

BRIEFING PAPER

Civil Society Perspectives on Fact-finding and the International Criminal Court

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During 2015, the Open Society Justice Initiative and local civil society groups conducted global and regional consultations and discussions on the best practices regarding information gathering by NGOs in the context of Rome Statute crimes. This paper sets out the key regional findings and cross-regional themes identified during these consultations.

Introduction

Civil society plays an important role in the implementation of the mandate of the International Criminal Court (“ICC” or “the Court”). The President of the ICC recognized this during the event commemorating International Justice Day this year, by highlighting the benefits which accrue to the Court as a result of maintaining regular dialogue with this important category of stakeholders.¹

Civil society organizations (“CSOs”) greatly contribute to bridging the gap between the Court and local communities, which is particularly important for the ICC given its physical and cultural distance from the affected communities. Other support has included supporting outreach activities, providing assistance with identifying and liaising with victims and witnesses, and providing advice on political, social, cultural or domestic legal issues in the concerned countries.

The relationship between civil society and the ICC has been especially crucial in the context of gathering information relating to alleged Rome Statute crimes. However, the extent to which non-ICC staff can conduct fact-finding and documentation for ICC purposes is still a sensitive matter because it may impact on perceptions of the Court’s independence.

Civil society actors document abuses committed in their communities for a variety of purposes, using various standards and methodologies. The ICC framework, however, places particular methodological parameters around such documentation efforts. The Court’s jurisprudence has addressed the challenging dynamics of this fact-finding process and the relationship between the ICC and civil society, including the issue of intermediaries, and the extent to which non-governmental organization (“NGO”) reports can be utilized by the Office of the Prosecutor (“OTP”). However, key aspects related to the dynamic between the ICC and CSOs remain to be addressed.

The Open Society Justice Initiative is working with local partners to explore the extent to which basic minimum standards can be identified to facilitate the engagement between the ICC and NGOs on fact-finding. These standards are being compiled into a set of proposed Guidelines for NGOs on Fact-Finding. Over 2015, OSJI and local civil society groups conducted global and regional consultations and discussions on the best practices regarding information gathering by NGOs in the context of Rome Statute crimes. This paper sets out the key regional findings and cross-regional themes identified during these consultations.

¹ http://www.icc-cpi.int/iccdocs/presidency/150626_Remarks_at_event_marking_International_Justice_Day.pdf

Feedback from 2015 Consultations by Region

Africa

The Africa consultations highlighted the diverse objectives behind civil society involvement in documentation. These include: the need to contribute to a historical record; to understand conflict patterns; to provide information to the general public; to promote dialogue with political authorities; to guide government laws and policies; to contribute to and support victim empowerment initiatives; to pursue reparations for victims; and to pursue prosecution of perpetrators of serious crimes before competent courts at national, regional or international level.

Depending on the context, fact-finding can serve different purposes, and may not necessarily be restricted to gathering evidence of the purpose of prosecuting individuals at the ICC. Civil society actors expressed the need for the ICC to recognize that NGOs have mandates which are broader than cooperation with the OTP, and NGOs must therefore decide the terms of their engagement with the ICC.

From accounts provided by civil society actors involved in documentation, it is apparent that at the time of commencing the documentation process, those involved are not always committed to one particular end-use of the data. Their primary goal is first to collect information; often decisions on how the information will be used are made at a later stage in the process. The decision on the use of information gathered on potential Rome Statute crimes is guided by numerous factors which may include political and legal developments as well as the restrictions that local actors may face. It is important to note, therefore, that seeking legal accountability is not necessarily a primary goal at the time civil society organizations begin their documentation work.

With some States alleging that civil society acts in cahoots with courts such as the ICC, it is particularly important to recognize that civil society functions independently. Although the court and civil society groups may share the objective of seeking accountability, it must be recognized and respected that NGOs are committed to their own mandates and responsibilities towards their communities. NGOs and victims are not aligned with any political interest other than the commitment to attain justice, and this is the sole motivation behind decisions to share their fact-finding information with judicial institutions such as the ICC.

