

JUSTICE IN AN EVER-EVOLVING (DIGITAL) WORLD - A REFLECTION ON THE ANNUAL INTERNATIONAL BAR ASSOCIATION'S WAR CRIMES CONFERENCE

*Isabella Regan**

I. Introduction

There is never a dull moment in the turbulent landscape of international criminal justice. Investigations into war crimes and other atrocities constantly undergo a range of developments, both mentally uplifting as well as sometimes downright disappointing. This year has already experienced a number of interesting shifts, both positive and negative, in this field. The ever-changing nature of this environment raises questions on what the future will hold for international criminal justice.

Let me start this article with an example of a recent positive development: the increase of the use of civil society documentation in national war crime prosecutions. In several European countries, evidence collected by a number of organisations has had tremendous impact on strengthening prosecutions of perpetrators of war crimes in Syria.¹ An example is the arrest of two former Syrian government officials in Germany for international crimes, including torture and crimes against humanity. This arrest was the outcome of intensive investigations by Berlin-based NGO European Centre for Constitutional and Human Rights (ECCHR).² For these organisations, who have been actively documenting the atrocities since the conflict broke out, as well as for others seeking paths to justice and accountability for crimes committed in Syria, this is a great accomplishment.

Another development I find exciting is the increase of civil society organisations using more advanced digital means to collect, verify and document atrocities. With many countries in conflict being difficult or sometimes even impossible for international criminal investigators to reach, evidence found on the internet is readily available - and nowadays in abundance. Besides more and more online evidence being used for accountability and awareness, human rights organisations now often team up with various technology experts to reconstruct, analyse and

* Lecturer in Criminology, Department of Criminology and Criminal Law, VU University Amsterdam. Researcher at the Center for International Criminal Justice (CICJ). Former project officer Human Rights Capacity-Building Programme at Amnesty International the Netherlands, research associate at CICJ and former editor-in-chief at Amsterdam Law Forum for the year 2016-2017.

¹ See for an overview of universal jurisdiction cases, particularly interesting due to the role of civil society are cases in France, Germany, Sweden for crimes committed in Syria: TRIAL International, 'Evidentiary challenges in universal jurisdiction cases', at: https://redress.org/wp-content/uploads/2019/03/TrialInternational_UJAR5_DIGITAL.pdf (accessed on 14 May 2019) and ECCHR, 'Sweden: Criminal Complaint Against Assad's Intelligence Officials', at: <https://www.ecchr.eu/en/case/sweden-criminal-complaint-against-assads-intelligence-officials/> (accessed on 14 May 2019).

² K. Connolly, 'Germany arrests two Syrians suspected of crimes against humanity', *The Guardian* 2019, at: <https://www.theguardian.com/world/2019/feb/13/germany-arrests-two-suspected-syrian-secret-service-officers> (accessed on 14 May 2019).

expose war crimes.³ This increase of use of technology is not only beneficial for the larger NGOs, such as Amnesty International (AI) or Human Rights Watch (HRW), but can also open doors for many smaller civil society organisations wanting to shed light on human rights violations.

These brief examples show that international criminal law never stands still. The ‘right path’ to justice can be confusing, disappointing sometimes, but certainly also innovative and exciting. In the next sections I will reflect on a selection of innovative and exciting developments related to international criminal investigations as discussed during the International Bar Association’s (IBA) Annual Conference on International Criminal Law. On 13 April 2019, the IBA War Crime Committee held its Annual Conference in the Peace Palace, The Hague.⁴ The title of the conference, ‘The Next Big Questions for International Criminal Justice’ suitably highlights the need to explore the future of this field.

In this commentary I aim to give an overview of the discussions and the ‘big questions’ posed during the panels at the IBA conference focusing on international criminal investigations. The topics set out are as follows: corporations and international crimes; civil society involvement; private criminal investigators and UN investigative mechanisms. Some of the speakers focused on *who is being investigated* (for example, corporations) whereas other speakers focused more on *who is investigating* and collecting evidence of other international crimes. A recurring topic is the role of private (non-state) actors in investigating international crimes. For each theme I provide an overview of what was discussed by panellists and follow with my own reflections from a legal and criminological point of view.⁵ Finally, I conclude by reflecting on what the future may bring to international criminal investigations, as to enhance further discussions in the field.

II. Corporate Involvement in International Crimes

During the first panel, *Corporate accountability for war crimes, crimes against humanity and genocide: what gives?*⁶ Gregory Kehoe mentions there is a line to address regarding how far accountability can go. Panellists discuss cases in which corporations were held to account for their involvement in the perpetration of international crimes to explore possibilities and challenges.

II.1 The Length of Corporate Accountability

Guénaél Mettraux starts by giving a historic overview of international law and corporations and explains that war crimes judgments have historically said corporations can contribute to war crimes and should be held to account. However, the regulation of corporate accountability for international crimes is left to domestic jurisdictions. The Rome Statute of the International Criminal Court (ICC) does not contain a provision for corporate criminal responsibility. However, Mettraux does state that a number of principles can be derived from international criminal law regarding the corporate responsibility of individuals. Sheryn Omeri argues that the

³ See, for example, Amnesty International’s project ‘Saydnaya. Inside a Syrian Torture Prison’, for which collaboration was sought with Forensic Architecture, at: <https://saydnaya.amnesty.org/> (accessed on 12 May 2019).

⁴ See for the full conference programme: <https://www.int-bar.org/Conferences/conf970/binary/The-Hague-War-Crimes-2019-programme.pdf> (accessed on 18 May 2019).

⁵ Where necessary, quotes, examples and discussion points are assigned to the specific panel speaker. Other comments and reflections present my own views.

⁶ Session Chair: *Gregory Kehoe* (Greenberg Traurig, Tampa, Florida; Co-Chair IBA War Crimes Committee). Speakers: *Judge Guénaél Mettraux* (Kosovo Specialist Chambers, The Hague), *Pieter Borms* (Van der Straten, Antwerp), *Emma Irving* (Assistant Professor of Public International Law, Leiden Law School, The Hague) and *Sheryn Omeri* (Cloisters Chambers, London).

failure to historically prosecute the supply of chemical weapons used in war crimes has resulted in a 'deterrence void'. She uses the Frans van Anraat – a Dutch national – case as an example of one of the only successful domestic prosecutions of a supplier of chemicals, which were used in the 1981 Halabja mustard gas attack by Saddam Hussein in Iraq. However, Omeri raises the question whether the names of other businesses involved in the chemical trade with Van Anraat should have been redacted from the court files. She points out that, despite the court ruling that businesses should be held accountable for their actions, other involved corporations – although maybe further along the production line – did not suffer legal consequences.

The panellists wonder how far corporate accountability should go. How could, for example, customer due diligence for international crimes be established? How many steps must there be between the crime committed and the corporate conduct? Kehoe illustrates this difficulty by pointing out that companies from the UK sold chemicals to Syria between 2002 and 2010 that could possibly have been used in attacks against civilians during the civil war. Should, in hindsight, these companies be held accountable for selling these chemicals to a dictatorial regime? Relatedly, Pieter Borms, questions what the role of private custom representatives⁷ should be in correctly administrating shipments of chemicals. Borms mentions a recent case in Belgium as an example, where two Flemish companies exported chemicals to Syria without having the necessary export permits.⁸ The chemical, isopropanol, is a precursor of sarin, the nerve gas used by the Syrian government against civilians on multiple occasions.⁹ In addition, Borms wonders whether EU import and export regulations could be used to hold customs employees to account for not checking shipments properly. In this way, corporate accountability could be extended to all those involved in the shipping process.

