable objectives of ICJ, international criminal courts and tribunals have proven ineffective in achieving their self-imposed objectives.

Against this backdrop, this thesis has set out to answer the following questions:

1. What is the current position of international criminal justice, as evidenced by modern international criminal courts and tribunals, as regards contributing to local peace and reconciliation?
2. What values should underpin international criminal justice's attempts to contribute to local peace and reconciliation?

¹ See 'ICTY Key Figures of the Cases' <<https://www.icty.org/en/cases/key-figures-cases>>; 'ICTR Key Figures of the Cases' <<https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf>> accessed 31 May 2021.

3. How can these values be realised in the post-conviction practices of international criminal courts and tribunals, in order for these courts to contribute effectively to local peace and reconciliation?

Part One of this thesis laid out the groundwork by discussing the current account of ICJ and the purposes behind it, from historical examples in the Nuremberg and Tokyo Tribunals to modern examples which have been the focus of this thesis - the *ad hoc* tribunals and the ICC - , focusing particularly on the position of modern ICTs with regards to contributing to local peace and reconciliation. In this regard, I commenced with a discussion of domestic criminal law and justice on which ICJ is based. ICJ, much the same as domestic criminal justice, is based on the punishment of individuals – retributive justice. In view of the need for ICJ’s justice to be exemplary, notions of restorative justice have been included, particularly by the ICC where victims are given unprecedented participatory rights. Modern ICTs in particular have borrowed from the purposes of domestic criminal law and justice, with the important distinction that ICTs have a broader, more disparate constituency, meaning they intend to have an impact on global peace and security and local peace and reconciliation for conflict-affected societies. Not only are these self-imposed objectives of the *ad hoc* tribunals and ICC, but they are inherent to international criminal justice, as without intending to restore peace for the conflict-affected society, ICJ cannot be a relevant response to mass conflict.² Domestic criminal justice similarly functions in order to ensure peaceful coexistence in respect of the society’s values; no less can be expected of ICJ.

Whilst Chapters I and II determined that ICJ must serve both its international and local stakeholders and contribute to global peace and security and local peace and reconciliation, Chapter III demonstrated the *ad hoc* tribunals’ and ICC’s failure to convince their local stakeholders. International sentences are often deemed too lenient, prison conditions too comfortable and the practice of early release particularly detrimental to the objective of contributing to local peace and reconciliation through post-conviction practices.³ All of this is

² Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers 2008) 12. I have briefly argued this point regarding the ICTY in particular in Dejana Radisavljević, ‘The ICTY and the Balancing Act: Reconciliation as Rehabilitation’ in Juan Pablo Perez-Leon-Acevedo and Joanna Nicholson (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing their Rights* (Routledge 2020) 128.

³ On sentencing see: Mirko Klarin, ‘The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia’ (2009) 7 JICJ 89, 90; Sam Szoke-Burke, ‘Avoiding Belittlement of Human Suffering: A Retributivist Critique of ICTR Sentencing Practices’ (2012) 10 JICJ 561, 563; Barbora Holá and Hollie Nyseth Brehm, ‘Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts’ (2006) 3 Genocide Studies and

evidence of ICTs' lack of sociological legitimacy from their local stakeholders, which hinders their ability to achieve their macro-level objectives. One of the reasons behind this lack of sociological legitimacy is a failure to engage fully with local stakeholders, with the *ad hoc* tribunals and ICC failing to see outreach as part of their core mandate.⁴ Communication with local stakeholders remains an afterthought, conducted in a piecemeal fashion with little or no contextualisation to the society or types of violence committed. The lack of sociological legitimacy has had an impact on these courts' ability to impact positively upon conflict-affected societies and local peace and reconciliation. Chapter IV in particular focused on the dominant responses to this legitimacy challenge, ranging from calls to reconceptualise ICJ from a restorative perspective to suggestions for limiting the macro-level objectives assigned to ICTs. I have argued that neither of these suggestions fully capture ICJ's purpose: to contribute to local peace and reconciliation as a response to mass conflict, through the enactment of punishment on individuals. Thus, in response to these different suggestions, I have argued that neither a wholly restorative reconceptualisation of ICJ nor a view of their work from a strictly retributive manner would be appropriate responses. As ICTs are courts of law, and this thesis' focus has been on how to make ICTs more effective in achieving their objectives, I have rejected ideas calling for a replacement of recourse to ICJ, with Truth and Reconciliation Commissions, for example. Nevertheless, ICTs *must* contribute to local peace and reconciliation if they are not to endanger global peace and security. At the same time, they must also respect the rights of the offender, balancing his/her rights to a fair and speedy trial against the need for ICTs to enhance their sociological legitimacy in relation to their work and

