

Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes

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ABSTRACT[∞]

This article addresses what the increased role of strategic litigation and universal jurisdiction for serious international crimes in domestic courts means for international criminal justice by exploring the opportunities and risks as well as implications for the field. A number of key overlapping and countervailing trends stand out: (i) a growing landscape where domestic legal systems are playing larger roles; (ii) a constantly proliferating and complex transnational network of actors – formal and informal – involved in the pursuit of accountability; and (iii) a risk of further entrenching Eurocentrism of international criminal justice resulting from the dominance of European domestic courts for the prosecution of international crimes under universal jurisdiction. The article concludes by stressing the importance of strategic litigation and universal jurisdiction and the role played by civil society in pursuing accountability for serious international crimes, and puts forward some modest recommendations for mitigating some of the identified risks.

KEYWORDS: Civil society, international criminal justice, strategic litigation, universal jurisdiction

INTRODUCTION

Largely in response to the inherent limitations and shortcomings of traditional international criminal law infrastructures,¹ including the budgetary constraints and limited jurisdiction of the International Criminal Court (ICC), there have been growing calls for revisiting and strengthening domestic prosecutions for serious international crimes.² These calls are in

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[∞] Portions of this article were presented at the 2021 annual conferences of the Association of Human Rights Institutes and European Society of Criminology. Professor McGonigle Leyh would like to thank Diane Marie Amann, Julie Fraser and Vivek Bhatt for comments on earlier drafts. Any mistakes or omissions are her own.

¹ Phil Clark, *Distant Justice: The Effects of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018); Barbora Holá, Roisin Mulgrew and Joris van Wijk, 'Introduction: National Prosecutions of International Crimes: Sentencing Practices and (Negotiated) Punishments,' *International Criminal Law Review* 19(1) (2019): 1–14; Joseph C. Powderly, 'International Criminal Justice in an Age of Perpetual Crisis,' *Leiden Journal of International Law* 32(1) (2019): 1–11; Prince Zeid Ra'ad Al Hussein et al., 'The International Criminal Court Needs Fixing,' *Atlantic Council Blog*, 24 April 2019.

² Barbora Holá et al., supra n 1; Bergsmo et al., eds., *Importing Core International Crimes in National Law* (Brussels: Torkel Opsahl Academic EPublisher, 2010).

line with the Rome Statute of the ICC, which asserts in its Preamble that the future of international criminal justice *should* be domestic.³ Coupled with persistent demands by victims for justice and accountability, the calls have resulted in novel legal developments, and more robust transnational networks of cooperation at the UN, state and civil society levels. Within this context, civil society actors and victims' rights groups in particular are playing a crucial role by developing strategic litigation strategies to pursue broader anti-impunity objectives.⁴

Strategic litigation, or variants of the practice, such as public interest litigation, impact litigation or cause lawyering, is the pursuit of a legal action as part of a strategy to promote broader interests and social change.⁵ While predominantly used in the context of civil litigation, this article uses the term strategic litigation to describe the use of criminal litigation (or court-centered advocacy) by civil society actors to advance accountability efforts for core international crimes including war crimes, crimes against humanity and genocide. This is done to signal the coordination, planning, and tactical decision making at play when bringing cases and the desire to change broader prosecutorial policies and other patterns of behavior. Working in partnership with others, civil society actors are using strategic litigation to bring about prosecutions – increasingly through universal jurisdiction opportunities in European states.⁶ Universal jurisdiction allows for the domestic prosecution of certain crimes regardless of where the crimes occurred or the nationality of the alleged perpetrator or victims.⁷ From the filing of robust criminal complaints to trials and convictions, examples include the October 2020 filing of a comprehensive criminal complaint by three NGOs, the Open Society Justice Initiative, Syrian Archive and Syrian Center for Media and Freedom of Expression, related to the use of chemical weapons in Syria with the Office of the German Federal Prosecutor⁸; the July 2021 announcement by the Swedish Prosecution Authority that it will prosecute an Iranian citizen, Hamid Noury, suspected of committing grave war crimes and murder in Iran in 1988⁹; and the June 2021 conviction of Alieu Kosiah, a Liberian national, in the Federal Criminal Court in Switzerland on 21 charges of war crimes, including murder and rape, committed during the First Civil War in Liberia in the 1990s.¹⁰

In this article, I address what the increased role of strategic litigation and universal jurisdiction for serious international crimes in domestic courts may mean for international criminal justice. First, I examine strategic litigation as traditionally employed by civil society organizations and the turn towards using it as a pathway for justice and accountability within the field of international criminal law. Here, I focus on the opportunities of the rising number of documentation initiatives and stronger transnational networks and alliances created. I also highlight

³ Elies van Sliedregt, 'Future of International Criminal Justice – Bursting the Bubble?' in *Zukunftsperspektiven des Strafrechts*, ed. E. Hoven and M. Kubiciel (Baden-Baden: Nomos, 2020), 253–276.

⁴ The UN defines civil society actors as individuals and groups who 'engage in forms of public participation and action around shared interests, purposes or values that are compatible with the goals of the UN: the maintenance of peace and security, the realization of development, and the promotion and respect of human rights.' UN OHCHR, *Civil Society Space and the UN Human Rights System: A Practical Guide for Civil Society* (UN, 2014), 3.

⁵ For more on strategic litigation, see Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation,' *Civil Justice Quarterly* 38 (2019): 407; Twanda Hondora, 'Civil Society's Role in the Development of International Law Through Strategic Litigation in Challenging Times,' *Australian International Law Journal* 25 (2018): 115–136.

⁶ For earlier cases in Europe, see Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008,' *Michigan Journal of International Law* 30(3) (2009): 927–980.

⁷ Stephen Macedo, trans., *Princeton Principles on Universal Jurisdiction* (Princeton: Princeton University, 2001); for national legislation, see e.g., International Crimes Act (ICA), Dutch Criminal Code (Wet Internationale Misdrijven – ICA) of 19 June 2003. See also Devika Hovell, 'The Authority of Universal Jurisdiction,' *European Journal of International Law* 29 (2018): 427–456.

⁸ Open Society Justice Initiative (OSJI), *Press Release: Justice Initiative Joins Syrian Groups in Filing First Criminal Complaint on Behalf of Sarin Attack Victims* (6 October 2020).

⁹ Swedish Prosecution Authority, *Press Statement: Prosecution for War Crimes in Iran* (27 July 2021).

¹⁰ Alain Werner, 'The Trial that Made Swiss Judges Go Down in History,' *Le Temps*, 20 July 2021, <https://civitas-maxima.org/2021/07/20/the-trial-that-made-swiss-judges-go-down-in-history/> (accessed 15 August 2022).

a key opportunity of facilitating survivor-driven justice that has led to, amongst other things, the recognition of specific and novel harms.¹¹

Next, I explore the risks (both actual and potential) as well as broader implications for the field.¹² In terms of the risks, I look at how over-documentation and contestation amongst civil society actors can lead to compromising the well-being of individuals and the quality of information. I also examine how limited codes of conduct and oversight could lead to the possible infringement of the well-being of victims, the rights of suspects and accused and the overall effectiveness of the criminal process. I then explore one of the more serious risks, namely the dominance of European states in adjudicating universal jurisdiction cases.

In identifying this non-exhaustive list of risks and opportunities, I have taken into account three factors: (i) the overarching goal of international criminal justice, namely ending impunity for serious international crimes through fair and effective prosecutions; (ii) the rights, needs and concerns of victims of these crimes; and (iii) the broader normative considerations given the often sensitive and complex geo-political contexts in which crimes occur. The aim is to draw attention to some of the key risks so that they can potentially be mitigated against in the future. The research and analysis is of primary and secondary sources. Primary sources include domestic case law and filings, where available, UN declarations and EU Directives. Secondary sources include academic literature by authoritative scholars in the fields of international criminal justice, transitional justice and human rights, as well as official press releases, news reports and NGO reports. My aim is to build upon earlier work on 'strategic litigation networks' for serious international crimes,¹³ and to position the more recent developments around these networks within the frame of rule of law and accountability 'from below.'¹⁴ In this sense, I explore the risks and opportunities around the growth and impact of these justice networks by looking at actors and systems beyond the state.