In reaction to an audience question, Omeri believes that the best deterrence against corporate crime would be prosecutions of management. Monetary fines are also possible but may have to be very high to be effective for certain corporations. Kehoe agrees fines can be effective and adds that the heaviest sanction is to prevent corporations from getting government contracts. Irving adds that, in addition to prosecutions, cutting off the possibility of functioning in a country can be effective.

⁷ Private companies that provide services to aid companies with custom declarations, administrations and other custom-related tasks.

⁸ This refers to the Belgian 'isopropanol-case'. Isopropanol 95% can be used to make nerve gas (sarin), which is why EU Regulation 36/2012 states that permits are compulsory for the export of this type of chemical. A Flemish chemical products trader, A.A.E. Chemie Trading, exported 24 batches of isopropanol to Syria and Lebanon between 2014 and 2016. In this case, the custom representatives of A.A.E. Chemie purposefully declared not to be shipping chemicals prone to EU Regulation 36/2012 restrictions, see: Syrian archive, 'Belgium illegally shipped 168 tonnes of sarin precursor to Syria' at: <https://syrianarchive.org/en/investigations/belgium-isopropanol/> (accessed on 12 May 2019) and Syrian archive, 'Belgian firms prosecuted over Syria chemical exports', at: <https://www.theguardian.com/world/2018/apr/18/belgian-firms-prosecuted-over-chemicals-exports-to-syria-sarin> (accessed on 12 May 2019).

⁹ OPCW, 'OPCW Confirms Use of Sarin and Chlorine in Ltamenah, Syria, on 24 and 25 March 2017', at: <https://www.opcw.org/media-centre/news/2018/06/opcw-confirms-use-sarin-and-chlorine-ltamenah-syria-24-and-25-march-2017> (accessed on 17 May 2019).

II.2 Facebook – Friends or Foe?

‘What does the platform I post cat pictures on, have to do with genocide against a religious minority?’¹⁰ Although an absurd (and, for me at least, also accurate) example, the fact that a social media platform people post pictures of their cats, children or lunches on, has been linked to atrocities committed in Myanmar, seems at first glance somewhat odd. However, the link between the two is not as farfetched as it seems.

In her presentation, Emma Irving focuses on the role of Facebook in perpetrating atrocities in Myanmar. Irving points out that the role of Facebook¹¹ in the atrocities against Rohingya and other ethnic groups in Myanmar is a widely discussed topic. It was found, that in advance of and during the atrocities, Facebook was used to spread misinformation, hate speech and incitement to violence. She explains that there was misinformation from the Myanmar military as well as from extremist Buddhist groups targeting the Rohingya population and other ethnic groups. Examples of propaganda posted on Facebook were included UN Myanmar fact-finding mission’s¹² report¹³, which outlines the role Facebook played in facilitating the violence.

According to Irving, Facebook could play such a role in the atrocities due to the fact that there is a low level of digital literacy in Myanmar. In addition, in Myanmar Facebook ‘is’ the Internet and many people use Facebook as their only source of digital information. Thus, they do not question the content on the platform. Irving explains that, therefore, this kind of hate speech in Myanmar, where there are existing ethnic tensions, inflames these tensions and causes violence. The UN Myanmar report also emphasises the connection between offline speech and online violence and concludes that the prevalence of the hate speech contributed towards the space where the atrocities could take place. So, why is Facebook – the corporation – criticised for the misuse of its platform – the product – by its users? Facebook, and other social media platforms have community guidelines, including provisions against the use of hate speech, misinformation and incitement to violence. However, Facebook did not delete posts that were reported to moderators nor determined that posts including atrocities were in violation of their guidelines.

After criticism, Facebook hired more content moderators who speak languages spoken in Myanmar.¹⁴ Irving explains that the fact that they did not speak the languages previously, made assessing whether content was against the community guidelines difficult. Facebook also reacted by removing hateful accounts and groups from the platform. However, according to Irving, this was problematic as pages with information on attacks were deleted. As a result, the information is difficult to assess and can no longer be used as evidence. Irving therefore proposes three

¹⁰ Quote given by Emma Irving at the IBA Annual War Crimes Conference during her presentation on the role of Facebook in Myanmar.

¹¹ Irving points out that it is necessary to distinguish between Facebook the corporation and Facebook the ‘product’, which is the platform. The role of ‘Facebook’ refers to the social media platform.

¹² This UN fact-finding mission/mechanism is further discussed in V.3.

¹³ United Nations Human Rights Council, ‘Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar’, A/HRC/39/CRP.2 2018, at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf (accessed on 14 May 2019).

¹⁴ Facebook eventually apologised for not reacting to calls from civil society members any sooner. Facebook’s chief executive officer Mark Zuckerberg’s email to activists from Myanmar outlines the steps that Facebook was taking to increase its moderation efforts. K. Roose & P. Mozur, ‘Zuckerberg was called out over Myanmar violence. Here’s his apology’, *The New York Times* 2018, at: <https://www.nytimes.com/2018/04/09/business/facebook-myanmar-zuckerberg.html> (accessed on 14 May 2019).

questions to provoke further thought on this case. First, should governments impose obligations on social media companies, with the risk that governments will decide on free speech? Secondly, should companies remove content themselves? An existing issue with this, is that social media companies have been taking the wrong type of content down, as the Myanmar case illustrates. Finally, Irving asks, should we differentiate between what is allowed online in some countries but not in others? As she explains, the situation in Myanmar and influence of Facebook therein does not necessarily mean the same will happen in other countries.

II.3 Reflections on Corporate Accountability

From the discussions above it becomes clear that corporate accountability for international crimes needs further exploring to be able to state where accountability starts and ends. The different cases mentioned also show the different ways in which corporations can be 'involved' in international crimes. Not only can they be directly involved by providing dictators materials usable for war crimes, corporations can, in various ways, indirectly facilitate the perpetration of these crimes. The goal is thus to determine what conduct can be seen as facilitation that corporations can be held accountable for. Another issue is determining in what ways corporations can safeguard the use of their products - whether chemicals or social media - in order to prevent atrocities. These examples illustrate the difficulty in decide who is complicit, how far accountability goes and who to bring to trial.

An additional issue that comes into play in these types of cases is the fact that corporations themselves often cannot be held criminally accountable. First, the ICC only has jurisdiction over persons, not corporations. In addition, several countries do not have national legal jurisdiction to hold corporations - whether local or multinational - criminally accountable. Thus, depending on domestic jurisdiction, possibilities for criminal accountability could be hampered. However, other types of accountability that are not of a criminal nature could be possible, including the opinion to hold the individuals accountable instead of the corporation itself.

Panellists discussed the deterrence of corporate crime, wondering what measure or sanction would be most effective to stop corporations from (re)offending. Especially when taking into account difficulties regarding holding corporations criminally accountable, this is an interesting question to ask. Many authors have raised questions related to corporate deterrence and accountability.¹⁵ From a criminologist's point of view, it is difficult to define exactly what works as corporate deterrence prior to criminal conduct, especially with regards to involvement in international crimes. It could, however, be possible to research corporation's conduct post-conviction for crimes already committed.