Prevention: An International Journal 59, 77. On enforcement see: Nancy Amoury Combs, 'Prosecutor v. Biljana Plavšić: Case No. IT-00-39&40/1-S' (2003) 97 AJIL 929, 936; Roland Kostic, *Ambivalent Peace: External Peacebuilding, Threatened Identity and Reconciliation In Bosnia and Herzegovina* (Uppsala University 2007), 268; Tracy Isaacs, 'International Criminal Courts and Political Reconciliation' (2016) 10 Criminal Law and Philosophy 133, 139. On release see: Jonathan H Choi, 'Early Release in International Criminal Law' (2014) 123 Yale Law Journal 1784, 1788; Barbora Holá, 'Early Release of ICTR Convicts: the Practice Beyond the Outrage' *Justice Info* (5 July 2019) <<https://www.justiceinfo.net/en/tribunals/ictr/41861-early-release-of-ictr-convicts-the-practice-beyond-the-outrage.html>>; Kurekura Nahimana na Rukundo ni ugukemukira abarokotse Jenoside-IBUKA' *Kigali Today* (20 December 2016) <<https://www.kigalitoday.com/amakuru/amakuru-mu-rwanda/article/kurekura-nahimana-na-rukundo-ni-uguhemukira-abarokotse-jenoside-ibuka>>; 'U Rwanda rwamaganye irekurwa rya Rukundo na Nahimana bahamijwe ibyaha bya Jenoside' *Umuryango* (16 December 2016) <<https://umuryango.rw/amakuru/mu-rwanda/ubutabera/article/u-rwanda-rwamaganye-irekurwa-rya-rukundo-na-nahimana-bahamijwe-ibyaha-bya#!>> accessed 31 May 2021.

⁴ Frédéric Mégret, 'The Legacy of the ICTY as Seen Through Some of its Actors and Observers' (2011) 3 Goettingen Journal of International Law 1011, 1038; Vasuki Nesiah, 'Local Ownership of Global Governance' (2016) 14 JICJ 985, 1003; Rachel Kerr, 'Peace through Justice? The International Criminal Tribunal for the Former Yugoslavia' (2007) 7 (3) Southeast European and Black Sea Studies 373, 379; Sara Parker, 'The International Criminal Tribunal for the Former Yugoslavia: The Promise and Reality of Reconciliation in Croatia' (2009) 15 (2) Peace and Conflict Studies 80, 95; Philipp Schulz, 'Justice seen is Justice done? - Assessing the Impact of Outreach Activities by the International Criminal Tribunal for Rwanda' (2015) 21(74) Croatian International Relations Review 63, 76.

sentences in particular.⁵ This paradox of on the one hand, ensuring normative legitimacy and not treating offenders as a means to an end, and on the other, needing to further the macro-level objectives of ICTs through their imposition of punishment creates a fundamental challenge for ICJ.

