Prosecuting International Crimes Series: Defining Legal Concepts and Frameworks

May 31, 2018

Prosecuting international crimes: expert meeting on the collaboration between national prosecuting authorities and non-governmental organizations

This article and the three following articles are a joint publication between the Global Justice Journal (in English) and Quid Justitiae (in French and Spanish).

General Introduction

Over the past 25 years, a system of international justice has emerged, seeking to answer decades-long calls for greater accountability for massive human rights abuses. Treaties and declarations signed by most countries of the world outlaw international crimes, including sexual violence, but what has been missing are the mechanisms and the political will to enforce them. According to Amnesty International, 86% of the 193 United Nations Member States have now defined one or more of the core international crimes within their domestic law and 76% have provided for universal jurisdiction over one or more of these categories of crimes[1]. The creation of the ICC has been at the forefront of this movement towards greater accountability. Its funding treaty enshrined the “complementarity” principle, which means that States bear the primary responsibility to investigate and prosecute international crimes[2]. The system it created depends on a strong network of state cooperation with the ICC (referred to as “vertical” cooperation), but cooperation has often been very inadequate,

detrimentally affecting the efficiency of the Court and its ability to fulfill its mandate[3]. Moreover, given that international tribunals can handle only a limited number of cases, it is essential to foster effective "horizontal" cooperation between States in the investigation and prosecution of international crimes[4]. An overview of global war crimes prosecutions indicates that 48 countries have initiated prosecutions related to atrocity crimes in the past decade and a half, 33 of which were themselves the affected country while more than 10,000 perpetrators have been brought to justice in national courts around the world[5]. Since that study, many more national prosecutions were undertaken, often based on universal jurisdiction and in contexts where they represent the only opportunity for victims to obtain justice, like prosecutions in Europe for crimes committed in Syria[6]. At the same time, significant challenges exist in bringing such cases before national courts: scarcity of resources for investigations and prosecutions; lack of political will and politicization of cases; inadequacies in national war crimes legislation; lack of personal security for victims and witnesses; stigmatization of victims of sexual violence; language, cultural and sensitivity barriers; lack of trust between stakeholders; misunderstanding of States' legal requirements to prosecute; and insufficient NGO-NGO and State to State collaboration for cases with transnational elements[7]. NGOs often play a role in the cases that are brought forward at the national level, and can contribute to the work of national prosecuting authorities by bringing additional resources and expertise. These are both international and nationally-based organizations working in the fields of human rights monitoring, gender issues, child soldiers, humanitarian relief, and many other areas. There are also a growing number of organizations directly involved in developing cases for trial, with direct access to victims and witnesses, partnerships with grassroots organizations, and expertise in international criminal law, sexual violence in conflict, child soldiers and other relevant areas. Some collaborative relationships with national prosecuting authorities exist and there are examples of successful prosecutions, such as the cooperation between Belgian and Swiss prosecutors and Civitas Maxima in the Johnson and Kosiah cases pertaining to Liberia, or the work of Human Rights Watch with the Senegalese government in the Habré case. However, while more attention has been paid recently to the role of NGOs[8], little has been developed in the way of guidelines for ensuring that governments and NGOs involved in such cases operate in a way that is mutually supportive, aiming at the goal of a successful prosecution with due regard to fair trial guarantees with a gender perspective at all stages. Our Canadian-led outreach activity aims at filling that gap.

Based on the above premise, a joint initiative of the Crimes against Humanity and War Crimes Section of the Canadian Department of Justice, the Canadian Centre for International Justice, Lawyers Without Borders Canada, the Human Rights Center of University of California's Berkeley Law, Université Laval and the Canadian Partnership for International Justice, an expert meeting was organized on the 15th and 16th of March at University of Ottawa. It identified the key issues that can lead to a more effective collaboration between NPAs and NGOs in the domestic prosecution of international crimes, while documenting and sharing the good practices of State officials and NGOs, with academic input.

Prior to the expert meeting, a background document was drafted in order to provide basic information on the cooperation between national prosecuting authorities (NPAs) and non-governmental organizations (NGOs) based on a number of documents that addressed this topic from different perspectives[9]. First, based on this research, some legal concepts and frameworks were defined as the basis of the discussion and to be kept in mind by all stakeholders when investigating international crimes (Part I).

The following articles will respectively highlight that knowledge of investigation policy and respect for the principles of cooperation and collaboration are essential to gather information that could have probative value (Part II), that documenting information needs to be done in a rigorous way according to several planning stages (Part III) and finally stress that after information has been gathered, the management of that information raises multiples challenges and outcomes (Part IV).