I observe a number of key overlapping and countervailing trends in this area: (i) a growing landscape where domestic legal systems are ensuring accountability for serious international crimes; (ii) a constantly proliferating and complex transnational network of actors – formal and informal – involved in the pursuit of this accountability; and (iii) a risk of further entrenching Eurocentrism in international criminal justice. I conclude by stressing the importance of strategic litigation and universal jurisdiction, and the role played by civil society in pursuing accountability for serious international crimes domestically. The unbounded and untested relationship between domestic, regional, transnational and international jurisdictions in international criminal law is exciting and chaotic, yet potentially full of risks. In order to make the most of the opportunities, I put forward recommendations for mitigating some of the identified risks.

¹¹ I predominantly use the term victim as reflected in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, U.N. Doc. A/RES/40/34 (1985) and the *Victims Rights Directive of the EU*, 2012/29/EU (2012) of the European Parliament and of the Council of 25 October 2012 Directive establishing minimum standards on the rights, support and protection of victims of crime. However, I employ the term survivor-driven justice as reflected in the advocacy work carried out by victim-led organizations; see Antony Pemberton, Pauline GM Aarten and Eva Mulder, 'Stories as Property: Narrative Ownership as a Key Concept in Victims' Experiences with Criminal Justice,' *Criminology & Criminal Justice* 19 (2019): 404–420.

¹² This article focuses on cases or complaints brought by civil society organizations and not on amicus curiae or third-party interventions.

¹³ Chrisoph Sperfeldt, 'The Trial Against Hissène Habré: Networked Justice and Reparations at the Extraordinary African Chambers,' *International Journal of Human Rights* 21(9) (2017): 1243–1260; Florian Jeßberger and Julia Geneuss, 'Litigating Universal Jurisdiction'—Introduction,' *Journal of International Criminal Justice* 13(2) (2015): 205–208; Jenia Iontcheva Turner, 'Transnational Networks and International Criminal Justice,' *Michigan Law Review* 105(5) (2007): 985–1032.

¹⁴ See Antoine Buyse et al., 'The Rule of Law from Below – A Concept Under Development,' *Utrecht Law Review* 17(2) (2021): 1–7.

STRATEGIC LITIGATION AS A FORCE FOR JUSTICE

All around the world human rights defenders have long used the law and legal processes as a tool to fight for social change, challenge those in positions of power and seek judicial enforcement of rights to achieve justice.¹⁵ Often, this work is referred to as strategic litigation. Although there is no generally accepted definition for the phrase,¹⁶ strategic litigation has been used to refer to legal actions that pursue a number of important and varied objectives, from modifying or clarifying existing laws to raising awareness and debate around specific issues. Generally, it is about legal mobilization around specific cases that aims to empower marginalized groups or social movements and create a culture of human rights¹⁷ – although, importantly, this is not always the case.¹⁸ While wide-ranging, strategic litigation seeks to bring larger structural issues before courts, and is ‘centered and aims to change policies and other patterns of behavior.’¹⁹ Conventionally, and as the term itself signals, organizers plan (or strategize) in advance of any legal action. They identify those courts and jurisdictions that are most likely to be receptive to their claims, often recruit plaintiffs to challenge the current law and file a civil or administrative suit against the relevant state, private individual or company.

One of the early models for a strategic litigation campaign was that of the NAACP Legal Defense and Education Fund in the 1940s and 1950s, resulting in the landmark US Supreme Court decision in *Brown v. Board of Education*.²⁰ More recent successful cases include litigation for marriage equality in multiple jurisdictions around the world,²¹ and environmental campaigns regarding climate change.²² Given its traditional focus on civil litigation and lawsuits brought against states, it is not necessarily a given that the term would prove useful for cases spearheading criminal prosecutions. However, since many civil law jurisdictions around the world allow for individuals or organizations to either initiate criminal proceedings or attach their civil claim for damages to a criminal case, strategic litigation has also crept into the world of criminal law and international criminal law more specifically.²³ In this way, strategic litigation seeking to modify structural situations has also been employed in contexts of mass impunity for serious international crimes.²⁴

Prominent earlier examples include cases against Nazi perpetrators investigated and brought forward by Beate and Serge Klarsfeld.²⁵ More recent examples include those in Guatemala where NGOs and victim-led organizations have successfully brought criminal complaints against former members of the military believed to be responsible for genocide and crimes

¹⁵ Miriam Saage-Maass, ‘Legal Interventions and Transnational Alliances in the Ali Enterprises Case: Struggles for Workers’ Rights in Global Supply Chains,’ in *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice*, ed. M. Saage-Maass et al. (New York: Springer, 2021), 26.

¹⁶ See Hondora, supra n 5; Ramsden and Gledhill, supra n 5.

¹⁷ See Emilio Lehoucq and Whitney K. Taylor, ‘Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?’ *Law and Social Inquiry* 45(166) (2020); Impunity Watch et al., ‘Changing the Face of Justice Keys to the Strategic Litigation of the Sepur Zarco Case,’ March 2017, https://www.impunitywatch.nl/docs/ResearchReport_Changing_the_Face_of_Justice_Sepur_Zarco_Case_2017_eng.pdf (accessed 15 August 2022).

¹⁸ See Mark P. Petracca, ed., *The Politics of Interests* (Abingdon: Routledge, 1992).

¹⁹ Impunity Watch et al., supra n 17.

²⁰ US Supreme Court, 347 U.S. 483 (1954).

²¹ Andrew Koppelman, ‘The Limits of Strategic Litigation,’ *Law & Sexuality* 17 (2008): 1–5.

²² Shibani Ghosh, ‘Litigating Climate Claims in India,’ *AJIL Unbound* 114 (2020): 45–50; Jacqueline Peel and Jolene Lin, ‘Transnational Climate Litigation: The Contribution of the Global South,’ *American Journal of International Law* 113(4) (2019): 679–726; Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2021 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2021).

²³ See Jeßberger and Geneuss, supra n 13 at 205–208; Jenia Iontcheva Turner, ‘Transnational Networks and International Criminal Justice,’ *Michigan Law Review* 105(985) (2007): 985–1032.

²⁴ Cath Collins, Lorena Balardini and Jo-Marie Burt, ‘Mapping Perpetrator Prosecutions in Latin America,’ *International Journal of Transitional Justice* 7(1) (2013): 8–28; Corporación Humanas Colombia, *Aportes de las sentencias de justicia y paz a los derechos de las mujeres – Estudio de caso* (Colombia: Corporación Humanas, Abogados sin Fronteras Canadá, 2015), 92.

²⁵ See Beate Klarsfeld and Serge Klarsfeld, *Hunting the Truth: Memoirs of Beate and Serge Klarsfeld* (New York: Farrar, Straus and Girox, 2018).

against humanity against the Maya population.²⁶ Despite the success of these initiatives, the backlash to the various accountability efforts has been severe. Successive governments have shut down key peace and accountability bodies, as well as blocking access to important archives.²⁷ The hostile responses experienced in Guatemala are indicative of the grave challenges facing increased prosecutions for serious international crimes. Domestic hostility can be particularly problematic in postconflict or transitioning contexts. Prosecutions often face significant obstacles or they cannot take place at all due to the adoption of amnesties. One of the appealing aspects offered by universal jurisdiction is that serious international crimes can be investigated and prosecuted with some distance from domestic political impediments.

The Increase in Strategic Litigation in Universal Jurisdiction Cases

States have not agreed on the scope and application of the principle of universal jurisdiction, and are often wary of its use and misuse.²⁸ For instance, most states have now adopted domestic universal jurisdiction legislation that limits the exercise of the principle to those situations where there is a clear link with the state, such as where the suspect is present on the territory of the prosecuting state. This approach is sometimes referred to as conditional universality jurisdiction, as opposed to a more absolute approach.²⁹ Regardless of the approach adopted, universal jurisdiction cases have steadily risen over the last three decades.³⁰ As noted by Maximo Langer and Mackenzie Eason, in the decade between 1988 and 1997, verdicts were issued in only eight universal jurisdiction trials. Between 1998 and 2007, this number increased to 18. And, finally, in the last decade – from 2008 to 2017 – there have been a staggering 34 universal jurisdiction trials completed.³¹ In the past few years the number of cases being brought has only increased, with TRIAL International noting a 40 percent rise between 2018 and 2019 alone.³² There are now hundreds of cases in the pipeline, almost entirely in European jurisdictions.