Part Two of this thesis focused on responding to this challenge and answering the second and third questions outlined in the Introduction to this thesis and above. Firstly, I have considered the values that should underpin ICJ's attempts to contribute to local peace and reconciliation and how these values can be realised by ICTs specifically at the post-conviction stage. As regards the second question on the meaning and values of peace and reconciliation, in Chapter V I suggested a multi-faceted conceptualisation of these terms, ranging from negative peace – peaceful coexistence devoid of interaction – to positive peace – requiring justice, cooperation and trust.⁶ Often in the immediate aftermath of conflict, peace will be more negative than positive, but the two are interrelated meaning that peace should be seen as a continuum. Reconciliation is connected to positive peace, as it essentially means a rapprochement between previously warring parties, but it does not only mean a deep healing of relations. Reconciliation, like peace, has different dimensions and can be thin or thick, at the individual or collective level, and must be seen as a dynamic process and goal, rather than just an end state of affairs.⁷ As positive peace and reconciliation are concerned with responding to structural violence – marginalisation and discrimination of specific communities – they are closely connected with justice and accountability. When understood as a dynamic process, ICTs can contribute to thinner versions of reconciliation, focusing on collective reconciliation rather than individual deep healing. I have suggested that these values of peace and reconciliation must guide ICTs in attempting to have an impact on the ground. In making my argument, I have not sought to argue that ICJ is the only or even best response to mass conflict, but that ICJ can and must make an important contribution to local peace and reconciliation.

In particular, I have argued that ICJ furthers two specific components of reconciliation: establishment of the truth and restoration of trust. Specific facets of ICTs' work contribute to

⁵ Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21(4) LJIL 925, 939; Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2006) 43 SJIL 39, 82; Sergey Vasiliev, 'International Criminal Trials: A Normative Theory' (PhD thesis, Amsterdam Center for International Law 2014) 170.

⁶ Johan Galtung, 'Peace, and Peace Research' (1969) 6(3) Journal of Peace Research 167, 183; Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (SAGE 1996) 14.

⁷ See section 1.2 of Chapter V for a discussion on the meaning, degrees and levels of reconciliation.

these two components of reconciliation: giving victims a forum to have their voices heard; individualising guilt; and, separating the offenders from the conflict-affected society. As these are contributions specific to criminal justice, they thereby give ICJ a clear role in contributing to local peace and reconciliation. As ICJ is premised on retributive justice, the punishment of individuals must feed into these objectives to promote peace and reconciliation.⁸ In this regard, I have argued that sentencing's contribution comes from its stigmatisation of the crimes and rehabilitation of the convicted individual. The former is vital both to restore the balance between victims and offenders and to give the victims a new sense of worth,⁹ whilst the latter is important for the entire society by ensuring the offender is prepared for their peaceful reinsertion into society.¹⁰

However, I have argued throughout this thesis that these contributions of ICJ to local peace and reconciliation are contingent on local acceptance: sociological legitimacy is crucial to the effectiveness of ICTs to achieve their macro-level objectives.¹¹ Without sociological legitimacy, the facts established by ICTs would not be internalised, and the expressive function of international punishment would have failed. In response to this, and having provided comprehensive definitions of peace and reconciliation as macro-level objectives of ICTs, I turned to answering the third question which has been the focus of this thesis: how the values of ICJ can be realised in the post-conviction practices of international criminal courts and tribunals, in order for these courts to contribute effectively to local peace and reconciliation.

In response to my third research question, I have suggested that these values can be realised through greater engagement with local stakeholders to encourage local ownership of ICJ and ICTs' post-conviction practices in particular. I have argued for greater engagement with local stakeholders for two reasons. Firstly, one of the greatest failures of the *ad hoc* tribunals and ICC has been their failure to recognise the impact of post-conviction practices on the collective conflict-affected society. Secondly, I have argued that reconciliation requires interaction and dialogue. ICTs are important dialogue-facilitators, through which they can enhance not only

⁸ Róisín Mulgrew, *Towards the Development of the International Penal System* (CUP 2013) 215.

⁹ Colleen Murphy, *A Moral Theory of Political Reconciliation* (CUP 2010) 184.

¹⁰ Joel Meyer 'Reflections on Some Theories of Punishment' (1968) 59(4) *Journal of Criminal Law and Criminology* 595, 597.