The case of Facebook in Myanmar highlights the role social media companies can play in bringing atrocities to light, as well as possible corporate accountability for facilitating violence. The magnitude of Facebook's role in Myanmar is illustrated by a quick search at how many times the word 'Facebook' has been mentioned in the UN's mission to Myanmar.¹⁶ I discovered that it can be found no less than 289 times in the report, both in the main text as well as in footnotes

¹⁵ See for a general discussion on corporate crime and deterrence: A. Hamdani & A. Klement, 'Corporate Crime and Deterrence', *Stanford Law Review* 2008, 61:2, pp. 271-310 and N. Schell-Busey, S.S. Simpson, M. Rorle & M. Alper, 'What Works? A Systematic Review of Corporate Crime Deterrence', *Criminology & Public Policy*, 15:1 2016, pp. 387-416. See for a discussion on corporate involvement in international crimes and prosecution as deterrence: W. Huisman & E. van Sliedregt, 'Rogue traders. Dutch businessmen, international crimes and corporate complicity', *Journal of International Criminal Justice* 8:3 2010, pp. 803-828.

¹⁶ UN HRC, *supra* note 14.

indicating the source of their information. The report even dedicates a whole section to the role of Facebook and social media platforms in the crimes committed; an interesting development that illustrates the importance of Facebook in the investigation. For this reason, Facebook should ensure that content deleted from its platform is analysed, archived and available for criminal purposes. Facebook does claim it now preserves all data and content from deleted pages and accounts, so this evidence should be made available to authorities for judicial purposes including criminal prosecution. Therefore, social media companies, including but not limited to Facebook, should continue to be monitored to see how harmful content is removed, whether it happens quickly and effectively, but, most of all, whether the right content is taken down.

I believe two new questions that are worth exploring can be identified. First, could this case imply that corporations could play a bigger role in preventing international crimes, by preventively not selling particular chemicals to dictatorial regimes? Second, could corporations in the future play a larger role in bringing to light corporations involved in atrocities by properly checking who they are doing business with and reporting suspicions to authorities? I believe corporate willingness to play a positive part in this process is an avenue worth exploring.

Going back to the Belgian isopropanol-case, I believe this is not only a prime example of how corporate actors can be held account for involvement in international crimes. The case also illustrates the role that non-state actors can play in revealing (corporate) involvement in atrocities.¹⁷ The next section will further discuss the role of private actors in investigating war crimes.

III. Private Actors, the New Criminal Investigators?

The discussion on the role of private (non-state) actors in documenting atrocities and collecting evidence for international criminal cases is not new. Natalie von Wistinghausen points out that especially in countries where other states or international bodies cannot investigate, private actors offer a solution in gathering evidence. In addition, due to technological developments, an even bigger pool of non-state actors now play a role in evidence gathering. This shift opens up the door for new opportunities and for increased justice and accountability efforts. Nevertheless, the abundance of private actors involved in international criminal investigations also raises questions about transparency and the proper handling of evidence. As Alexa Koenig states ‘one of the big opportunities and challenges is that private actors are going to be collecting information that have relevance to international crimes, whether we like it or not’. During the session ‘*Private actors and investigations: aid or hindrance to international criminal justice?*’¹⁸ these issues are discussed.

III.1 Civil Society Involvement in Investigations

Matthew Butt points out that due to its historic context, the UK legal system is friendly towards private actors bringing cases to court. Therefore, large numbers of private criminal cases against heads of states are brought before British courts annually, including cases involving allegations of war crimes or torture. This does not however mean that the cases are, as Butt claims, ‘worry-free’

¹⁷ Belgian media outlet Knack (together with Bellingcat) and NGO Syrian Archives revealed the case based on information on exports in the UN Comtrade database gained through a freedom of information request.

¹⁸ Session Chair: *Natalie von Wistinghausen* (Defence Counsel Special Tribunal for Lebanon, The Hague; Co-Vice Chair, IBA War Crimes Committee). Speakers: *Matthew Butt* (3 Raymond Buildings, London), *Toby Cadman* (Guernica 37, Madrid; European Liaison Officer, IBA War Crimes Committee), *Joe Holmes* (Global Rights Compliance, The Hague), *Alexa Koenig* (Berkeley Human Rights Centre, Berkeley, California) and *William Wiley* (Commission for International Justice and Accountability (CIJA), The Hague).

from a prosecution perspective. Using the example of a Nepalese torture case,¹⁹ brought to court in the UK by Nepalese human rights NGOs, Butt illustrates the difficulties of these universal jurisdiction cases. Prosecutors in this case faced many challenges, the biggest of which were problems with NGO statements. After disclosure of victims' statements to the court, it became clear that the NGO had made comments on inconsistencies in the statements and had changed or deleted content. Nevertheless, Butt points out that in terms of universal jurisdiction, the case can be seen as a success: the private actor – NGO in this case – found a target, built a case and handed it over to the UK police. In addition, Toby Cadman says a positive outcome is that the case had great impact in Nepal, as former senior officials involved in torture realised they could be prosecuted for their acts. However, the violations of basic standards of investigations by the NGO handing over crucial evidence resulted in the trial failing. Cadman adds that the case illustrates the need for minimum standards for private actors in international criminal investigations. This is particularly necessary as private actors will continue to do this work, no matter how much we try to control them. Sometimes these difficult universal jurisdiction cases are the only option to ensure effective accountability and to offer a solution to, for example, the lack of accountability measures in Syria and the International Criminal Court's (ICC) lack of jurisdiction. However, working with private actors, an issue is always going to be the quality of the evidence. According to Cadman, the problems on the ground regarding evidence and private actors, are a challenge wherever the war crimes case is being built. It is therefore not a matter of standards, but more importantly how actors apply these standards.

Cadman mentions a number of issues he has come across with private actors investigating war crimes. First, most private actors on the ground are not experienced or specialised in investigating (international) criminal cases, but are mainly human rights activists. Many of these activists have therefore not been properly trained in how to interview victims and witnesses, especially victims of sexual violence. Cadman gave an example of a Syrian activist – a young, non-practising lawyer – conducting interviews over Skype with victims of sexual violence and torture.²⁰ Due to lack of training, private actors do not realise there are basic standards to adhere to. He adds that sometimes it is better not to conduct the interview because of the trauma and (digital) security risks the victim faces when an interview takes place with someone lacking specialised training. Secondly, there are many groups working on the ground who refuse to work together and who are competing for funds, which can make investigations ineffective. Finally, activists can raise unrealistic expectations among victims and witnesses by promising, for example, that Syrian victims' statements will be used at the ICC. Therefore, victims who have been given false expectations may be reluctant to give statements to proper investigators in the future. Cadman mentions that a risk of investigating without proper knowledge is that defence councils can easily challenge evidence gathered by activists if it has not been properly verified or corroborated.

¹⁹ This case concerned Kumar Lama, a Nepal Army colonel who was arrested while visiting the UK in 2013 and charged with two counts of torture. See for more information on the case and lessons learned: I. Massagé & M. Sharma, 'Regina v. Lama: Lessons Learned in Preparing a Universal Jurisdiction Case', *Journal of Human Rights Practice* 2018, pp. 327-345.

²⁰ Not only is this problematic in terms of not being able to control the environment in which the interview is held (for example, is someone else in the room who could influence the conversation?) and not being able to communicate on sensitive issues in person, Skype is contested as a safe digital communication means by activists and journalists. See for example: L. Kirchner, 'Why Skype isn't safe for journalists', *Columbia Journalism Review*, 2014, at: https://archives.cjr.org/behind_the_news/skype_alternatives.php (last accessed 14 July 2019).

Koenig also sets out general points of concern when private actors get involved in international criminal investigations. First, she mentions that communities need to be informed on what information is needed by investigators in their countries. Secondly, she wonders whether private actors really understand what they are signing up for when they choose to become part of the investigative process. Third, Koenig points out that the handling of information, the ‘chain of evidence’, by private actors is a challenge. In addition, activists or reporters talking to witnesses and victims can be problematic in terms of gathering statements, as Cadman also mentioned. Finally, she points out that there is an issue with physical and digital security. The security of these private actors themselves is at risk. They could however also put others, such as witnesses, at risk by speaking to them. Although problems have occurred with private actors collecting evidence, Holmes points out that civil society actors (such as journalists and activists) have strengths too. They are much quicker to deploy in a crisis situation, have lower security profiles, operate cheaper, and have greater scale.