Civil society actors in the region have had the highest level of interaction with the ICC given that the majority of the court's active cases originate from the African continent. The challenges faced by NGOs must be acknowledged and addressed by the ICC, particularly in relation to security, protection, and financial costs of documentation, within the parameters of independence and neutrality, as mandated by the ICC's codes of conduct. With respect to protection issues, some NGOs highlighted security challenges that they have faced as a result of interacting with the Court, and the limited assistance provided by the ICC.

In addition, some of the documentation reports submitted to the OTP were not used despite the time and effort dedicated to the documentation process by the relevant NGOs. These frustrations come in the wake of a deteriorating relationship between African NGOs and the ICC due to several on-going challenges. These include the lack of adequate consideration of the support provided by intermediaries; increasing disappointment about the outcome of

cases and investigations; and the lack of concrete impact in situation countries. All these issues have negatively impacted on civil society's willingness to actively contribute to the Court's work in certain situation countries.

Asia-Pacific

Civil society groups in the region are active in documenting human rights violations at an advanced level. There are regional networks of NGOs developing databases and other means of coordination around fact-finding and human rights litigation. However, currently there is limited awareness of international criminal law, in particular the basic minimum standards for fact-finding. Some academic institutions in the region are strong on teaching the substantive law, but there are only preliminary efforts to translate academic knowledge into practical fact-finding and litigation techniques. Civil society expressed the need for guidance on the gravity threshold of crimes under the Court's jurisdiction, and on ICC evidence standards, as well as specific training in the fields of international criminal law and international humanitarian law.

The central point of concern in the region relates to the lack of engagement by the ICC. Although the absence of Rome Statute ratifications or cases before the ICC may appear to limit the feasibility of the ICC to engage, civil society actors indicated that the Court still remains relevant to their accountability efforts. Some NGOs identified a direct correlation between interactions from the ICC, either through official visits to specific countries or the region more generally, and the ability for local groups to invoke international criminal law in their efforts to attain accountability.

During the consultations there was agreement on the positive impact that engagement with the ICC could have with respect to promoting complementarity at the national level. Unlike some prior situations before the ICC, the "peace versus justice" debate could operate in favor of international involvement in accountability, since the ICC would empower national authorities to rely on the ICC as an independent arbitrator to address accountability, which previously has been sacrificed in the process of political negotiations around peacebuilding. Additionally, several civil society representatives expressed hope that the ICC could provide support to contexts where the national justice system is not currently fulfilling its national accountability responsibilities. To this extent, there was a unique sense of appreciation of the ICC in the Asia-Pacific region, and civil society actors were looking forward to the opportunity to learn more about the court and the methodologies of Rome Statute operations, including basic minimum standards for fact-finding.

Europe

The ICC is considered to be a useful tool in the efforts to attain accountability within the region. Although civil society groups are actively engaged in compiling information, there is much need for guidance on the means of documentation which are relevant for Rome Statute crimes. In particular, guidance is needed on how to compile and assess information relating to policy or modes of liability. NGOs indicated that full participation with ICC processes is only feasible once the full context of proving an international crime is understood. To this extent, there cannot be a limited "leads only" approach to information gathering, particularly given that local NGOs are also seeking to build cases for other forums. The potential for capacity building with respect to the methodologies of building cases under international criminal law is a key potential contribution of the ICC. However, local actors who have engaged with ICC representatives indicated that the ICC Intermediaries Guidelines were mentioned in passing, but the parameters relating to protection and support were not discussed in detail. Such

sharing of information on the ICC Intermediaries Guidelines is not only mandated by the Guidelines themselves, but also is essential to ensuring fully informed consent of local groups engaged in the ICC process.

Latin America

Civil society organizations from the region have developed a strong movement in favor of the right to truth, justice and reparations following the military dictatorships from the 1970's to the 1990's. Litigation before the Inter-American system for human rights has played a key role in this regard, as both the Inter-American Commission and the Inter-American Court have made innovative findings on States' obligations to investigate human rights violations, victims' rights to truth especially following the massive cases of disappearances in different countries, and comprehensive reparations measures. Organizations from the region interact with complex and advanced domestic legal systems. Yet, many NGOs mistrust the respective State and claim that the legal system is sometimes used to avoid justice or to target organizations that act in support of accountability.