Part I: Defining Legal Concepts and Frameworks

Civil society actors (CSAs) should be encompassed in a broad definition embracing “any non-state actor that has either a formal or a non-formal role in the legal justice process”[10]. This definition includes NGOs and other first-responders who may interact directly with victims or come to be in contact with or in possession of information or evidence of an international crime[11]. As first-responders, NGOs are often well-positioned to collect information about international crimes since their personnel can arrive at crime scenes long before criminal investigators who may face diplomatic, legal or pragmatic obstacles to reach atrocity sites[12]. The word “investigations” includes “monitoring”, “documentation” and “fact-finding” undertaken by national or international investigators into egregious violations[13].

The term “cooperation” refers not only to a wide spectrum of interactions between CSAs and judicial mechanisms, either at national or international level, but also to any interventions or actions of one party that could have an impact upon the other, such as highlighting specific cases in order for the prosecutors to trigger an investigation; interventions affecting the successful investigation and prosecution of international crimes; the collection of evidence and the identification of victims and witnesses; or the provision of special care and support to victims[14]. An “effective cooperation” is the main goal pursued, without purely-results driven approach that could harm victims, while improving channels of communication at all levels, throughout the whole process of information and evidence gathering[15]. It includes a broad range of forms of cooperation such as facilitating the identification and the prosecution of international crimes; a greater awareness in the public consciousness of the need for justice for victims and the lack of impunity for perpetrators; or a reparative benefit and an empowering experience for victims[16].

Substantial barriers to NGOs participation can be highlighted. When engaged in information gathering and fact-finding, they might not be willing to cooperate with jurisdictions or focus their efforts on collecting evidence for legal proceedings. Also, they may lack training to carry out gathering techniques and they may not get the needed information that could be admissible in Court, for

instance regarding the requirements of the process of authentication by the Office of the Prosecutor (OTP) of the ICC[17]. This is why, “thus, there is a need to develop trainings and disseminate guidelines on how to collect evidence of crimes in ways that will maximize its potential probative value in court”[18]. Another challenge that can be emphasized is that NGOs involved in fact-finding should be aware of the protocol and practices to be followed in information gathering about international crimes in order to enhance accountability, either before national or international jurisdictions. Nevertheless, any guidelines should embrace flexibility by implementing minimum standards of the principles and techniques to be followed by CSAs when collecting information and evidence[19].

“Egregious violations” should be understood as the international crimes of genocide[20], crimes against humanity[21] and war crimes[22] but also as any other grave violations of international humanitarian, criminal and human rights law[23]. The term “witnesses” can include “victims”, who can also be identified as “survivors”[24].

The understanding and interpretation of sexual violence as an international crime should be based upon the provisions of the Rome Statute of the ICC[25]. These provisions are largely ratified by States, including those on conflict-related sexual violence and are reflected in numerous national legislations. Therefore, these understandings should be common to the ICC and to national courts aiming to prosecute CRSV as an international crime[26].

Sexual and gender-based violence against men and boys should be seen broadly and as including any conduct “that targets men and boys because of their sex, sexual orientation and/or socially constructed gender roles, regardless of whether that conduct also involves sexual violence or not; that does not necessarily take place during armed conflict; of a sexual nature involving no physical violence or contact”[27].

Violence and grave violations against children in armed conflict refer to every person younger than 18 years old, being subject to killing or maiming; recruiting or use of children in armed forces and groups; attacks against schools or hospitals attended by children; rape and other forms of sexual violence against children; abduction of children; and denial of humanitarian access to children[28].

Please cite this article as: Silviana Cocan, Joseph Rikhof, and Érick Sullivan, “Prosecuting International Crimes Series: Defining Legal Concepts and Frameworks” (2018) 2 PKI Global Just J 16.

Silviana Cocan*Silviana Cocan* *is completing a joint doctoral degree at the Faculty of Law of Laval University and at the Université de Bordeaux in France. Her doctoral thesis is on the dialogue between jurisdictions and quasi-juridictions protecting human rights, especially as it relates to the prohibition of torture and other cruel, inhumane or degrading treatments. Silviana is participating to the Clinique de droit international pénal et humanitaire at Laval University.*

*Joseph Rikhof**Globally-recognized as an expert in cases of war crimes,* ***Dr. Joseph Rikhof*** *was with the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and teaches International Criminal Law in the Faculty of Law at University of Ottawa. Dr. Rikhof was a visiting professional with the International Criminal Court in 2005 and Special Counsel & Policy Advisor to the Modern War Crimes Section of Canada's Department of Citizenship and Immigration between 1998 and 2002. Extensively published, Dr. Rikhof lectures around the world on organized crime, terrorism, genocide, war crimes, and crimes against humanity.*