Joe Holmes explains that Global Right Compliance is launching a ‘Basic Investigative Standards’ (BIS) mobile phone application (app) that helps civil society document violations according to investigative standards.²¹ The app could fill a massive gap in evidence gathering capability. The solution to the problem needs to be a multifaceted approach, as not one approach to aiding civil society has worked or will work in the future. Holmes states that civil society organisations are already heavily engaged in this process, but the lack of direction and guidance is causing mass problems. He says that excluding them from the process, however, is impossible, highly undesirable and a waste of potential resource.

Holmes mentions that the ‘BIS’ app is not the first effort to help civil society actors document and preserve evidence. In 2016 global pro bono law firm Public International Law and Policy Group (PILPG) launched a civil society documentation manual²² setting out principles and best practices for civil society actors collecting and documenting evidence of atrocities. Another application developed for civil society members is the EyeWitness to Atrocities app,²³ which helps store photographic and video evidence in a virtual evidence locker for future possible use in trials and investigations. Global Rights Compliance’s ‘BIS’ app is thus complementary to efforts already made to improve investigative standards. It also functions as a more user-friendly, accessible, and pocket-sized guide to war crime evidentiary standards. Holmes points out that therefore the app is more suited for use in the field than existing war crimes manuals which are extensive desktop tools. The ‘BIS’ app is a more hands-on approach to the ‘so what?’ question when collecting information. Holmes mentions that as a downside the app cannot effectively be used by a larger group of civil society members worldwide in its current form. For it to be widely used and accessible, the app has to be easily understood as well as translated into various (local) languages.

²¹ See for more information on the Basic Investigative Standards (BIS) project: Global Rights Compliance ‘Basic Investigative Standards for international Crimes Investigations’ <https://www.globalrightscompliance.com/en/projects/basic-investigative-standards-for-international-crimes-investigations> (accessed on 18 May 2019).

²² See for more information: PILPG, ‘Handbook on Civil Society Documentation of Serious Human Rights Violations’, at: https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/59dfab4480bd5ef9add73271/1507830600233/Handbook-on-Civil-Society-Documentation-of-Serious-Human-Rights-Violations_c.pdf (accessed on 18 May 2019).

²³ See for more information: Eyewitness project, at: <https://www.eyewitnessproject.org/> (accessed on 18 May 2019).

III.2 From Corporations Under Investigation, to ‘Corporations’ Doing the Investigating

A new type of non-state actor to enter the international criminal justice is the private criminal investigator. William Wiley, founder of the Commission for International Justice and Accountability (CIJA), explains that CIJA is a private criminal investigative body that focuses on war crimes committed in Syria and Iraq. Wiley explains that the organisation exists solely to support authorities and does not ‘do’ its own activism or advocacy. The commission also builds its own cases and has a criminal law ‘linkage evidence’ focus, rather than a human rights monitoring focus. CIJA receives ‘requests for assistance’ from domestic authorities to support them in their war crimes investigations. These domestic authorities are often countries where suspected war criminals have migrated to and that aim to prosecute these individuals under universal jurisdiction. Due to security risks and political issues most of the cases the CIJA builds are confidential.

Have privately owned and led investigations become a necessity for international criminal justice? Is it now impossible for states and international bodies to handle the amount of evidence on their own, without having to pay third parties? Wiley believes that if we want to preserve the amount of international criminal justice that we have now, we will need private sector engagement in the investigative process. A difficulty is that these private actors need to know what they are doing in legal terms. For example, using a human rights group as a private investigative service will not work according to Wiley, as they focus on a different body of law. Private investigators have to their advantage that they are quick and efficient. Wiley therefore believes that private investigators that focus on international criminal law are necessary, despite having high financial costs. It will be hard for a new next private investigative company to be set up with no or limited funding. Butt points out that a risk could be that too many private investigators may start without the right skillset, and investigations will become fractured. He adds that not all actors are suited to do this work. His criticism of civil society at the moment is that it is ‘all human rights’ but we need more criminal law actors, and to retool some human rights actors as criminal investigators.

So, what does this mean for the ICC and investigations? Could the ICC increase its notion of complementarity to include the use of private actors, or should private actors simply take over all investigations from the ICC? Should all human rights NGOs retrain as private criminal investigators? The ICC clearly needs assistance but, Wiley states, private actors such as the CIJA would not be prepared to do the investigative work for them and then turn the evidence over to the ICC. He believes the Court could look into working more closely with the private sector in order to see what can be gained from such a partnership.

III.3 The Use of New Digital Technologies by Civil Society

With the increase of internet and smartphone usage worldwide, civil society members and ordinary citizens on the ground are more involved in aiding investigations. As Michelle Jarvis points out, the more traditional ways of collecting evidence (victim evidence and testimonies, for example) will always be necessary. However, she argues, digital technologies have a clear added value.²⁴ This subsection therefore focuses on the use of digital technologies in war crimes investigations, specifically focusing on the role of civil society herein.

²⁴ Comment given by Michelle Jarvis in Panel 3 on UN mechanisms, see section V below.

Koenig states that an increasing amount of private actors now use open-source intelligence²⁵ as a way of collecting video and photographic evidence of war crimes. This new approach takes methodologies from digital investigations, law enforcement, intelligence strategies, and investigative reporting practices. Koenig mentions three different actors that play an important role in these investigations: NGOs, social media platforms, and lawyers. These actors are new to this process of digital evidence gathering, which emphasises the need for all those involved in this new digital space to know how to handle this type of criminal evidence. In addition, Koenig argues, social media companies, such as Facebook, have to know how to handle this type of information being posted on their platforms. Collaboration between these actors is thus necessary. Therefore, the Human Rights Investigations Lab (U.C., Berkeley) works with lawyers, NGOs and social media companies to discover how to best use digital information in international criminal investigations. Koenig, who is involved in this process, explains that being located in California has the advantage of being close to large tech companies' headquarters. Facebook, Twitter, YouTube and Google are close by and therefore collaboration is possible. Together with a team of researchers with various expertise, the Human Rights Investigations Lab is also drafting a protocol on the use of open-source information in international criminal investigations to standardise the collection of evidence. Koenig states this is necessary, especially taking into account the volume of digital information available, private actors are needed to collect, document and analyse this evidence for international justice purposes.²⁶

Panellists agree on the fact that as civil society actors increasingly use these techniques, all actors have to step up their technological game. It is thus necessary for international lawyers and others to become more tech-aware and incorporate new technologies to be able to document and use digital evidence. Although these digital investigations offer a range of new possibilities and open the door for investigations by civil society actors, there are also a number of challenges. First, Koenig mentions a challenge for private actors navigating themselves in this field is how to create a 'common language'. She explains that a 'common language' in terms of a standard protocol is needed on how to properly document and preserve content for legal purposes. Secondly, actors are struggling with the questions on how to let pieces of data 'speak to each other' and how to tag data so the most relevant data can be easily found and used for legal purposes. Thirdly, the fact that different types of private actors are getting involved in these types of investigations, often means that these actors use different investigative methods. These methods can also vary due to differences between human rights documentation and criminal legal investigations. Finally, Koenig argues that it will be challenging for judges to know how to weigh this new type of digital evidence. She emphasises the need to help judges and prosecutors assess digital evidence, so they know how to use and weigh digital evidence in legal proceedings.