Many human rights NGOs from the region approach documentation from the perspective of litigation. Unlike civil society from Africa, litigation for gross human rights violations is often the main goal for documentation across the region. Various participants at the consultations indicated that in many cases documentation is triggered by victims' complaints. A particular challenge that organizations face in relation to litigation is sustainable funding across the length of a case, which can take several years from the documentation phase to a final decision (especially in case of exhaustion of local remedies and a case before the Inter-American system).

Civil society actors across Latin America have developed an admirable set of practices in relation to victim support, and respect and implementation of victims' rights. Victims' consent and information appear to be at the center of documentation and litigation efforts, including in relation to litigation strategies. Victims are also involved in information gathering, especially in relation to requests for reparations. Several organizations provide psycho-social support to victims in relation to the cases they are involved, either in-house or through referrals to other organizations.

One of the main challenges in Latin America is the limited understanding of specific requirements of international criminal legal standards. Organizations are familiar with litigating at the national and Inter-American level, but lack experience in international criminal law. Consequently, they have difficulties, for example, in recognizing and documenting contextual elements, including proof of the existence of an attack, its generalized or systematic nature or the identification of patterns, or a policy to commit an attack. Many organizations are interested in further training on documentation of crimes against humanity, given developments in their respective countries. Related challenges include development and use of databases that can allow for inquiry into the above requirements, and acquiring specific analysis skills. The use of technology for documentation purposes is also rather limited currently, and technology is seen as a potential asset in achieving accountability.

It is important to note that the degree to which organizations have acquired expertise on documentation varies greatly from one country to another. For example, Guatemala has very advance experience on the issues, given the expertise acquired by civil society organizations in preparation of transitional justice cases, identification of the disappeared and other actions to

achieve justice for the 1980s' genocide. On the other end of the scale, for example, organizations from Honduras struggle with basic skills for documentation and systematization of information.

Middle East and North Africa Region

Civil society actors have been at the forefront of fact-finding efforts relating to grave crimes across the region, particularly in the context of limited national resources to conduct investigations into potential Rome Statute crimes. Until now, NGOs have utilized their reports largely for advocacy purposes before different international human rights bodies, although such documentation is submitted in support of litigation at the national level wherever possible. The Court however must share information and conduct outreach with NGOs in order to explain key components relating to the ICC legal process, in particular: the process for submitting information to the ICC; the ICC evidentiary standards; and the weight that is accorded to NGO reports, particularly in order to manage expectations.

It is of concern that the ICC Intermediaries Guidelines appear to not have been disseminated among groups who have had contact with ICC representatives. It is important that ICC representatives go beyond simply disseminating the Intermediaries Guidelines, and also explain and discuss the issues fully with civil society partners. In particular, it is of utmost importance that civil society groups are informed of the ICC's limitations in relation to protection and support. As a result, NGOs must have internal protection strategies in place to protect them and their sources during the process of submitting information to the OTP. In addition, given the politically sensitive context of the crimes, it is important for the ICC to clearly inform parties from either side of the conflict that all sides are subject to on-going investigations.

Priority Themes from Consultations

The positions of CSOs differed by region, country, and communities. However, there is clear agreement on the enormous contribution made by NGOs and CSOs in sharing their fact-finding with the ICC and national accountability institutions. The main themes across the regional consultations concern promoting the interests of victims, addressing protection challenges, and advancing the contribution of technology to enhancing fact-finding.