Érick Sullivan***Érick Sullivan*** *is a lawyer and the Deputy-Director of the Clinique de droit international pénal et humanitaire since September 2012. He worked as a research assistant for the Clinic for two years prior to being promoted as Deputy-Director. He is a law graduate from Laval University (LL.B., 2009) and completed an internship at the International Criminal Tribunal for Rwanda in 2010 as part of the Defence team of Callixte Nzabonimana and under the supervision of Me Philippe Larochelle. He collaborated to the intervention of the Groupe d'études en droits et libertés de la personne of the Law Faculty of Laval University before the Supreme Court of Canada in the* Momin Mohammad Khawaja *case.*

Translation team: Silviana Cocan, Maria Belén Gallardo Rivas, Maxime Mariage, Marie Prigent, Alicia Pujol

References

1. Amnesty International, "Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2 www.amnesty.org/en/documents/IOR53/019/2012/en/.

Lafontaine, F. “National Jurisdictions” in W. A., Schabas, Cambridge Companion to International Crimina
Akhavan, P. “Whither National Courts? The Rome Statute’s Missing Half: Towards an Express and Enfo
International Crimes” Journal of International Criminal Justice 8, no. 5 (2010): 1245; Schabas, W. A. The
Statute (Oxford: Oxford University Press, 2010); Broomhall, B. International Justice and the Internationa

2. Dancy G. & F. Montal. “Unintended Positive Complementarity: Why International Criminal Court Investig
Prosecutions” American Journal of International Law 1 (2017, Forthcoming): 4; Heller, K. J. “Radical Cor
(2016): 637; Mégret F. & M. G. Samson. “Holding the Line on Complementarity in Libya: The Case for T
Criminal Justice 11, no. 3 (2013): 571; Stahn C. & M. M. El Zeidy., eds, The International Criminal Court
(Cambridge: Cambridge University Press, 2011).

3. International Criminal Court, ICC-Resolution ICC-ASP/13/Res.3, 17 December 2014; Broomhall, B. & C.
Rome Statute: a Comparative Synthesis”, in C. Kress & G. Bitti, dir., The Rome Statute and Domestic Le
Sluiter, G., H. Friman, S. Linton, S. Vasiliev & S. Zappalà. International Criminal Procedure: Principles a

4. Lafontaine, F., “La compétence universelle et l’Afrique?: ingérence ou complémentarité??” Études intern
https://doi.org/10.7202/1025120ar; Ellis, M. S. “InternationalJustice and theRule of Law: Strengthening t
the Rule of Law 1, no. 1 (2009): 79; Gaeta, P. “The Need to Reasonably Expand National Criminal Juris
Realizing Utopia: the Future of International Law (Oxford: Oxford University Press, 2012) 596.

5. Rikhof, J. “Prosecution of International Crimes – a Historical and Empirical Overview”, Bergen Journal of
https://boap.uib.no/index.php/BJCLCJ /article/view/706.

6. Trial International, “Universal Jurisdiction Annual Review: Make Way for Justice #2” (Geneva: Trial Inter
“Complementarity Revisited: National Prosecutions of International Crimes and the Gaps of Internationa
(Routledge, 2018, Forthcoming), ch. 13; Langer, M. “Universal Jurisdiction is Not Disappearing: The Shi
Jurisdiction” Journal of International Criminal Justice 13 (2015): 245.

7. Currie, R. J. & J. Rikhof, “International & Transnational Criminal Law”, 2nd ed, (Toronto: Irwin Law, 2014
in N. Boister & R.J. Currie, eds, Routledge Handbook of Transnational Criminal Law (London: Routledge
Gaeta, ed, The UN Genocide Convention – A Commentary (Oxford: Oxford University Press, 2009) 278
jurisdiction for international crimes” Journal of International Criminal Justice 13, no. 2 (2015): 237; “Univ
Misgivings towards International Criminal Justice as Administered by Western States” Journal of Interna
F., “Universal Jurisdiction – the Realistic Utopia” Journal of International Criminal Justice 10, no. 5, (201
droit suisse : compétence universelle et crimes internationaux, 2nd ed., (Geneva : Trial, 2015), online : h
ch.org/fileadmin/user_upload/documents/publications/Manuel_juridique_2015/TRIAL-MJ_FINAL_21.07.
against Humanity and War Crimes in Canadian Courts (Toronto: Carswell, 2012); Kemp, S. “Guatemala
Perspectives on Genocide and Domestic Criminal Justice.” Journal of International Criminal Justice 12,

8. Bekou, O. “Doing Justice for the Liberian Victims of Mass Atrocity: NGOs in Aid of Universal Jurisdiction
1, 2015): 219. https://doi.org/10.1093/jicj/mqv006 ; Van der Wilt, H. “Sadder but wiser? NGOs and unive
International Criminal Justice 13, no. 2 (2015): 237; UK & Commonwealth Office, “International Protocol
Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Cri
https://www.gov.uk/government/ uploads/system/uploads/attachment_data/file/598335/International_Pro
Commission, Crimes against Humanity Proposed Treaty, Draft Article 4.