III.4 Reflections on Private Actors

From my own experience working with human rights activists in various African and Middle Eastern countries, I recognise the abovementioned issues regarding collecting evidence highlighted by Cadman. Strictly speaking, my previous work focused on human rights research and training for human rights reporting purposes. Working with activists from countries in conflict, however, it was necessary to address international crimes and to emphasise the difference

²⁵ Open source investigations can be defined as 'online investigations that involve combing through publicly accessible resources for information related to potential crimes', see: A. Koenig, F. McMahon, N. Mehndru & S. Silliman Bhattacharjee, 'Open source fact-finding in preliminary examinations' in: M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Brussels: Torkel Opsahl Academic EPublisher, 2018, pp. 682.

²⁶ Koenig illustrates this by stating that 6000 tweets are being sent out and that over 500 hours of video are being uploaded to YouTube on average every second.

between human rights research and criminal investigations. Especially the latter frequently caused some frustration among activists who felt that the most important aim was to collect criminal evidence for the ICC. Important was to point out that if evidence is not collected by proper evidentiary standards, it would fail to hold up in a criminal court anyway. It was also important to emphasise the ways in which human rights reporting can lead to other types of accountability or political pressure and can serve as crucial starting points in preliminary examinations.

Von Wistinghausen raises the interesting question whether in the future activists would have to use certain apps and manuals for their evidence to be taken into account. It could therefore be necessary to create other protocols and regulations for civil society members. However, in my view, over-regulating and over-protocoling the collection of evidence is not an ideal solution. An abundance of rules, regulations, protocols and manuals could easily overwhelm civil society. Furthermore, some standards may differ from – rather than complement – each other, leading to confusion and difference in evidence. I therefore believe we should be cautious when developing new guidelines for civil society.

Although Wiley's suggestions are interesting and could be a solution to the current gap between the work of human rights organisations and international criminal investigators, I think it raises issues. Is it actually desirable – and achievable – to have all human rights actors on the ground trained in international criminal investigation? Especially considering the fact that human rights monitoring can have different aims than pure legal accountability. For instance, human rights monitoring can aim to show broader patterns of violations rather than pinpointing individual criminal responsibility for crimes. Another point is that CIJA is paid by governments to collect evidence. This could raise questions about the impartiality and independence of the evidence collected by private investigators. It is therefore worth exploring the role of private investigators further to set out the legal and ethical implications of this way of collecting evidence.

Although it is a pioneer, not only U.C., Berkeley works together with civil society members to explore the use of digital investigations and evidence. The Digital Verification Unit of the University of Essex's Human Rights Centre Clinic also researches how advances in digital communication and technology (particularly smartphones and social media) can be used to document and share information on violations. For this purpose, the Unit works together with Amnesty International in order to use open source investigative techniques in accountability efforts. It is encompassed in the AI's digital verification corps.²⁷ In addition, many initiatives have been established to further help civil society members, especially NGOs and activists on the ground in documenting, preserving, analysing and verifying digital and video evidence. Witness,²⁸ for example, is an NGO focused on training civil society members in video documentation and preserving 'video as evidence' in order to enhance evidentiary value of this type of documentation.²⁹ The earlier mentioned EyeWitness to Atrocities app is another effort to help civil society members collect verifiable photographic and video evidence.³⁰

²⁷ See for more information: Digital Verification Unit Research Project, at: <https://www.essex.ac.uk/research-projects/digital-verification-unit> (accessed on 18 May July 2019).

²⁸ See for more information: Witness, at: <https://witness.org/> (accessed on 18 May 2019).

²⁹ Witness' work can be seen as the first step in activist documenting and preserving digital evidence that could later be found by NGOs using OSINT and used in criminal investigations.

³⁰ This app has been designed to report a violation by recording and uploading information directly through the app. It then subsequently collects the necessary metadata for verification and sends the footage to EyeWitness' secure server where analysts can assess uploaded footage. A copy of the video or photograph is kept by the user to share. Different from Witness, the EyeWitness app is only an application without

However, I believe that – related to being cautious about developing too many guidelines for civil society – we should also be aware of not overwhelming civil society with initiatives, apps and protocols. It is clear that civil society needs to collaborate with other actors to enhance its digital investigative skills. It is also clear that all actors need to adhere to the same standards, and that apps and protocols can help towards this. Nevertheless, one should be aware of who will use these types of mobile applications, where they will be used, and how. There is a risk that particular civil society actors, working in conflicts that are out of reach of the public eye, may not benefit from these initiatives. In addition, many activists on the ground will need guidance in how to use these apps properly if the information is to be used in legal proceedings. Therefore, it is necessary to look further than just the development of these types of apps and to assess the practical implications of using apps for collecting evidence for activists operating in different conflict situations worldwide. I will further reflect on this issue in the last section of this article.

V. Geneva vs. The Hague: Discussions on UN Investigative Mechanisms

Speakers in the panel ‘Novel investigative models to fight impunity: the IIIM, the Iraq Mechanism and justice for Iraq, Myanmar and Syria’³¹ discuss the (fairly) recently established UN investigative mechanisms. As will become clear in this section, the mechanisms’ mandate thus goes further than traditional (UN) human rights monitoring, documenting and reporting. This section sets out the presentation on the UN mechanisms for Syria, Iraq and Myanmar. After, the panellists’ thoughts on a standing UN mechanism will be discussed and I will reflect on the speakers’ views.

V.1 The Syria Mechanism

Michelle Jarvis from the UN International Impartial Independent Mechanism for Syria (IIIM) explains what this mechanism has achieved in almost a year of operation. She explains that the IIIM was created because of the situation of political deadlock in the UN Security Council due to the impossibility to refer the situation to the ICC and the absence of political will to establish an *ad hoc* tribunal in Syria. The General Assembly Resolution establishing the IIIM³² was a relatively conservative decision. It did not establish jurisdiction to try crimes in Syria, but it did come up with a novel mandate. Jarvis points out that the IIIM has two key components: collecting, consolidating and preserving evidence; and building criminal law case files. This stems from the need to collect evidence and apply criminal law methodologies rather than carrying out human rights fact-finding missions. The mechanism relies on prosecutions by national war crime units that can exercise extraterritorial or universal jurisdiction, such as in France, Germany and Sweden, which is why these countries have become increasingly active in criminal prosecutions of Syrian war criminals.

additional training or guidance. Witness however focuses on training and working together with activists on the ground and to help individuals or organisations to document safely and use footage effectively.

³¹ Session chair: Federica d’Alessandra (Oxford Institute for Ethics Law and Armed Conflict, Oxford; Co-Chair, IBA War Crimes Committee. Speakers: Sareta Ashraph (United Nations Investigative Team for Accountability for Crimes Committed by Daesh/ISL (UNITAD), Baghdad; Treasurer, IBA War Crimes Committee), Kate Gibson (St Phillips Chambers, Former United Nations Independent International Fact-Finding on Myanmar, Geneva), Michelle Jarvis (UN International Impartial Independent Mechanism for Syria, Geneva), Nicholas Koumjian (United Nations Independent Investigative Mechanism for Myanmar, Phnom Penh and Stephen Rapp (US Holocaust Memorial Museum, Former United States Ambassador for Global Criminal Justice, Washington DC; Member, IBA War Crimes Committee Advisory Board).

³² United Nations General Assembly Resolution 71/248 establishing the International, Impartial and Independent Mechanism, 21 December 2016.