Victim-Centered Fact-finding

NGO fact-finding is established on the need to communicate the interests of victims and affected communities. The Assembly of States Parties ("ASP") has recognized victims' rights as a cornerstone of the Rome Statute.² The rights of victims include: the right of victims to present views and concerns in proceedings where their personal interests are affected; the right to expeditious and effective access to justice; the right to protection and support; the right to adequate and prompt reparation for harm suffered; and the right to access relevant information concerning violations and redress mechanisms.³

² Preamble ICC-ASP/13/Res.4 Resolution on "Victims and affected communities, reparations and Trust Fund for Victims" http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res4-ENG.pdf

³ Preamble ICC-ASP/13/Res.4 Resolution on "Victims and affected communities, reparations and Trust Fund for Victims" http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res4-ENG.pdf

Through their fact-finding work, NGOs and CSOs make a substantial contribution to the realization of victim's rights. Across different regions, civil society actors have highlighted the need to advance the priorities of victims in the accountability discourse, through incorporating victim's experiences within national and international accountability interventions. Some local groups even went so far as to strongly advocate that victims' needs must be prioritized over the methodological requirements for documentation or litigation.

The ICC is looked to for leadership on upholding victims' rights. Across the global consultations, civil society actors identified means by which the ICC can demonstrate this commitment to victim's rights: by expediting legal proceedings to ensure access to justice within a reasonable timeframe; by ensuring genuine participation by victims, which includes legal representation by a counsel of their choice, as well as regular consultations; and reviewing the current outreach model in order to improve victims' access to information on its work. NGOs commend efforts undertaken by the ICC judges to prioritize work around harmonizing best practices and improving the court's efficiency in order to expedite proceedings.⁴

States on the other hand, need to increase their financial contributions to the ICC in order to ensure that these efficiencies can be attained by the ICC. Such budgetary support must also be provided to the ICC Trust Fund which is tasked with implementing the Court's victim assistance and reparation mandate. The Trust Fund has reported a relative decline of income from voluntary contributions in the second half of 2014 to the first half of 2015.⁵ It has also been noted that despite the ICC opening investigations in additional countries over the last ten years, the Trust Fund's activities have not extended beyond Uganda and the Democratic Republic of Congo (the first two ICC situation countries). Victims in those countries also have immediate needs and, unfortunately, the pace of justice at the ICC is relatively slow. Experience has shown that the time elapsed between the crimes and a reparations award (in case of a conviction) can be longer than 12 years. Also, given the limited nature of ICC cases, only a few victims will be able to access reparations and others rely on assistance by humanitarian organizations, national redress programs or reparations as a result of domestic proceedings, all of which are either rare or insufficient to cover the extent of victims' needs. An area currently under-supported relates to the high numbers of victims suffering from physical and psycho-social trauma. Civil society organizations focus their limited budget on documentation, and are therefore not in a position to provide psycho-social assistance to victims. External institutions such as the ICC Trust Fund therefore have a critical role to play in providing coordinated, community-based psycho-social support to victims.

States, however, need to demonstrate the same level of commitment to victims in their individual countries by prioritizing the establishment of government-backed redress programs. This will ensure that the end objectives of NGO documentation are realized, such that victims and witnesses are supported holistically within their communities to

⁴ ICC Press Release 22/06/2015: "ICC Judges agree on measures to improve efficiency of criminal process." https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1121.aspx

⁵ Trust Fund for Victims, Assistance & Reparations Achievements, Lessons Learned, and Transitioning, page 56 http://www.trustfundforvictims.org/sites/default/files/media_library/documents/FinalTFVPPR2015.pdf

enable cooperation with the ICC. Other ways in which victims' access to justice can be supported by States is through the adoption of specific legislation on victims' rights, or adequate implementation of such legislation where it exists, inviting victim delegations and incorporating victims' views in the context of peace negotiations was also highlighted as a relevant measure.

Protection of Information Sources

Owing to the sensitivity of the issues they document, protection is a major priority for CSOs. This is especially the case given that the ICC is required to focus investigations on alleged perpetrators who bear the most responsibility, and are therefore typically high-level State and non-State actors. The reality, however, is that NGOs have limited capacity with respect to protection issues. And with the cooperation between NGO fact-finding and national judicial processes, civil society actors have limited control over the protection that can be offered to their information sources.