Leading NGOs working in this area share a desire to end impunity for serious international crimes, seek redress for victims and shed light on heinous human rights and humanitarian law violations. In this sense, they pursue broader societal changes beyond the scope of the individual case at hand. In reaction to the accountability gaps for serious international crimes at both the domestic and international levels, these organizations are filling a space previously reserved

²⁶ The Jalok U Collective, composed of the indigenous victims, and the Alliance to Break the Silence and Impunity, made up of three Guatemalan civil society organizations – the Community Studies and Psychosocial Action Team (ECAP), Women Transforming the World (MTM) and the National Union of Guatemalan Women (UNAMG) – jointly pursued a comprehensive, multi-disciplinary litigation strategy. See Impunity Watch et al., supra n 17; Jo-Marie Burt, 'Gender Justice in Post-Conflict Guatemala: The Sepur Zarco Sexual Violence and Sexual Slavery Trial,' *Critical Studies* 4 (2019): 63–96, citing Sentencia Número Único 01076–2012-00021, Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente del Municipio y Departamento de Guatemala, Ciudad de Guatemala, 19 July 2017; see also OHCHR, *UN Experts Hail Sentence Against Military Officials for Crimes Against Humanity* (1 March 2017), <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=17118&LangID=S>; another important example outside of Europe includes the Hissène Habré case, see Reed Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré,' *Journal of International Criminal Justice* 13(2) (2015): 209–217.

²⁷ Jo-Marie Burt and Paulo Estrada, 'The Future of War Crimes Prosecutions in Guatemala,' *International Justice Monitor* (14 December 2020); Emily Green, 'Guatemala Shut Down Its Anti-Corruption Commission. Now Its People Worry About Impunity,' *The World*, 14 October 2019.

²⁸ UN General Assembly, 'The Scope and Application of the Principle of Universal Jurisdiction,' A/RES/76/118 (2021); see also resolutions 64/117 of 16 December 2009, 65/33 of 6 December 2010, 66/103 of 9 December 2011, 67/98 of 14 December 2012, 68/117 of 16 December 2013, 69/124 of 10 December 2014, 70/119 of 14 December 2015, 71/149 of 13 December 2016, 72/120 of 7 December 2017, 73/208 of 20 December 2018, 74/192 of 18 December 2019 and 75/142 of 15 December 2020. Some states, like Germany, adhere to the legality principle and do not directly apply customary international law, whereas other states may allow judges to do so. See Howard Varney and Katarzyna Zduńczyk, 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes,' (International Center for Transitional Justice, 2020), 12.

²⁹ Fannie Lafontaine, 'Universal Jurisdiction: The Realistic Utopia,' *Journal of International Criminal Justice* 10(5) (2010): 1277; Aisling O'Sullivan, *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony* (Abingdon: Taylor & Francis Group, 2017), 187–190; see also Amina Adanan, 'United Kingdom Policy Towards Universal Jurisdiction Since the Post-War Period,' *International Criminal Law Review* 21 (2021): 1025.

³⁰ Maximo Langer and Mackenzie Eason, 'The Quite Expansion of Universal Jurisdiction,' *European Journal of International Law* 30(3) (2019): 779–817 at 788.

³¹ *Ibid.*, 788.

³² TRIAL International, *Universal Jurisdiction Annual Review 2019*.

for states or international bodies and are now carrying out sophisticated private investigations and bringing forth comprehensive criminal complaints.³³ Often staffed by former international investigators, prosecutors or victims' representatives, numerous civil society organizations are using universal jurisdiction in foreign domestic legal systems to achieve their goals which have been inadequately addressed in other legal or political fora.

The civil society actors leading the way generally fall into two categories: those directly working on strategic litigation³⁴ and those working in technology and/or evidence gathering.³⁵ Each of the partners brings forward specific expertise and legitimacy. They are making a noticeable impact with multiple landmark prosecutions across Europe.³⁶ Never before has the public-private divide been so blurred in these types of cases.³⁷ The joint filing for the first criminal complaint related to the use of chemical weapons in Syria with the Office of the German Federal Prosecutor in relation to the sarin attacks on Ghouta in 2013 and in Khan Shaykhun in 2017 is just one example.³⁸ The dossier included a detailed investigation with new evidence and investigative leads, which also identified a number of Syrian government officials and chains of command responsible for the attacks.³⁹ The filing is remarkable for its depth as well as for the crucial collaborations that were formed when pulling the dossier together. Significantly, the three NGOs that officially filed the complaint did not work in isolation. The groups not only joined forces with one another but also worked together with technology companies and university partners.⁴⁰

Philip Alston and Sarah Knuckey have identified two key reasons for the changes in how civil society actors approach international criminal accountability.⁴¹ The first reason relates to advances in investigative methods and new technologies – including the use of smart phones and applications to capture and store material – available to a broader array of actors. The second concerns increasing aspirations on the part of civil society to impact existing legal frameworks, such as international criminal justice. Additional factors contributing to the rise of universal jurisdiction cases include the adoption of universal jurisdiction legislation across Europe; the creation of domestic specialized investigation units; more robust support from regional actors such as the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes (Genocide Network); stronger transnational alliances between civil society, states and UN bodies, including new UN investigative bodies mandated to build criminal case files; and the migratory patterns of both victims and alleged perpetrators of serious international

³³ Alexander Heinze, 'Private International Criminal Investigations and Integrity,' in *Integrity in International Justice*, ed. M. Bergsmo and V.E. Dittich (Brussels: Turkel Opsahl Academic Epubliser, 2020), 615–733; Brianne McGonigle Leyh, 'Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations,' *Utrecht Journal of International and European Law* 33(84) (2017): 44; Harmen van der Wilt, "'Sadder But Wiser?": NGOs and Universal Jurisdiction for International Crimes,' *Journal of International Criminal Justice* 12 (2015): 237; Jelena Subotić, 'The Transformation of International Transitional Justice Advocacy,' *International Journal of Transitional Justice* 6 (2012): 106.

³⁴ Examples include the Atlantic Council; Civitas Maxima; Commission for International Justice and Accountability (CIJA); the ECCHR; Global Rights Compliance; International Federation for Human Rights (FIDH); Open Society Justice Initiative (OSJI); Syrian Justice and Accountability Center (SJAC); and TRIAL International.

³⁵ Examples include Bellingcat; Benetech; C4ADS; Forensic Architecture; eyeWitness; Horizontal; and the Public International Law & Policy Group (PILPG).

³⁶ Wolfgang Kaleck and Patrick Krock, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' *Journal of International Criminal Justice* 16 (2018): 165–191; TRIAL International, *supra* n 32; TRIAL International, *Universal Jurisdiction Annual Review 2020*; Steve Kostas and Eric Witte, 'Building Roads to Justice in Syria,' OSJI, 17 December 2019; Civitas Maxima, *Press Release: Former RUF Commander arrested in Finland over War Crimes and Crimes Against Humanity Allegedly Committed in Liberia* (11 March 2020).

³⁷ Michelle Burgis-Kasthala, 'Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice,' *European Journal of International Law* 30 (2020): 1165–1185, at 1182.

³⁸ OSJI, *supra* n 8.

³⁹ OSJI, *Public Summary of Evidence, Eastern and Western Ghouta Sarin Attack* (5 October 2020); OSJI, *Public Summary of Evidence: Khan Shaykhun Sarin Attack* (5 October 2020).

⁴⁰ See Brianne McGonigle Leyh, 'The Role of Universities and Law Schools in Documenting Serious International Crimes and Advancing the Rule of Law,' *Utrecht Law Review* 17 (2021): 87–101.

⁴¹ Philip Alston and Sarah Knuckey, *The Transformation of Human Rights Fact-Finding* (Oxford: Oxford University Press, 2016).

crimes into legal systems that have universal jurisdiction options.⁴² The diversity of the civil society actors involved and differences in specializations has meant that they can respond quickly and start the groundwork for serious investigations, opening up new opportunities in the field.

Opportunities Associated with Strategic Litigation in Universal Jurisdiction Cases

Three key opportunities include: increased documentation initiatives; stronger transnational networks and alliances; and increased agency for victims through and survivor-driven justice that can lead to, amongst other things, the recognition of specific and novel harms.

