

Opinion – Civil Society Participation in International Criminal Justice

Written by Kjersti Lohne

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KJERSTI LOHNE, OCT 17 2024

The International Criminal Court (ICC) is in trouble. To commentators and observers of the Court, one crisis seems to lead on to the next, so that the field of international criminal justice has been described as being in ‘perpetual crisis’. Following a brief ‘revitalization’ of the Court due to its swift reaction to Russia’s 2022 full-scale invasion of Ukraine, in recent events, its investigation of the Palestine situation has led to further politization and pushback from states against its work, including by so-called liberal democracies such as Israel and the US.

At the same time, the liberal international order is facing challenges on its own. Dictatorships are advancing, with seventy per cent of the world’s population now living under them, which means that the level of democracy is back at 1989 levels; the liberal democratic progress of the last 30 years has come to an end. Without delving into what this means for the prospects for peace or increased violence, it does raise questions about what an increasingly autocratic world might mean for the future of international criminal justice, given that the ICC is completely dependent on state cooperation to do its job. For example, to effectively investigate international crimes, the Court needs access to territories and victim and witness communities, including (state) security provisions for its personnel. As the Court does not have its own police force, it is also dependent on states to enforce arrest warrants. Yet, as we know, state cooperation with the ICC is uneven and volatile, at best. Thus, a central question remains whether *non-state actors* can fill in at least some of the gaps resulting from the lack of state support and cooperation with the Court. In the remainder of this piece, some of the core issues concerning past and present roles of civil society in the pursuit of international criminal justice are addressed, drawing on a recent article published in *International Criminal Law Review*.

Much of the early scholarship on civil society engagement with the ICC praised the extensive participation of NGOs at the 1998 Rome Conference at which the ICC was established, celebrating the ICC as a ‘global civil society achievement’—a court ‘by the people, for the people’. After the ICC became operational in 2002, international human rights NGOs have been involved in almost all aspects of the Court’s functioning, from agenda-setting conflicts, documenting and investigating crimes, communication with victims and victim communities, lobbying states for political and financial support to the Court, advocacy for ratification and implementation of the ICC statute in domestic systems of justice, capacity-building for international justice—the list is endless. International human rights NGOs became integral advocates for international criminal justice as much as being part of the day-to-day functioning of the Court.

In recent years, new additional ‘types’ of NGOs and civil society actors have become prominent within the field of international criminal justice, as can be gleaned from ongoing developments in accountability efforts for international crimes in Syria and Ukraine.

In response to the lack of ICC jurisdiction over the conflict in Syria, a variety of civil society actors, including international organizations and local NGOs, have worked to collect and preserve information, and document and build cases, in a search for accountability for international crimes committed in Syria, including by the state itself. This includes local NGOs such as the Syrian Network for Human Rights and documentation actors such as the Violations Documentation Centre established by Syrians immediately after the uprising began, together with

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international organizations such as Bellingcat, the UN Commission for Syria, the International, Impartial, and Independent Mechanism (IIIM), and the Commission for International Justice and Accountability (CIJA).

While in the past local and international NGOs have been involved in documenting international crimes, including for the ICTY and the ICTR, there is something qualitatively new about actors such as CIJA working in the field of international justice. It bears witness to an increasing privatization of international criminal justice and a 'departure from the practice of conducting international criminal investigations under the aegis of public institutions'. Because Syria is not a member of the ICC (and is a closed autocracy) and a Security Council referral of the situation to the ICC has been vetoed by China and Russia, the jurisdiction gap in international criminal justice has paved the way for this type of 'entrepreneurial justice'. However, the privatization of international criminal justice may raise some issues of accountability. It is notable that these models rely on 'local capacity' within the autocratic state, that is, dissidents and local NGOs.

The Russian full-scale invasion of Ukraine sparked an unprecedented international (western) mobilization for war crimes investigations and prosecutions. A multiplicity of domestic and international NGOs are now involved in collecting, documenting, investigating, and preparing masses of data on war crimes for prosecution in various courts, legal institutions, and jurisdictions. In addition to a host of international organizations, including the ICC and Eurojust, and contributions from western states, domestic NGOs in Ukraine are heavily involved in documenting Russian war crimes. War crimes documentation is also being crowdsourced among the Ukraine population, the Ukrainian prosecution office having established a dedicated homepage where citizens can register and document war crimes.