As an institution which benefits from NGO fact-finding reports, the Court needs to review its witness protection regime and protocols to provide maximum protection to individuals who risk their lives to testify at the ICC. In particular, full information must be shared broadly with communities at the earliest stages of the ICC's engagement, including during the early phases of preliminary examinations. Some civil society actors have in some cases interacted with the Court without first understanding the full implications of potential future disclosure of their information to the defence. It is troubling that such incidents are continuing even following the ICC's publication of the Intermediaries Guidelines in 2014. Furthermore, the OTP has reported an increasing pattern of witness interference through bribes, intimidation and threats.⁶ These circumstances have made CSOs skeptical about sharing information with the Court because this may not only endanger their staff, but also their sources.

States also have an important role to play with respect to protection. During the 2014 ASP session, protection measures for witnesses and victims were discussed within the broader framework of cooperation,⁷ and there is much to be done in terms of positive complementarity by States, as well as information sharing between States on the implementation of witness protection. In particular, countries with functional witness protection units must provide direct technical assistance to States without such witness protection capabilities. The urgency of this issue necessitates that States deliberate on protection as a stand-alone theme within the ASP and through continued consultations during the annual operations of the ICC. Central to this protection framework, States must ensure non-retaliation against NGOs and individuals involved in fact-finding and litigation for accountability both at the national level and through international support to advocates advancing accountability.

Role of Technology in Fact Finding

CSOs recognize that the environment in which they are operating is fast-changing particularly owing to the increasing use of modern technology. Technology has the potential to improve the fact-finding work of NGOs, particularly the process of collecting and preserving certain

⁶ Draft OTP Strategic Plan 2016-2018, para. 77 http://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf

⁷ ICC-ASP/13/Res.3 Resolution on Cooperation http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res3-ENG.pdf

types of information. Because it is a relatively novel area, the understanding of the potential for technology to advance accountability is rather limited in terms of full integration within the work of civil society actors and the ICC.

NGOs recommend the enactment of a Court-wide technology strategy which may in turn give NGOs the opportunity to explore new data collection and storage methods. The OTP has reported that the increased availability of satellite imagery and other remote sensing techniques offers new possibilities for monitoring and proving ICC crimes.⁸ Furthermore, that access to the internet by victims, witnesses and perpetrators creates a dynamic environment to monitor and confirm the commission of ICC crimes, as well as the activities and networks of perpetrators.

In most of the regional consultations, civil society actors identified that technology has the potential to fill evidence gaps, particularly in contexts where the ICC begins its operations in a situation country after several years following the events. This time-lag may lead to the erosion of critical evidence. As actors on the ground, civil society can rely on technology to collect and preserve such information. However, CSOs need basic minimum standards to follow while using technology as a means of fact-finding. During the global consultations, NGOs requested guidance regarding their role in online and open source information gathering, particularly with respect to basic minimum standards on finding, capturing, storing, and transmitting information.

States should provide sufficient resources to improve the Court's technology capacities. Additionally, support to national governments should also be directed at improving civil society capacities to use technology for fact-finding purposes. States must not engage in negative uses of technology, including surveillance of NGOs involved in fact-finding.

Conclusion

Fact-finding is an integral part of NGOs and CSOs' human rights work. However, the needs in relation to fact-finding vary greatly from region to region on account of differences in capacity, expertise, and approaches to documentation. Although the documentation reports of NGOs have proved relevant in a number of accountability proceedings even at the ICC, it should be recalled that the primary role to conduct investigations lies solely with courts themselves. While there is often a nexus between CSO fact-finding and court accountability processes, civil society acknowledge that the former cannot supplant the latter. NGO fact-finding efforts therefore complement the work of the ICC, and can only be conducted effectively based on mutually reinforcing relationships between the ICC and CSOs, particularly around the understanding of basic minimum standards for fact-finding. The ICC and civil society groups must come together to shape the development of basic minimum standards through collaborative sharing of best practices and expertise.

⁸ Draft OTP Strategic Plan 2016-2018, para. 23, http://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf

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