Increased Documentation Initiatives

Civil society actors, and victims in particular, are learning new documentation skills and contributing to processes in ways, and on a scale, like never before. As recently noted by Emmanuelle Marchand from Civitas Maxima, ‘if the documentation was left to the traditional prosecuting authorities, there would be no hope that the victims of these horrific crimes would be able to testify and have access to justice.’⁴³ Moreover, for many of the victims involved, they are no longer just passively hoping that the public sphere will do its job, but are actively working towards accountability solutions.⁴⁴

Documentation of serious international crimes can be carried out for any number of objectives, such as investigating and collecting evidence for truth-telling, justice and accountability processes; advocating for policy changes around human rights; building a collective memory that supports community building and reconciliation; or providing direct services, such as psycho-social support, to victims and their families.⁴⁵ Civil society organizations and victims’ groups have long been involved in documentation efforts for human rights violations,⁴⁶ but as documentation efforts by civil society have professionalized over the last five to ten years, with best practice workshops and guidelines growing in number,⁴⁷ the quality of the information gathered (and later analyzed) has increased significantly. In many cases, organizations have adopted documentation standards in line with criminal investigators – which is unsurprising given the fact that many of the staff of the international NGOs working in documentation work were former international investigators or prosecutors.⁴⁸ In some instances, this higher standard increases the usefulness of the information whether used in a criminal process or (most likely) for general truth-telling purposes.

Additionally, new technological and digital advances, including new online collection tools, encryption software and cloud storage, now allow these actors to collect, store, manage and share information in unprecedented ways. For instance, individuals specializing in open source investigations (OSINTs) have made important impacts on justice processes.⁴⁹ This documentation work often challenges state monopolies on information gathering and investigations.⁵⁰

⁴² Langer and Eason, *supra* n 30 at 781.

⁴³ Civitas Maxima, *2021 Annual Report* (2022), <https://75890720.flowpaper.com/AR2021/>, at 44.

⁴⁴ This has enabled victims to exercise their agency in new ways, referring to ‘the degree to which individuals have the capacity to act independently and make their own free choices.’ See Mark Mullaly, ‘Exercising Agency: What Is Agency?’ Blog, 13 March 2015, <https://markmullaly.com/2015/03/13/exercising-agency-what-is-agency/> (accessed 15 August 2022).

⁴⁵ James Meernik et al., ‘The Impact of Human Rights Organizations in Naming and Shaming Campaigns,’ *Journal of Conflict Resolution* 56(2) (2012): 238; PILPG, *Human Rights Documentation by Civil Society – Technological Needs, Challenges, and Workflows* (November 2020), 26.

⁴⁶ See McGonigle Leyh, *supra* n 40; Sam Dubberley, Alexa Koenig and Daragh Murray, *Digital Witness: Using Open-Source Information for Human Rights Investigation, Documentation, and Accountability* (Oxford: Oxford University Press, 2020).

⁴⁷ See e.g., Public International Law & Policy Group (PILPG), *Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles and Best Practices* (Washington: PILPG 2016); UN OHCHR, *supra* n 4; International Bar Association and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *Guidelines on International Human Rights Fact-Finding Visits and Reports (The Lund-London Guidelines)* (2009), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=D7BFB4EA-8EB6-474F-B221-62F9A5E302AE>, 17.

⁴⁸ Burgis-Kasthala, *supra* n 37 at 1180.

⁴⁹ See Dubberley et al., *supra* n 46.

⁵⁰ ‘Open-Source Intelligence Challenges State Monopolies on Information,’ *The Economist*, 7 August 2021.

No longer does the state (or investigating authority) have full control over the collection and analysis of information and evidence. Further, there is an increasing multi-actor documentation response, where civil society actors are learning from one another and raising the standards with which they document crimes. The situation in Ukraine, where over 8,000 investigations have officially been opened, is a good example, with local civil society organizations working with Ukraine's Prosecutor General's Office, the ICC, Eurojust and other states.⁵¹

Increased Transnational Networks and Alliances

As is clear from the above example, closely connected to the documentation work is the opportunity to increase and strengthen transnational networks and alliances. In addition to the more formal legal networks between states and international bodies,⁵² informal networks amongst civil society actors, referred to as transnational advocacy networks (TANs), are hugely important when it comes to advocacy and strategic litigation work.⁵³ Within the field of international criminal justice, these networks and alliances are crucial because the crimes can take place years if not decades earlier, then in geographic locations far removed from the criminal proceedings, involving complex fact patterns with mass criminalization and victimization and politically sensitive matters.⁵⁴ Diverse civil society actors will need to pool resources, contacts and ideas to ensure successful documentation and litigation strategies.

Collaborations between local and international civil society actors, together with universities and technology companies, have proven to be formidable. Each actor brings in specific expertise, such as specialized knowledge and skills around a country's context and culture or different types of documentation methods or analysis, that when brought together can advance causes of justice. The collaborations have, for instance, allowed the networks to address issues of verification and corroboration (diversity of sources) of information – two issues that judges will assess during a trial phase.⁵⁵ Here, the additional role of the new UN investigative bodies in relation to the situations in Syria, Northern Iraq and Myanmar, in combing through, verifying and analyzing information collected further assists in these complex cases. The Lausanne Platform of April 2018, which provided a framework for 'collaborative engagement' between the International, Impartial and Independent Mechanism for Syria (IIIM) and a diverse range of Syrian civil society actors, is a good example of how to facilitate greater collaborations for purposes of

⁵¹ William Worley, 'How Ukrainian Civil Society Is Documenting Alleged Russian War Crimes,' *Devex*, 20 April 2022.

⁵² Nadia Banteka, 'A Network Theory Approach to Global Legislative Action,' *Seton Hall Law Review* 50(2) (2019): 339; Sperfeldt, supra n 12; Niel Boister, 'Further Reflections on the Concept of Transnational Criminal Law,' *Transnational Legal Theory* 6 (2015): 9; Richard Severns, Craig Patterson and Souadou Brogan, 'The Transnational Investigation of Organised Modern Slavery: A Critical Review of the use of Joint Investigation Teams to Investigate and Disrupt Modern Slavery in the United Kingdom,' *International Journal of Crisis Communication* 4(1) (2020): 11–22; Anne Weyembergh, Inés Armada and Chloé Brière, 'The Cooperation between Police and Justice at the EU Level: The Representative Example of Joint Investigation Teams,' in *Needed Balances in EU Criminal Law: Past, Present and Future*, ed. Chloé Brière and Anne Weyembergh (London: Bloomsbury, 2018); Ludo Block, 'EU Joint Investigation Teams: Political Ambitions and Police Practices,' in *Cross-Border Law Enforcement: Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives*, ed. Saskia Huftnagel, Clive Harfield and Simon Bronitt (Oxford: Routledge, 2012); Conny Rijken and Gert Vermeulen, trans., *Joint Investigation Teams in the European Union: From Theory to Practice* (The Hague: TMC Asser Press, 2006).

⁵³ Wendy Wong, *Internal Affairs: How the Structure of NGOs Transforms Human Rights* (New York: Cornell University Press, 2014); Jelena Subotić, 'The Transformation of International Transitional Justice Advocacy,' *International Journal of Transitional Justice* 6(1) (2012): 106; Sanjeev Khagram, James V. Riker and Kathryn Sikkink, trans., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis: University of Minnesota Press, 2002); Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (New York: Cornell University Press, 1998); Jan Aart Scholte, 'Beyond Institutionalism: Toward a Transformed Global Governance Theory,' *International Theory* 13(1) (2020): 179–191; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford: Oxford University Press, 2018); David Held, 'Elements of a Theory of Global Governance,' *Philosophy and Social Criticism* 42 (2016): 837; Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

⁵⁴ See Jeßberger and Geneuss, supra n 13 at 205–208.

⁵⁵ Konstantina Stavrou, 'Civil Society and the IIIM in the Investigation and Prosecution of the Crimes Committed Against the Rohingya,' *Utrecht Journal of International and European Law* 36 (2021): 95–113 at 102.

evidence gathering, information sharing and assistance requests.⁵⁶ These types of cooperation projects take time, however, and they require trust between the actors involved. Additionally, the cooperation extends beyond the non-state actors to the public bodies involved in the prosecutions. Civil society organizations are increasingly exchanging information with public officials and entities in relation to international crimes⁵⁷ – although much of this information sharing is not openly available and accessible.