Reflecting on collaboration with civil society actors, Jarvis points out that this mechanism puts a heavy emphasis on collecting material that has been collected by other actors in order to avoid duplicating others' investigative efforts. When gaps arise in the evidence, the mechanism has a mandate to fill these gaps by investigating and collecting evidence. Because the actors the mechanism relies on are mostly human rights groups, there have been a few obvious gaps related to what was previously discussed in this article. Nevertheless, Jarvis emphasises that the IIM has prioritised 'proactive sharing frameworks', in which civil society and the mechanism engage in two-way dialogue and share information with each other. Therefore, memorandums of understanding and sharing platforms have been created with civil society actors. However, balancing the independent and impartial character of the mechanism while working with civil society is challenging. To ensure its impartiality and independence, the IIM therefore set expectations and baseline principles and communicates to civil society about what it can and cannot do in terms of accountability measures.

Related to the discussion set out above on the impact of digital evidence, Jarvis explains that, due to the abundance of video and photographic evidence of the war in Syria, the mechanism had to know how to process this type of evidence in a proper manner. The IIM could learn a lot about preservation of physical evidence from past *ad hoc* tribunals, but not how to process digital evidence. It therefore had to find out how to best preserve this evidence in databases. Not only the documents had to be archived, but meta-data from videos and photographs had to be collected for verification. Jarvis points out that this mechanism also had to incorporate 'state of the art technology' into its work by using advanced programmes to detect patterns and correlations in evidence. Besides increasing collaboration with civil society, this is thus a second achievement for the Syria mechanism.

V.2 The Iraq Mechanism

Saretha Ashraph from the UN Investigative Team of Accountability for Crimes Committed by Daesh/ISIL (UNITAD) explains the mission's tasks in Iraq. This mechanism was designed to help national governments in their investigations of Daesh perpetrators within the country. There is overlap with the work of the UN mechanism for Syria, discussed below, as UNITAD supports national jurisdictions in holding alleged perpetrators to account. The difference between this mechanism and the UN mechanism for Syria, however, is that UNITAD only focuses on one group, Daesh, whereas the mechanism for Syria focuses on all warring parties. UNITAD thus has a much narrower approach. These two mechanisms' main tasks are collecting, preserving and storing evidence, as well as communicating with local actors within Iraq to help them with accountability efforts. It is however currently unclear how much information has been collected by fact-finding missions and civil society, and how much UNITAD will have to collect. A documentation collaboration between civil society and UNITAD is thus a possibility worth exploring according to Ashraph.

V.3 The Myanmar Mechanism

The third mechanism, the UN Independent International Fact-Finding Mission on Myanmar (FFMM), was set up in 2017 to investigate violations that occurred in 2016. Kate Gibson explains that by chance the mission's fact-finders were on the ground in Myanmar in August 2017 and were therefore the first international actors to speak to Rohingyas crossing the water and fleeing violence. As Nicholas Koumjian from the FFMM points out, the mandate of this mechanism is to collect information from governments and NGOs about international crimes and other violations committed in Myanmar since 2011. The mandate therefore covers crimes committed in the entire country and for a longer period of time, thus does not only focus on the crimes in Rakhine State in 2017. Koumjian emphasises that the mechanism intends to collect evidence for

possible criminal trials in the future, including at the ICC. This mechanism aims to analyse the evidence and comes to its own legal conclusions on the determination of facts. Subsequently, the mechanism will build case files for courts that may want to prosecute crimes committed in Myanmar in the future. Koumjian believes that this makes this mechanism unique.

Besides giving an overview of the work of the various mechanisms, the panellists highlight points of critique of the nature of these fact-finding missions. First, Ashraph points out that these mechanisms and fact-finding missions are a result of not having a direct path to justice. The mechanisms are thus “solutions” to not having other possibilities for justice or accountability. As they are solutions to political problems, they are managed by different sections of the UN such as the General Assembly or Security Council which can result in a failure to streamline efforts or lessons learnt. In addition, Gibson states that human rights investigations can be seen as a screening for criminal investigations, as they are much shorter and simpler. There is no information collected on the credibility of witnesses, background information or linkage evidence.³³ Typically, UN fact-finders do not look for this type of evidence but instead look to form an overall picture of what has occurred, and which human rights have been violated. Linkage evidence is difficult for mechanisms to gather and this task is usually not encompassed within their mandate, though exceptions are now being seen in the mechanisms for Syria and Myanmar.

V.4 What about a Universal Standing Mechanism?

Could a standing independent mechanism with a more criminal investigative approach – similar to the Syria and Myanmar mechanisms – be the solution to this gap between fact-finding and criminal investigations? Gibson’s concern with a universal standing mechanism is that it might make states reluctant to put efforts into an *ad hoc* court or tribunal or into investigating crimes themselves. She also questions whether having a standing mechanism would have any effect in terms of deterrence, as dictators would not be “scared off” by a standing mechanism in Geneva, just as they are not intimidated by a standing ICC in the Hague. Koumjian also has some words of caution on a standing mechanism. He wonders whether it would be feasible for a standing mechanism to build from scarce knowledge on the country and context in which crimes are committed. For each new court or tribunal that is established, an abundance of information is needed on the context, crimes, perpetrators, and victims. Without this contextual knowledge, it is impossible to build cases against state leaders, particularly in terms of linkage evidence. Koujman believes a risk is that a standing mechanism would not have the in-depth knowledge or even the capacity needed for these types of cases.

Stephen Rapp adds that generally mechanisms cope with a multitude of problems that a standing mechanism would also experience. Mechanisms are under-resourced, dependent on (voluntary) state contributions, and have difficulties attracting well-qualified staff with expertise in international criminal law. Although some existing mechanisms receive useful information about the crimes through interviews with refugees who have fled, not much linkage information is available. Additional problems with a standing mechanism, Rapp adds, include determining the scope of its mandate as well as a probable lack of political will. Lastly, Rapp states that mechanisms do not write reports, so providing visibility on what is happening in order to ensure funding for a standing mechanism would be difficult. In contrast, human rights groups and other civil society actors are usually more transparent in that they publish reports about their conduct as well as their findings.

³³ Evidence that indicates a clear link between a particular person accused and what happened (the criminal offense).

V.5 Reflections on UN Mechanisms

I believe the steps made by the recent mechanisms in terms of evidence collecting and facilitating accountability are welcomed developments. These mechanisms also illustrate a shift from traditional human rights fact-finding to collecting evidence. The fact that UN investigative mechanisms generally have a human rights fact-finding mandate and cannot collect crucial evidence needed for criminal investigations is an indication of the “Hague - Geneva divide”: whereas Geneva focuses on a human rights approach, the Hague focuses on criminal prosecutions. This divide could cause issues for mechanisms in terms of accountability-seeking: where their work stops (with fact-finding), the work of criminal prosecutors starts (finding linkage evidence, for example). However, the three mechanisms discussed above show that the UN is now making more legal determinations of facts by identifying those most responsible, and other questions of law. There is thus a shift from a pure human rights fact-finding and documentary approach (the UN’s traditional monitoring tasks) to a more criminal law investigative approach. The issue is, however, that there are still important differences between human rights fact-finding and criminal investigations. Generally, human rights inquiries focus on the ‘big picture’, whereas criminal investigations seek evidence for the sake of individual accountability. In addition, human rights and humanitarian law differs somewhat from international criminal law.³⁴

Additionally, session chair d’Alessandra argued already in 2017 that the very nature of human rights fact-finding by the UN presents structural challenges for these missions. The first reason mentioned by d’Alessandra explaining these challenges is the UN’s place at the ‘crossroads of international politics’. Secondly, it is the fact that tensions between calls for human rights protection on the one hand and state sovereignty on the other hand can be problematic. Finally, limited coordination between the UN and other international institutions together with ‘a lack of institutional memory’ by these actors makes the fact-finding work more challenging.³⁵ I believe it is therefore crucial for new mechanisms to be aware of these challenges and to put safeguards in place to ensure that their work can be done properly and efficiently. In addition, what is meant with “accountability” and for whom justice will be “done”, needs to be made clear as to manage expectations.