This 'democratization' of domestic NGOs and civil society actors engaged in documenting international crimes is facilitated by digital technologies and the availability of digital evidence such as open-source information. While important challenges remain with using new technologies and open-source investigations—including particularly as regards the digital divide—their potential appears particularly useful for local NGOs, both by enabling access to hard-to-reach areas and by helping counter state narratives. Importantly however, crowdsourcing investigations is dependent on there being an advanced digital infrastructure, which there is in Ukraine, but is not the case in many other ICC situation countries.

In short, what we see emerging within the ecology of international criminal justice is an increasingly professionalized and transnational private industry ready to collect evidence and prepare cases for prosecution, either under universal jurisdiction or, if time permits, international criminal court(s). This means that the rising tide of autocratization around the world is paralleled by important shifts in the actors and activities of civil society engagement with the ICC. These observable shifts are both driven by technological advances and, crucially, by opportunities arising from the lack of jurisdiction and lack of state cooperation with the ICC. The diversification of civil society engagement with the ICC and international criminal justice more broadly—with not-for-profit investigatory organizations, private technology companies, and local NGOs focused on documentation and investigations rather than advocacy, calls for further scrutiny – not least for what all this means for the ICC and for the pursuit of international criminal justice more broadly.

First, the diversification of civil society actors at the ICC reflects broader trends in the ecosystem of international criminal justice. The ICC was originally designed by its creators to replace ad hoc judicial institutions that dealt with specific situations—for a while, it represented the pinnacle of international criminal accountability. Today, this elevated position in the hierarchy of international criminal accountability is increasingly challenged by a proliferation of ad hoc, locally specific, and quasi-judicial 'accountability' institutions. The 'novel generation' of UN accountability mechanisms for Syria, Myanmar and Daesh are mandated 'to collect, collate, analyse and preserve evidence of international crimes ... according to criminal justice standards, and to make this evidence available for domestic or international prosecutions' (D'Alessandra et al 2021).

In response to the Russian full-scale invasion of Ukraine, the EU, with EuroJust, has also significantly upscaled its collection, processing, and storage of evidence—for instance through the International Centre for the Prosecution of the Crime of Aggression against Ukraine—in anticipation of future domestic or legal prosecution. This 're-orientation of stakeholders', referred to as an 'accountability turn' in the international criminal justice ecosystem, is paralleled by

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the growing use of universal jurisdiction by domestic authorities when prosecuting international crimes, such as Daesh crimes committed in Syria by Syrian nationals but prosecuted in Germany. In other words, there has been a noticeable fragmentation and decentralization of international criminal justice, in which the ICC is increasingly referred to and refers to itself as a 'capacity-builder', arguably giving up the hegemonic role in international criminal justice, it was once envisioned to have.

Second, this fragmentation of international criminal justice may make investigation and prosecutions of international crimes more effective since trials can be held under universal jurisdiction in third countries. On the other hand, one may ask what the future holds for the ICC at all, given that it does not have a monopoly on international criminal accountability, and its institutional make-up makes it powerless when confronting state power, particularly big state power. The emergence of new actors and a professionalization of civil society actors documenting international crimes, 'increasingly prove that in the new international criminal justice ecosystem, the unsc-dependent institutions remain at the periphery of accountability initiatives, whereas domestic jurisdictions emerged as key accountability avenues' (Aksamitowska 2021). Moreover, questions may be asked whether this accountability development does indeed produce more 'justice' for the local populations and civil society in whose name international justice is (usually) sought. Indeed, we might see an expansion of a type of 'donors' justice' and a more articulated politization of the aims of international criminal prosecutions. Rather than claiming universality, it may increasingly give voice to a liberal monologue in an increasingly autocratic world.

About the author:

Kjersti Lohne is Professor in Criminology at the University of Oslo, and Research Professor at the Peace Research Institute Oslo (PRIO). She is interested in the intersections of global order-making, morality, violence, and law, and publishes across the disciplines of international relations, criminology, and sociology of law. She is the author of *Advocates of Humanity* (OUP) and is currently leading a research project on the role of criminal justice in states' foreign policy (JustExports).