Survivor-Driven Justice

This rise in professionalism, quality of documentation and maturity of the alliances has opened up further opportunities to allow legal specialists, working together with the victim communities, to directly impact the ways in which cases get framed and argued. To do so, civil society actors are often representing or supporting victims' participation in domestic criminal processes as civil parties or co-plaintiffs, affording the survivors of the crimes opportunities to exercise their agency in ways otherwise not available.⁵⁸ Survivor-driven justice centers those intricately affected by the criminal process. Increased participation and familiarity with the system can also help mobilize victims' groups, strengthening transnational networks and alliances, to have even larger impacts on anti-impunity policies.

The position of victims before traditional international criminal law infrastructures has always been controversial,⁵⁹ with scholars lamenting their 'imaginary or marginal' status before the ICC in particular.⁶⁰ Within EU jurisdictions, this may fare better. Victims are afforded a good deal of rights – at least on paper.⁶¹ The Victims' Rights Directive provides for the right to access information, the right to support and protection and a set of procedural rights which includes participatory rights.⁶² Although EU states have struggled to ensure these rights in practice,⁶³ a new strategy plan places high importance on strengthening access to reparations as well as on the international dimension of these rights.⁶⁴ These steps are important because they can contribute to feelings of empowerment and increased knowledge of justice systems.⁶⁵

Through participation, victims are calling for prosecutors and judges to recognize specific types of victimization or address novel harms. In many of the cases involving crimes in Syria or Northern Iraq, it would often be easier for the states to secure convictions on charges not specifically related to serious international crimes. This is because it is widely acknowledged that it is easier to secure a conviction on terrorism charges than it is for serious international crimes

⁵⁶ International, Impartial, Independent Mechanism for Syria (IIIM), *Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform* (3 April 2018).

⁵⁷ Langer and Eason, *supra* n 30 at 793.

⁵⁸ I adopt a philosophical and sociological understanding of the term agency, referring to notions of freedom, will and self-determination. See Mark Mullaly, *Exercising Agency: Decision Making and Project Initiation* (New York: Routledge, 2015).

⁵⁹ See Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Cambridge: Intersentia, 2011).

⁶⁰ Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood,' *Law and Contemporary Problems* 76 (2014): 235–262 at 255.

⁶¹ 'EU Victims' Rights Directive'; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order and Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters.

⁶² EU Victims' Rights Directive.

⁶³ European Center for Constitutional and Human Rights (ECCHR), Federation Internationale de Ligues des Droits de l'Homme (FIDH), REDRESS, *Report: Breaking Down Barriers – Access to Justice in Europe for Victims of International Crimes* (September 2020).

⁶⁴ The 2020–2025 European Commission Strategy on Victims' Rights presents five key priorities: (i) effective communication with victims and a safe environment for victims to report crime; (ii) improving support and protection to the most vulnerable victims; (iii) facilitating victims' access to compensation; (iv) strengthening cooperation and coordination among all relevant actors; and (v) strengthening the international dimension of victims' rights. European Commission, *Strategy on Victims' Rights, 2020–2025* (24 June 2020), 3.

⁶⁵ Impunity Watch et al., *supra* n 17.

charges.⁶⁶ Yet, securing convictions on terrorism charges is not the desired goal for many of the organizations and individuals involved in these types of strategic litigation cases. Instead, they are demanding charges that accurately reflect the harms suffered by victims.

They are requesting not only traditionally charged serious international crimes such as torture or murder as crimes against humanity but are often seeking to get newer types of harms formally recognized. Alexandra Lily Kather notes a few of the instances where civil society organizations have sought novel charges against an accused that more accurately capture the violations perpetrated against victims. In the Alaa M. case in German courts, which involves charges against a Syrian doctor and alleged member of the Syrian Military Intelligence Service, the prosecutor is charging, for the first time in the Syrian context, the deprivation of the reproductive capacity as a crime against humanity.⁶⁷ In another example from June 2021, the Higher Regional Court of Düsseldorf convicted Sarah O., a German national who joined the Islamic State in Syria as a minor, for numerous crimes including, for the first time, persecution as a crime against humanity perpetrated against Yazidi women on the intersecting grounds of gender and religion.⁶⁸ In each of these instances, the cases highlight the gendered commission of crimes against both men and women – which for too long has been largely overlooked in national and international jurisprudence.⁶⁹ The present emphasis on sexual and gender-based violence points to the important role played by litigants seeking gender justice.⁷⁰ Arguing for never-before-charged crimes or new ways of interpreting crimes is valuable because it not only contributes to the development of national and international criminal law, but also better reflects lived experiences of victims.

RISKS OF INCREASED STRATEGIC LITIGATION IN UNIVERSAL JURISDICTION CASES

In addition to the notable opportunities touched on above, there are a number of risks. Not everyone welcomes civil society taking on the roles previously dominated by states or public bodies.⁷¹ There are legal and ethical concerns about over-documentation; cooperation amongst the different investigative actors; codes of conduct and oversight over these organizations; participation and protection of victims; handling and ownership of evidence; and the rights of suspects and accused. Neither these concerns nor the applicable human rights standards have been adequately explored by legal scholarship. Each of these concerns deserves more scholarly attention than is possible in this article, particularly as the universal jurisdiction cases become more sustained. The aim here is to highlight some of these risks in more detail. To do so, it

⁶⁶ Alexandra Lily Kather, “‘Water Finds Its Way’? Universal Jurisdiction as an Avenue for Justice in Syria,” Lieber Institute West Point, 28 July 2021, <https://lieber.westpoint.edu/water-finds-way-universal-jurisdiction-justice-syria/>; Eurojust and EU Genocide Network, *Report: Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences* (2020).

⁶⁷ Kather, supra n 66; Section 7(1)(6) of the German Code of Crimes against International Law (CCAIL). Kather notes that in addition to the novel reproductive charges, in the same case, two areas regarding medical personnel and military hospitals will be examined in detail for the first time: the way medical personnel were involved in the commission of international crimes and the consideration of military hospitals as stand-alone crime sites while simultaneously interlinked with government-run detention facilities’ (footnote 48 in her blog post).

⁶⁸ Higher Regional Court of Düsseldorf, *Press Release No. 28/2021* [in German] (16 June 2021), https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20210616_PM_SarahOUrteil/index.php; she was sentenced to a unified juvenile sentence of six years and six months.

⁶⁹ Alexandra Lily Kather and Anne Schroeter, ‘Co-Opting Universal Jurisdiction? A Gendered Critique of the Prosecutorial Strategy of the German Federal Public Prosecutor in Response to the Return of Female ISIL Members: Part I,’ *Opinio Juris*, 7 March 2021, <http://opiniojuris.org/2019/03/07/co-opting-universal-jurisdiction-a-gendered-critique-of-the-prosecutorial-strategy-of-the-german-federal-public-prosecutor-in-response-to-the-return-of-female-isil-members-part-i/> (accessed 15 August 2022).

⁷⁰ See Silke Studzinsky and Alexandra Lily Kather, ‘Will Universal Jurisdiction Advance Accountability for Sexualized and Gender-based Crimes? A View from Within on Progress and Challenges in Germany,’ *German Law Review* 22 (2021): 894–913.

⁷¹ For concerns raised, see Heinze, supra n 33; on excessive information flow, see Stavrou, supra n 55 at 104; on civil society and the ICC more generally, see Kjersti Lohne, ‘Global Civil Society, the International Criminal Court, and Legitimacy in International Criminal Justice,’ in *The Legitimacy of International Criminal Tribunals*, ed. N. Hayashi and C.M. Bailiet (Cambridge: Cambridge University Press 2017), 449–472.

focuses on three risks: over-documentation and contestation amongst civil society actors; limited codes of conduct and oversight over civil society, which amongst other things, could infringe the rights of suspects and accused; and the risk of continued European dominance in the field of international criminal law.

Over-Documentation and Contestation Amongst Civil Society Actors

As noted by ICC Prosecutor Karim Khan at an event celebrating 20 years of the ICC,⁷² despite the opportunities associated with increased documentation work, over-documentation (or ‘overcentration’) is a risk both for the safety and well-being of the victims as well as for the reliability and usability of the information gathered.⁷³ The risk of over-documentation involves situations where victims are repeatedly asked, by numerous and varied actors, to retell their stories again and again. In many of these situations, victims are unaware of who is recording their story or what it will be used for.