However, despite these challenges, the Syria and Myanmar mechanisms appear to be successful: evidence is being collected and preserved; communication with civil society is effective; and the mechanisms are seemingly making progress in accountability measures and criminal cases. So why not create a standing mechanism, to copy-paste this success formula to whichever country needs its assistance? The speakers in the panel, although positive about the mandates, ways of working, and outcomes of the existing *ad hoc* mechanisms, did not seem as enthusiastic about a permanent mechanism.

It seems, according to the panellists’ perspectives, that the risks of creating a universal standing mechanism for investigating international crimes may outweigh the benefits of it.³⁶ Looking at the discussions set out above, it seems that there is a need to more specifically explore what gap a

³⁴ A thorough discussion of these differences goes beyond the scope of this article. For more information and the ‘accountability turn’ see: F. d’Alessandra, ‘The accountability turn in third wave human rights fact-finding’, *Utrecht Journal of International and European Law*, 2017 33:84, pp. 59-76.

³⁵ *Ibid.*

³⁶ For a thorough overview of the potential benefits of and questions on a standing mechanism, see also K. Abbott and S. Zia-Zarifi, ‘Is it time to create a Standing Independent Investigative Mechanism (SIIM)? (Part I & II)’, in: *OpinioJuris*, April 2019, available at: <http://opiniojuris.org/2019/04/10/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim/> and <http://opiniojuris.org/2019/04/11/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim-part-ii/> (accessed 14 May 2019).

universal standing mechanism would be filling in order to decide whether it is necessary. Country-specific investigative mechanisms that cooperate well with local civil society and have a criminal investigative-focus can successfully operate in terms of collecting criminal evidence. These mechanisms are successful when they engage in a two-way dialogue with civil society actors, which in turn receive guidance on how to properly collect criminal evidence and communicate with mechanisms. In addition, in response to Gibson's comments on the deterrent effect of a mechanism, I believe it is questionable whether deterrence should be the aim of any mechanism anyway, but it should rather be accountability, justice, truth-telling and remembrance.

The sections above have given an overview of a selection of topics touched upon by the panellists at the IBA conference. In the following and last section of this article, I reflect more generally on these important discussions on the future of international criminal justice.

VII. Concluding Questions and Remarks: What Will the Future Hold?

So, what will the future bring for international criminal investigations? In the last part of this commentary, I aim to provoke further thoughts and discussions on this topic. This section will be led by two main questions which have also been touched upon above by looking at the present situation: who will investigate international crimes and how will they be investigated?

VII.1 Who Will Investigate - and Prosecute?

Let me start by reflecting on the institutions, groups, or individual actors that will be decisive in future international criminal investigations. To start, the role of the ICC in the future of international criminal investigations has not yet been discussed in this article. Could this indicate that the future of international criminal justice goes beyond the ICC? Taking into account the recent Afghanistan decision,³⁷ I believe we should probably look further than this Court. The decision has caused discussions among legal scholars on recurring issues at the Court such as its bias towards African (or at least, non-Western) countries and the influence of politics on its decisions.³⁸ The Court is even said to be in "crisis".³⁹ Given these problems, one could ask what the ICC's added value - its "unique selling point" (USP) - is in the current world of international

³⁷ Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17, Pre-Trial Chamber II, 12 April 2019.

³⁸ From the beginning, however, the ICC has had problems with investigations, evidence, management, budget issues and scandals besides not being able to efficiently process cases. In addition, judges recently have come under fire for their morality, integrity and independence. See for more information on the recent ICC scandals: T. Lingsma, 'ICC judges at centre of controversy', in: *Justice Info*, 16 May 2019, available at: <https://www.justiceinfo.net/en/tribunals/icc/41447-icc-judges-at-centre-of-controversy.html> (accessed 17 May 2019).

³⁹ See, for example, opinion articles by S. Vasiliev, 'Not just another 'crisis': Could the blocking of the Afghanistan investigation spell the end of the ICC? (Parts I & II), in *Blog of the European Journal of International Law*, April 2019, available at: <https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-i/> and <https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-ii/> (accessed on 17 May 2019); A. Whiting, 'The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?', in: *Just security*, 12 April 2019, available at: <https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/> (accessed on 17 May 2019); and M. Kersten, 'The ICC was wrong to deny prosecution for Afghan probe', in: *Aljazeera*, 12 April 2019, available at: <https://www.aljazeera.com/indepth/opinion/icc-wrong-deny-prosecution-request-afghan-probe-190412101757533.html> (accessed 17 May 2019).

criminal justice? First, it could be argued that the ICC is a “symbolic institution” bringing atrocities into the public eye and showing that the international community is “taking a stand against” the most heinous crimes. Another element the ICC has to offer in comparison to other (domestic) alternatives is a focus on perpetrators who are most responsible; the “big fish”. A final USP is the fact that the ICC is complementary to domestic prosecutions when countries are unable or unwilling to prosecute. However, a first counterargument is the fact that the ICC has not solely focused on the big fish, as it has also tried lower-level perpetrators. Additionally, on the domestic level, arrest warrants have also been put out for higher-level perpetrators in universal jurisdiction cases.⁴⁰ These universal jurisdiction cases, as has been set out above, have offered effective domestic alternatives to prosecuting those responsible of international crime and could therefore also be seen as “complimentary” to domestic prosecutions.

That being said, perhaps –as already stated in 2006 by William Burke-White and Anne-Marie Slaughter– ‘the future of international law is domestic’.⁴¹ Perhaps the future will see a shift from global justice to localised justice as universal jurisdiction of international crimes is implemented. Perhaps more countries will deal with their violent past themselves and domestically prosecute the perpetrators. A recent example is Sudan’s uprising in April of this year which raised hope that (now) ex-President Al-Bashir –a long-time fugitive of the ICC and sought for war crimes and genocide in Darfur– may finally be held accountable.⁴² The new interim government pledged to take responsibility in convicting Al-Bashir in Sudan, rather than extraditing him to the ICC.⁴³ In addition, other alternatives than relying on international criminal institutions can be seen in countries including Gambia⁴⁴ and Colombia.⁴⁵ Could this attitude towards “fixing our own problems” be a turning point for more in-country investigations and prosecutions, rather than investigations and prosecutions depending on the ICC or on universal jurisdiction? Could truth commissions, commissions of enquiries, and domestic prosecutions thus play a greater role?

Related to the role of domestic courts in universal jurisdiction cases, I believe that in terms of investigating, UN mechanisms such as the ones for Syria and Myanmar offer a solution to the ICC’s problems by collecting, documenting and preserving evidence. These universal jurisdiction cases are also often less expensive and more effective than the ones at the ICC. These mechanisms also offer a solution to the situations of political deadlock at the Security Council, as illustrated by the Syrian mechanism. What is important now is to see how lessons can be learnt

⁴⁰ See, for example, E. Jarry, ‘France issues arrest warrants for senior Syrian officials’, in *Reuters*, 5 November 2018, available at: <https://www.reuters.com/article/us-syria-crisis-france/france-issues-arrest-warrants-for-senior-syrian-officials-idUSKCN1NA11L> (accessed 17 May 2019).

⁴¹ W.W. Burke-White & A.M. Slaughter, ‘The future of international law is domestic (or, the European way of law)’, *Penn Law: Legal Scholarship Repository*, 2006 47:2, pp. 327-352.