9. Human Rights Center, UC Berkeley School of Law, *First Responders – An International Workshop on C* September 2014 (hereinafter, *First Responders*), p. 1: http://www.publicinternationallawandpolicygroup.c Society-Documentation-of-Serious-Human-Rights-Violations_c.pdf ; Institute for International Criminal In *Sexual and Gender-Based Violence Against Men and Boys*, 29 February 2016 (hereinafter, *Investigating* https://iici.global/0.5/wp-content/uploads/2017/03/160229_IICI_InvestigationGuidelines_ConflictRelatedS Policy Group, *Field Guide for Civil Society Documentation of Serious Human Rights Violations*, 2016 (he 2: http://www.publicinternationallawandpolicygroup.org/wp-content/uploads/2016/03/Field-Guide-for-Civi Violations_c.pdf ; United Nations Children's Fund (UNICEF), *Field Manual – Monitoring and Reporting M situations of Armed Conflict*, June 2014 (hereinafter, *Field manual – MRM on grave violations against ch* https://childrenandarmedconflict.un.org/wp-content/uploads/2016/04/MRM_Field_5_June_2014.pdf ; Un *Monitoring and Reporting Mechanism on Grave Violations Against Children in situations of Armed Confli* violations against children in situations of armed conflict), p. 4: https://childrenandarmedconflict.un.org/w _5_June_20141.pdf ; Foreign & Commonwealth Office, *International Protocol on the Documentation and Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, 2nd editi *documentation of sexual violence in conflict*), p. 11: https://www.gov.uk/government/uploads/system/upl ; International Nuremberg Principles Academy, *Cooperation between Civil Society Actors and Judicial M Sexual Violence: Guiding Principles and Recommendations*, July 2017 (hereinafter, *Cooperation betwee CRSV*), pp. 6-8: https://www.nurembergacademy.org/fileadmin/media/pdf/projects/improving_cooperation_sexual_violen ; Public International Law & Policy Group, *Handbook on Civil Society Documentation of Serious Human* (hereinafter, *Handbook on Civil Society Documentation*), p. 13: http://www.publicinternationallawandpoli Civil-Society-Documentation-of-Serious-Human-Rights-Violations_c.pdf ; Foreign & Commonwealth Offi *of sexual and gender-based violence crimes*, Center for International Law Research & Policy, Case Mat *of SGBV crimes*): www.legal-tools.org/doc/e06a52/pdf/ ; Human Rights Center, UC Berkeley School of L to Investigate Grave Crimes (hereinafter, *Using Open Source Information*), February 2018: https://www. content/uploads/2018/02/Bellagio_report_2018_9.pdf
10. *Cooperation between CSAs and judicial mechanisms in the prosecution of CRSV*, p. 8.
11. Ibid., the term 'first-responders' can refer to journalists, medical professionals, psychologists, human rig
12. *First Responders*, p. 4.
13. *Investigating CRSGBV against men and boys*, p. 18: investigations can be lead "by national police inves investigators for the purposes of supporting criminal and non-prosecutorial forms of accountability"; "crim international criminal courts such as the ICC"; "other investigations" refers to "international and other co international and other arbitration and civil-liability mechanisms, and bodies such as truth and reconciliat
14. *Cooperation between CSAs and judicial mechanisms in the prosecution of CRSV*, p. 9.
15. *First responders*, p. 5.
16. *Cooperation between CSAs and judicial mechanisms in the prosecution of CRSV*, p. 9.
17. *First Responders*, p. 4.
18. Ibid.

19. Ibid., pp. 9-10.
20. According to the article 6 of the Rome Statute of the ICC.
21. Ibidem, article 7.
22. Ibid., article 8.
23. *Investigating CRSGBV against men and boys*, p. 16.
24. Ibid., p. 18.
25. For the provisions of the Rome Statute on sexual-violence, s. Annex A of *Cooperation between CSAs a* s. also *International Protocol on the documentation of sexual violence in conflict*, Chapter 4, pp. 41-64.
26. *Cooperation between CSAs and judicial mechanisms in the prosecution of CRSV*, p. 9.
27. *Investigating CRSGBV against men and boys*, p. 16; s. also p. 17 on the specific definition of “men and differ from women or girl victims of such violations; pp. 18-19 on other sexual and gender minorities (des transgender/trans and/or intersex).
28. *Guidelines – MRM on grave violations against children in situations of armed conflict*, p. 3. These six gra reporting mechanism established within the framework of the UN, involving a broad circle of stakeholder UN departments and agencies, international and local NGOs and affected communities.