Having to recount traumatic experiences multiple times to multiple actors, who are often strangers, can lead to what experts call ‘interview fatigue,’⁷⁴ and re-traumatization.⁷⁵ In the context of the multi-layered civil society documentation of crimes against the Rohingya, the International Commission of Jurists has warned that ‘the large scale, mostly uncoordinated’ documentation of crimes can result in harm to victims and witnesses, especially children and victims of sexual and gender-based violence.⁷⁶ Similar unease has been raised with regard to the increasingly crowded investigative situation in Ukraine.⁷⁷

Concerns around the well-being and re-traumatization of victims are also connected to questions about the quality and accuracy of the information collected. Research indicates that when victims or witnesses recount something multiple times, the reliability of their statement declines.⁷⁸ Inaccurate and unreliable statements harm justice processes, and present obstacles to building successful cases. But in many communities affected by violence, it is inevitable that a number of actors will be involved in documentation and investigation work, increasing the risk of over-documentation. Actors range from local and international groups; lay people and professionals; and across a range of backgrounds from academia, the NGO world, government or the private sector. Indeed, the various actors are not neutral and will each have their own (potentially divergent or competing) interests and concerns. It could be the case that the civil society organizations involved in the documentation work are doing it to feed directly into accountability processes⁷⁹ or advocacy work, but this is not always the case. There will be different standards of collection depending on the purposes for which it will be used.⁸⁰ The divergent practices and interests will, in many ways, be influenced by donors and funding sources (largely from the West). The various groups must often compete for available funding from donors to carry

⁷² Conference to mark the ICC’s 20th anniversary on 1 July 2022; recording available at <https://www.youtube.com/watch?v=wBeULaPSwoM> (accessed 15 August 2022).

⁷³ Eva Buzo, ‘Capturing a Crisis: What Lessons Can We Learn from the “Overdocumentation” of the Rohingya Crisis?’ *Justice in Conflict*, 20 May 2020, <https://justiceinconflict.org/2020/05/20/capturing-a-crisis-what-lessons-can-we-learn-from-the-overdocumentation-of-the-rohingya-crisis/>. Buzo prefers the term ‘overconcentration’ as it more accurately reflects what is happening.

⁷⁴ See Jelke Boesten and Marsha Henry, ‘Between Fatigue and Silence: The Challenges of Conducting Research on Sexual Violence in Conflict’ *Social Politics* 25(4) (2018): 568–588; Timothy C. Hart, ‘Respondent Fatigue in self-Report Victim Surveys: Examining a Source of Nonsampling Error from Three Perspectives’ (PhD diss., University of South Florida, 2006).

⁷⁵ L. Bickford et al., *Documenting Truth* (ICTJ, 2009), 18.

⁷⁶ Kingsley Abbott, ‘Myanmar: Documentation Practices May Raise Challenges for Accountability,’ *Opinio Juris*, 24 January 2019, <http://opiniojuris.org/2019/01/24/myanmar-documentation-practices-may-raise-challenges-for-accountability/>.

⁷⁷ Brianne McGonigle Leyh, ‘Ukraine Symposium: Documentation and Investigative Responses to Serious International Crimes,’ *Articles of War Blog*, 13 July 2022.

⁷⁸ See Joyce W. Lacy and Craig E.L. Stark, ‘The Neuroscience of Memory: Implications for the Courtroom,’ *National Review of Neuroscience* 14(9) (2013): 649–658.

⁷⁹ Christian Axboe Nielsen and Jann K. Kleffner, *A Handbook on Assisting International Criminal Investigations* (Folke Bernadotte Academy and Swedish National Defence College, 2011), 50.

⁸⁰ See PILPG, supra n 47.

out their work, and they compete for gaining attention to specific harms or specific populations.⁸¹ Even when groups share the same end goals, the hierarchies and contestations that arise (e.g., between grassroots organizations and international NGOs) may endanger the safety and well-being of victims and limit attempts at coordination and cooperation.

Poor Conduct and Lack of Oversight

Another risk has to do with limited codes of conduct and a lack of oversight. The same ethical and professional standards that apply to domestic investigators and prosecutors do not apply to private investigators. Limited – or non-existent – codes of conduct mean that private documenters or investigators may not be adhering to key principles and following good practices, which again can negatively impact the safety and well-being of victims and compromise the information collected. Furthermore, the lack of democratic legitimacy,⁸² oversight and accountability (coupled in some cases with geographic distance between the victim communities and the international NGOs) is problematic in relation to the rights of others as well as the reliability of the process as a whole.

It is generally accepted amongst international civil society actors that one of the most important principles applicable to documentation and investigation efforts is the ‘do no harm’ principle.⁸³ This principle entails the recognition, prevention and reduction of any unintended negative effects of activities related to the documentation work. It encompasses individuals as well as communities, and may require either action or inaction depending upon the relevant circumstances. It necessitates strategic planning and the carrying out of a risk assessment, into threats to physical safety, mental well-being and protection of the information, prior to engaging in the documentation work.⁸⁴ Other relevant principles related to the work of civil society investigations and documentation work are those of informed consent and confidentiality.⁸⁵ These principles are meant to protect the individual providing the information as well as the information sought.

Given the practical and ethical issues involved, there are risks that civil society actors may not be aware of or abide by these governing principles.⁸⁶ Although there are a growing number of reports and guiding documents on the subject,⁸⁷ few civil society actors have expressly or publicly adopted codes of conduct for their staff, with clear consequences if those codes are not adhered to. In fact, even if there were explicit codes of conduct, there is still little oversight over these organizations and how they operate. Alexander Heinze has noted that while ‘private investigations are indispensable at the international level,’ there are fair trials concerns around exculpatory material (both being sought as well as turned over) and professional behavior in obtaining information.⁸⁸ This is because private investigatory actors are not required to adhere to the same standards as public officials, and there have already been numerous incidences where private actors have behaved badly.⁸⁹ Often, transparency (linked with accountability) is lacking when mistakes are made. In interviews with CIJA staff, Michelle Burgis-Kasthala asked:

⁸¹ Jeßberger and Geneuss, *supra* n 13 at 206; see also Christine Schwöbel-Patel, ‘Spectacle in International Criminal Justice: The Fundraising Image of Victimhood,’ *London Review of International Law* 4 (2016): 247–274, and Leila Ullrich, ‘“But What About Men?”: Gender Disquiet in International Criminal Justice,’ *Theoretical Criminology* 25 (2021): 209–227.

⁸² Jeßberger and Geneuss, *supra* n 13.

⁸³ See e.g., UK Foreign & Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, 2nd edn. (2017); UN Office for the Coordination of Humanitarian Affairs, *2015 Syrian Arab Republic Strategic Response Plan* (18 December 2015), 11.

⁸⁴ OHCHR, *Training Manual on Human Rights Monitoring, Chapter V: Basic Principles of Monitoring* (1996), 88; International Bar Association and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *supra* n 47.

⁸⁵ See McGonigle Leyh, *supra* n 33 at 54.

⁸⁶ Noting bad behavior of private investigators, Heinze, *supra* n 33.

⁸⁷ OHCHR, *supra* n 84; International Bar Association and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *supra* n 47; ICC, *Code of Conduct for Intermediaries* (March 2014).

⁸⁸ Heinze, *supra* n 33 at 616 and 636.

⁸⁹ Klarsfeld and Klarsfeld, *supra* n 25 at 354.

to whom is CIJA accountable? She noted ‘Interviewees disagreed, but the majority tended to identify “the Syrian community” and/or donors as their principle [sic] audience.’⁹⁰

The lack of accountability, coupled with ‘consequentialist considerations’ by the private investigators, is a serious risk.⁹¹ It can lead to individuals or organizations violating key principles and potentially the rights of other individuals. There may not be situations where actual prejudice is caused to a specific suspect or individual – for instance through hacking into someone’s computer.⁹² Rather, there may be an abstract conflict that indicates that there is a substantial risk that an individual’s rights may be violated – for example by making public accusations without bringing claims to authorities. Such accusations could lead to vigilantism and put individuals in danger. This should already prompt reputable organizations, and certainly any authorities involved, to look into the matter and to rigorously protect any relevant rights – including privacy rights. Unfortunately, given the multi-dimensional and complex investigatory landscape, particularly at the international level, this may not always happen.