¹¹ Daniel Bogdansky, 'Legitimacy in International Law and International Relations' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 336; Hitomi Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) 4(2) *Amsterdam Law Forum* 3, 15; Lisa Maria Dellmuth and Jonas Tallberg, 'The Social Legitimacy of International Organisations: Interest Representation, Institutional Performance, and Confidence Extrapolation in the United Nations' (2015) 41 *Review of International Studies* 451.

their sociological legitimacy but also prove better able to promote local peace and reconciliation. By rethinking how they interact with local stakeholders and intensifying engagement to include this stakeholder group in processes of ICJ they would encourage local ownership of ICJ, and encourage acceptance even when they inevitably make unpopular decisions.¹² Engagement allows an ICT to become a reality to its local stakeholders, giving it a “human face” that they can relate to, particularly at such an important stage of its work.¹³ Furthermore, by encouraging inter-group dialogue between previously warring communities or societies, ICTs would be working towards the prerequisites for sustainable peace and reconciliation.

In order to make their engagement as relevant to the conflict-affected society as possible, I have argued for its contextualisation based on the types of violence committed and the root causes of the conflict. Based on these two factors, ICTs can decide with whom to engage and how to ensure that they are not viewed as distanced courts unconcerned with the context in the society and its needs. To this end, I have formulated a normative framework for engagement with local stakeholders at each of the four post-conviction stages of ICTs: imposition of the sentence, designation of an Enforcement State where the sentence will be served, deciding on the prison regime applicable to international offenders; and, deciding whether to grant early release from imprisonment. Organised around these four post-conviction stages, I have suggested specific activities that ICTs should engage in so as to encourage individual, community, societal and political reconciliation. Finally, I demonstrated the applicability of my framework by testing it against three specific cases at the *ad hoc* tribunals and the ICC: Prosecutor v Erdemović (ICTY), Prosecutor v Nahimana et al. (ICTR) and Prosecutor v Al Mahdi (ICC). In applying my normative engagement framework to these three cases, I have enjoyed the benefit of hindsight, but the discussion has brought up different factors that will be relevant to other cases, present and future. By demonstrating the applicability of my framework to these three specific cases, which differ substantially in the times of crimes of the individuals, their profile, the conflicts in which the crimes were committed and the ICT prosecuting and sentencing them, I have demonstrated the versatility of my framework. This in turn means that

¹² Mark A Pollack, ‘The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence’ in Harlan Grant Cohen, Nienke Grossman, Andreas Follesdal, Geir Ulfstein (eds), *Legitimacy and International Courts* (CUP 2018) 145.

¹³ Victor Peskin, ‘Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme’ (2005) 3 JICJ 950, 954.

a normative engagement framework for different ICTs is a legitimate endeavour which has the potential to bear fruit if applied consistently by ICTs.

In conclusion, the question of ICJ and peace and reconciliation, the so-called ‘peace v justice’ dichotomy, is often understood in rather binary terms: either ICTs cannot promote peace and reconciliation and therefore should not attempt to do so; or, on the contrary, ICJ must have a local impact as a response to mass conflict and must be reconceptualised along these terms. In response, this thesis has set out to make a practical contribution to the debate by suggesting a pragmatic response to the challenge faced by ICTs, at the same time recognising the need to have a restorative impact on the conflict-affected society whilst acknowledging the limits of a court of law based on retributive justice which must focus on the individual offender. In writing this thesis I have attempted to build on ICJ research and make an original contribution thereto by conceptualising an unprecedented normative engagement framework linking ICJ’s macro-level objectives with its focus on the offender and his/her punishment for violations of ICL. To do so, I have both drawn on the abundance of existing research on ICJ and gone beyond existing research in my proposed solution to the problematic shared by the *ad hoc* tribunals and the ICC to have a positive impact on conflict-affected societies. I hope that this research contributes to ICJ research and to the discussion on how ICTs can be more effective, rather than questioning their existence. I would welcome further research to test the applicability and suitability of this normative engagement framework. One such avenue for further research could be discussions with ICJ practitioners in different ICTs on the suitability of such a framework, or even using a future ICT for testing the engagement framework to ascertain its suitability to ICJ. Although a challenging task, institutions of ICJ have little choice but to enhance their sociological legitimacy through some form of engagement with their local stakeholders if they are to be a relevant response to mass conflict.

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