Dominance of the Domestic Criminal Law of European States

With a few exceptions, such as the Hissène Habré case in Senegal and recent developments in Argentina,⁹³ European states are dominating the accountability landscape when it comes to universal jurisdiction cases for serious international crimes.⁹⁴ Since 2009, there has been a ‘significant’ shift in terms of which European states are pursuing investigations and prosecutions.⁹⁵ Previously, complaints were often filed in Belgium and Spain. However, after a political backlash against the more diplomatically sensitive cases, both countries narrowed their universal jurisdiction legislation.⁹⁶ Now, there are more cases being brought in Germany, France and the Nordic states. In addition to historical and political explanations, much of this movement has to do with the very practical strengthening of specialized international crime units in the relevant states and the shift to more structural investigations. These developments, along with the significant harmonizing force of the European Union (with its directives, mutual recognition and support of joint investigations) and the European Court of Human Rights (with its emphasis on minimum standards of protection for suspects and accused), can certainly be seen positively.⁹⁷ But looked at more critically, what does this dominance mean for the international criminal law landscape and how does it pose a risk?

Historically, European states have played a leading role in the creation and development of legal norms and practices relevant for international criminal law.⁹⁸ Critical scholarship has long viewed ‘traditional’ international criminal law infrastructures as spectacles mainly created and sustained for audiences in the Global North.⁹⁹ Calls for less-Eurocentrism resonate, in part, because these judicial bodies are meant to be global institutions reflecting global norms

⁹⁰ Burgis-Kasthala, *supra* n 37 at 1179.

⁹¹ Heinze, *supra* n 33 at 637.

⁹² S. Zappalá, ‘The Rights of Victims v. the Rights of the Accused,’ *Journal of International Criminal Justice* 8(1) (2010): 137–164 at 143.

⁹³ ‘Argentina’s Justice System to Probe Myanmar War Crimes Claims,’ *Buenos Aires Times*, 30 November 2021; Tun Khin, ‘Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide,’ *Opinio Juris*, 23 October 2020, <http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/>.

⁹⁴ Langer and Eason, *supra* n 30 at 799–800; Hovell, *supra* n 7 at 427–456; Bettina Steible, ‘EU Support to Domestic Prosecution of Violations of International Humanitarian Law,’ *EU Law Journal* 4(1) (2018): 51–66.

⁹⁵ Langer and Eason, *supra* n 94.

⁹⁶ Olympia Bekou, ‘Doing Justice for the Liberian Victims of Mass Atrocity: NGOs in Aid of Universal Jurisdiction,’ *International Journal of Criminal Justice* 13(2) (2015): 219–227, at 224; Naomi Roth-Arriaza, ‘Just a Bubble: Perspectives on the Enforcement of International Criminal Law by National Courts,’ *Journal of International Criminal Justice* 11(3) (2013): 541–542.

⁹⁷ See Kai Ambos, *European Criminal Law* (Cambridge: Cambridge University Press, 2018); Diane Marie Amann, ‘Harmonic Convergence? Constitutional Criminal Procedure in an International Context,’ *Indiana Law Journal* 75 (2000): 809–873, at 826–835; Cf. Werner Schroeder, ‘Limits to European Harmonisation of Criminal Law,’ *EUCRIM* 2 (2020), 144–148.

⁹⁸ Mark S. Berlin, *Criminalizing Atrocity: The Global Spread of Criminal Laws against International Crimes* (Oxford: Oxford University Press, 2020), 55.

⁹⁹ See Schwöbel-Patel, *supra* n 81; Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice* (Oxford: Oxford University Press, 2019), 145.

and experiences. However, strategically focusing on a select number of European states will inevitably lead to (even greater) Eurocentricity in the field.¹⁰⁰ A shift to European domestic systems, away from global institutions, carries three risks: (i) a reproduction of colonial dynamics whereby actors in the Global North exercise jurisdiction over 'others' in the South, marginalizing local groups and contributing to a two-tiered system of justice; (ii) substantive fragmentation whereby domestic crime interpretation may prevail over that of global institutions; and (iii) procedural obstacles for participating and non-participating victims and affected communities in the foreign domestic jurisdiction.

By increasing domestic prosecutions under universal jurisdiction, European states can continue to rely on and evoke the moral discourse on the humanitarian imperative to 'do something,'¹⁰¹ whilst being able to maintain even greater control over the decision-making. The same is true for those Western NGOs involved in the strategic litigation. European interest will in all likelihood prevail when it comes to case selection or any other politically sensitive topic. If cases become too sensitive (for instance they begin to target Western allies) as they had in Belgium and Spain in the late 1990s and early 2000s, there will likely be a curtailment of universal jurisdiction.¹⁰² There is an obvious hypocrisy here. This is also the case when funding comes directly from Western states known to oppose foreign accountability processes directed at their own citizens or allies.¹⁰³ Additionally, there is a 'danger of a colonial power dynamic (white saviour complex)' between the Western-based NGOs and the grassroots organizations and populations they are working with and 'assisting.'¹⁰⁴ Care must be taken not to marginalize the voices and interests of affected groups. Indeed, pursuing cases outside of the country in which they occur carries the risk of curtailment of their potential impact on affected communities, and in particular on the inclusion of civil society beyond participating NGOs.

Substantively, European dominance in this new landscape will mean that the case law examined and picked apart by legal practitioners and scholars will no longer focus almost exclusively on international courts and tribunals. Instead, domestic (European) jurisprudence will again become relevant in interpreting crimes or even modes of liability. International infrastructures, like the ICC, can play complementary roles or no role at all. As a result, the differences in substantive law will become more important to acknowledge and understand and could lead to norm fragmentation. By way of illustration, Tamas Hoffmann has looked into how 196 countries criminalize genocide and noted considerable differences, 'often significantly expanding or limiting the scope of application of the crime.'¹⁰⁵ Comparative legal scholars will have their hands full. However, most of the comparisons will be about European jurisdictions, further cementing Europe's hegemony in influencing international law.

Procedurally, there are also difficulties around prosecutions framed across different cultures.¹⁰⁶ In the context of the recent Syrian universal jurisdiction cases in Germany, civil society organizations and victims' representatives have routinely highlighted issues faced by

¹⁰⁰ Andreas Fischer-Lescano, 'From Strategic Litigation to Juridical Action,' in *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice*, ed. Saage-Maass et al. (New York: Springer, 2021), 301.

¹⁰¹ Lohne, supra n 99 at 149.

¹⁰² Langer and Eason, supra n 30 at 785, noting, however, that other countries continued to press ahead with universal jurisdiction cases.

¹⁰³ See Burgis-Kasthala, supra n 37; see also Public International Law & Policy Group (PILPG), Report, 'Documenting Atrocity Crimes Committed against the Rohingya in Myanmar's Rakhine State,' *PILPG*, December 2018, noting support from the US State Department.

¹⁰⁴ Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights,' *Harvard International Law Journal* 42 (2001): 201–245. Fischer-Lescano, supra n 100 at 304.

¹⁰⁵ Tamas Hoffmann, 'The Domestic Definitions of the Crime of Genocide: A Dizzying Diversity,' *Opinio Juris*, 17 June 2020, <http://opiniojuris.org/2020/06/17/the-domestic-definitions-of-the-crime-of-genocide-a-dizzying-diversity/> (accessed 15 August 2022).

¹⁰⁶ See Julie Fraser and Brianne McGonigle Leyh, eds., *Intersections of Law and Culture at the ICC* (Edward Elgar, 2020).

non-German speaking victims and affected communities.¹⁰⁷ Difficulties include victims participating in the proceedings having limited access to translated documents serving as evidence, and affected communities being unable to follow the proceedings due to a lack of transcripts, livestreaming or even reporting in Arabic. It makes it more difficult for victim communities to follow what is happening in the trial. In the Al Khatib trial in Germany, without summary reports produced by SJAC and ECCHR,¹⁰⁸ many court watchers were struggling to follow. And, unlike at international courts, these domestic processes do not provide transcripts of the proceedings, making the summary reports all the more important. In August 2020, after Arabic-language journalists appealed to the German Constitutional Court, judges found that the court should provide access to the Arabic translation but only for accredited Arabic-language journalists. They did this based on the special character of the proceedings which relate to the international community, and taking into consideration the right to equality before the law and freedom of the press.¹⁰⁹ Other states, such as the Netherlands, however, have not taken this step.

LOOKING AHEAD: IMPLICATIONS FOR THE FIELD AND MITIGATING RISK

Beyond the specific opportunities and risks mentioned above, a number of key intersecting and counteracting trends stand out. First, domestic legal systems (predominately European) are playing a more prominent role in ensuring accountability for international crimes. This is largely positive. The drive to hold alleged perpetrators accountable through universal jurisdiction, and the peripheral opportunities explored above that come with these actions, will generally outweigh any of the risks noted in this article. But the risks should not be downplayed too much. Instead, the risks should be at the forefront of those organizing and strategizing to end impunity for serious crimes because these risks need to be mitigated against for the well-being of victims, the rights of suspects and the overall credibility of the criminal process.

Second, there is a proliferating, and increasingly messy, transnational network of actors – both formal and informal – involved in the pursuit of this accountability. Empirical evidence shows that civil society organizations are partnering and cooperating with one another, technology companies, universities, states and international bodies to pursue accountability and justice like never before. This legal mobilization and bottom-up approach to accountability challenges dominant state-centric narratives and highlights the potential that new perspectives and voices can bring. But the cooperation is still limited, sporadic and heavily dependent upon the organizations (and levels of trust) involved. Greater dialogue, cooperation and coordination between the multi-layered and multi-directional initiatives is needed. That said, cooperation and coordination are difficult to do both for practical as well as substantive reasons.¹¹⁰ Cooperation takes time and costs money, and there needs to be a desire to connect on the part of the actors involved. When organizations are dependent on donor funding and deliverables, they may not have the capacity or willingness to form the necessary alliances to ensure more robust work standards or greater coordination. Moreover, when there are added cultural barriers like language,

¹⁰⁷ Alexander Dünkelsbühler, Alexander Suttor and Lea Borger, 'Universal Jurisdiction without Universal Outreach?' *Völkerrechtsblog*, 13 January 2021; Charlotte Bailey, 'Syrian War Crimes on Trial in Germany: Will Justice Be Lost in Translation?' *The New Humanitarian*, 21 October 2021; International Federation for Human Rights, European Center for Constitutional and Human Rights, and REDRESS, supra n 63; Syria Justice & Accountability Center, *A Missed Opportunity: Court Denies Recording of Closing Statements in Koblenz* (30 September 2021).

¹⁰⁸ See SJAC, *Trial Monitoring of the al-Khatib Trial at the Higher Regional Court in Koblenz*, <https://syriaaccountability.org/trial-monitoring/>; ECCHR, *Trial Updates of the al-Khatib Trial at the Higher Regional Court in Koblenz*, <https://www.ecchr.eu/en/case/trial-updates-first-trial-worldwide-on-torture-in-syria/>.

¹⁰⁹ German Constitutional Court (BVerfG), *Beschluss der 2. Kammer des Ersten Senats vom 18 August 2020 – BvR 1918/20* -, Rn. 1–17.

¹¹⁰ OHCHR, supra n 84; International Bar Association and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, supra n 47.

cooperation becomes even more challenging. Without financial and other forms of cooperation support, civil society actors may struggle to prioritize ethical conduct or much-needed cooperation efforts.

In early 2021, the International Commission of Jurists, together with the Dutch government, took important steps towards fostering greater awareness about these issues. After a number of online consultations and dialogues, they released their report in December 2021,¹¹¹ which not only calls for better coordination and cooperation but specifically suggests that a general protocol for civil society cooperation and engagement be developed.¹¹² Like the 2018 Lausanne Platform, the protocol would help minimize conflicts, identify key principles and best practices around documentation and increase cooperation around evidence gathering, information sharing and assistance requests.¹¹³ Importantly, where there is a substantial risk that an individual's rights may be violated by certain actions, the organizations involved should take steps to respect rights. It should not only be left to the courts, at a later stage, to protect rights of suspects and accused.

Beyond a protocol, civil society actors could also take steps to routinely consult with victims' groups in meaningful ways to ensure that the strategic litigation is part of a survivor-driven justice response. This means that civil society actors will need to adopt safeguards to ensure that asymmetric power imbalances are not reproduced and expanded. Survivor-driven justice should become the norm whereby victims and affected communities exercise voice and agency. Documentation initiatives should for example preserve all material in the original language so that affected communities have access to and decision-making rights over the information. Diversity of personnel on legal teams, inclusive consultation processes and open and transparent decision making are crucial.

Third, the almost exclusive use of European domestic courts in universal jurisdiction cases risks perpetuating a Eurocentric imbalance within the field of international criminal justice. It is imperative that the strategic litigation initiatives expand beyond those based out of Europe. Recent initiatives, such as the filing of a criminal complaint with the Attorney General of Singapore by a South African organization to hold the former Sri Lankan President accountable for war crimes, could be supported.¹¹⁴ To overcome some of the risk of European hegemony, strategic litigation actors, possibly driven by the 'leaders of the pack,' could create an ICL-strategic litigation sector. The sector can promote the adoption of codes of conduct amongst civil society organizations, possibly through a general protocol discussed above, to help ensure the ethical practice of law. It can look to increase the number and types of cases brought in jurisdictions outside of Europe and help to build the capacity of partners around the world, especially when it comes to victim support and technology use.¹¹⁵ And, it can play an important role in the monitoring and evaluation of strategic litigation cases and organizations.¹¹⁶

Finally, it is crucial that domestic justice systems adapt and respond to the specific issues likely to arise. One suggestion is the adoption of special domestic international criminal procedural codes that would complement existing domestic criminal procedural codes. A distinct code for domestic prosecutions of international crimes, whether in Germany or elsewhere, could

¹¹¹ See International Commission of Jurists and the Kingdom of the Netherlands, *Report: The Future of Accountability Mechanisms: Twenty Recommendations* (December 2021), <https://www.icj.org/wp-content/uploads/2021/12/GLOBAL-Report-The-Future-of-Accountability-Mechanisms-ENG-2021.pdf>.

¹¹² *Ibid.*, 8.

¹¹³ IJIM, *supra* n 56.

¹¹⁴ Lauren Ban, 'Rights Group Files Complaint Against Former Sri Lanka President Rajapaksa for War Crimes,' *Jurist*, 25 July 2022.

¹¹⁵ For recommendations on strategic litigation more generally, see Hondora, *supra* n 5 at 115.

¹¹⁶ Catherine Corey Barber, 'Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations,' *International Journal of Human Rights* 16(3) (2012): 411–435.

allow for more germane procedural rights and protections for victims, accused and broader communities that all have an interest in these proceedings. This code could ensure clear rights for participation, protection and reparation. Judges can also be trained and instructed to realize the international dynamics and impacts of these cases. Despite the fact that domestic judges may just be sitting in judgement of domestic law violations for international crimes, they are nonetheless intricately involved in a process that transcends geographic and temporal boundaries – as the judgments will impact affected communities often scattered across the globe for generations to come. At the very least, interpretation needs to be made available, outreach beyond the national borders needs to be coordinated and archives need to be established.

CONCLUSION

Due on the one hand to the limitations and constraints inherent in the work of the ICC, and to the technological and legal developments of the past 10 years on the other, a new and growing landscape in international criminal justice is emerging. In this new landscape, domestic prosecutions are taking center stage and networks of cooperation are helping to shape justice outcomes. The turn towards criminal investigations and the building of criminal case files by civil society organizations has not only become more regular but has also become more structured and prosecution oriented. Driving the prosecutions 'from below,' civil society is creating new opportunities by cooperating like never before on complex cases with myriad actors involved.¹¹⁷ The relationships between these actors and domestic, regional, transnational and international jurisdictions in international criminal law are exciting and understandably messy, yet potentially full of risks. The legal implications will be significant. This article has sought to explore some of the opportunities and risks around increased strategic litigation and universal jurisdiction and offers some modest recommendations to mitigate against the risks. The differences in terms of how and where the legal responses take shape, the position of different actors within the legal frameworks (including their rights and obligations under domestic and international law) and how they cooperate will all impact upon the quality of investigations, the ultimate success of prosecutions and the future of international criminal justice as a field. This is an area of law that will become increasingly significant as more strategic litigation cases are brought, requiring greater scrutiny and scholarship.

¹¹⁷ Bethan McKernan, 'Criminal Complaint Submitted to German Court Over Sarin Gas Attacks in Syria,' *The Guardian*, 6 October 2020.