⁴² See J. Burke, ‘Sudan protesters reject army takeover after removal of president’, in: *The Guardian*, 11 April 2019, available at: <https://www.theguardian.com/world/2019/apr/11/sudan-army-ousts-bashir-after-30-years-in-power> (accessed 17 May 2019) and Prosecutor v. Omar Hassan Ahmad Al Bashir, Second Decision on the Prosecution’s Application for a Warrant of Arrest, ICC-02/05-01/09-94, Pre-Trial Chamber, 12 July 2010.

⁴³ D. Walsh, ‘Sudan’s Omar al-Bashir Charged in Connection With Killings of Protesters’, *The New York Times*, May 13 2019, available at: <https://www.nytimes.com/2019/05/13/world/africa/al-bashir-charged-sudan.html> (accessed 17 May 2019).

⁴⁴ Amnesty International, ‘Gambia: Truth Commission hearings an important step towards justice and reparations’, 7 January 2019, available at: <https://www.amnesty.org/en/latest/news/2019/01/gambia-truth-commission-hearings-an-important-step-towards-justice-and-reparations/> (accessed 17 May 2019).

⁴⁵ M. Casij Pena, ‘Colombia’s Transitional Justice: Mission Impossible?’, in: *Justice Info*, 23 November 2018, available at: <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/39567-colombia-transitional-justice-mission-impossible.html> (accessed 17 May 2019).

from the current mechanisms and how similar efforts can be put in place and used in the future. Collaboration between civil society actors and these mechanisms should continue to be close. The amount of information from civil society actors that is being used by the IIM and the consequential size of the evidence database resulting from it is substantial. This illustrates civil society's important role which, with the growth of new digital technologies, will expectedly only increase. This impact on universal jurisdiction cases and revealing atrocities in the digital age is unprecedented. Whoever works with these actors, whether ICC or UN investigators, must keep this in mind.

That being said, NGOs must be aware of the differences in standards and the types of investigations. As was discussed above, there is a "gap" in the evidence collected by (human rights) civil society actors and what is needed for during a criminal investigation. Activists must be aware of the differences between human rights reporting and criminal investigations, as well as of the limits and possibilities of providing legal bodies with evidence. This means that, if civil society is to continue to play a role in future investigations, regulations and guidance in terms of evidence collecting is crucial. Especially standards for the documentation and verification of digital evidence are needed, as this type of evidence can only become more important in the future. Efforts by U.C., Berkeley in developing a guide to OSINT for civil society are therefore welcome developments. We should however be cautious about wanting to completely retool activists to become criminal investigators, because at the end of the day, criminal proceedings are only one part of the solution. But, the role of NGOs in presenting evidence for preliminary examinations should also not be underestimated; good and thorough human rights reports can function as a starting point in preliminary investigations.

I also wonder whether it can be expected that civil society members will be able to collect the evidence needed, even with use of an app. In addition, it is possible that the skills and justice gap between donor-fuelled countries in conflicts and the countries that are out of the public eye widens. The responsibility of collecting evidence, establishing a chain of evidence, documenting the right type of information and handing it over to the authorities is challenging. For a large group of civil society members operating worldwide, it is questionable if they will be reached by the protocols and guides and whether they will be able to work with these documents in dangerous situations. Especially for activists focusing on human rights issues in the field, it is questionable whether high enough standards of evidence should be expected, regardless of whether they have received training in human rights documentation or not. Lower profile activists and countries in conflict that operate out of sight of public interest and donors risk missing out on these developments, trainings and manuals. In addition, a smartphone is needed by the activist. Thus, these types of apps can be more easily used by certain groups of activists which have access to donors, resulting in the over-documentation of high-profile conflicts. Inaccessibility would, however, result in a lack of evidentiary information –and thus justice possibilities– for other countries. Whatever protocols, apps and guides are developed, I believe this is something to keep in mind.

VII.2 How Will Be Investigated?

Regarding the second question – how will international crimes be investigated? – it is clear that digital technologies and evidence will be decisive in how international justice is practiced in the future. Almost each week, a new report is released, using new digital technologies to expose atrocities and violations. The use of 'open-source intelligence' (OSINT) in investigative journalism, human rights monitoring, and international criminal investigations has become increasingly popular over the past years. Although the use of OSINT in criminal investigations intelligence gathering is not new, the widespread use of this technique by many actors is

innovatory. Civil society members, including human rights activists and journalists, are increasingly using new digital means to bring to light violations of international criminal law. A range of initiatives by NGOs aims at training human rights activists in using technology for monitoring and documenting. Larger NGOs, such as Amnesty International, now also use “crowdsourcing” to be able to conduct labour intensive analysis, verification and documentation of online open sources.⁴⁶ In reaction to this new trend, major global human rights organisations, including AI and HRW, have intensively been recruiting open-source intelligence experts. HRW even recently posted a vacancy for ‘head of open source investigations’ to focus on this type of investigation. With regards to digital investigations, therefore, a shift cannot only be seen on *how* crimes are being investigated, but also on *who* is investigating these crimes. It can be expected that future conflicts and situations of mass violence will be well documented due to the expansion of internet and smartphone usage worldwide. Although witness and victim testimonies, forensic traces and other physical forms of evidence will stay important, digital evidence and OSINT are taking over the crime scene. All actors and institutions involved in international investigations should therefore prepare themselves for working with this type of evidence.

These new technological developments do mean that investigative standards, policy and practice need to adjust to these digital situations. As has been made clear above, social media companies play an important part in this, as well as civil society members, lawyers and academia. Social media companies are a source of information for criminal investigations, including on international crimes. The Myanmar example illustrates the possibilities for using social media in investigations, since many photos and videos posted by the Myanmar armed forces during attacks in Rakhine state were posted online. Some of these photos were even published on a Commander-in-Chief’s Facebook page to show their “clearance operations”.⁴⁷ It seems, social media ignorance can sometimes be bliss. However, the role of social media in removing and storing content needs further attention. Illustrative of the needs and changes in this new digital age, a summit was organised in Paris by Jacinda Ardern –Prime Minister of New Zealand– to discuss the role of social media platforms in hosting and broadcasting violent and extremist content. Ardern calls for more investment in research into technology in order to address these issues, by both political leaders and directors of tech companies themselves. As she states: ‘It’s about these companies and how they operate’.⁴⁸ Something to keep in mind, however, is that by blocking the uploading extremist content, important evidence may also be lost.⁴⁹ It is therefore crucial that systems are put in place where extremist content is filtered and blocked from being

⁴⁶ A. Koenig, F. McMahon, N. Mehandru & S. Silliman Bhattacharjee, ‘Open source fact-finding in preliminary examinations’ in: M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Brussels: Torkel Opsahl Academic EPublisher, 2018, pp. 681-710. An example is ‘Decode Darfur’ a previous AI ‘decode’ project, see also: Amnesty decoders, available at: <https://decoders.amnesty.org/> (accessed 14 May 2019).

⁴⁷ See, for example, UN HRC 2018, *supra* note 14, p. 319.

⁴⁸ J. Ardern, ‘How to stop the next Christchurch massacre’, *The New York Times*, 11 May 2019, available at: <https://www.nytimes.com/2019/05/11/opinion/sunday/jacinda-ardern-social-media.html> (accessed 17 May 2019).

⁴⁹ Recently, it has come to light that Facebook’s and other social media platform’s new algorithms have caused war crimes evidence to become lost, hampering investigative efforts by various actors. See for example B. Warner, ‘Tech companies are deleting evidence of war crimes’, *The Atlantic*, May 8 2019, available at: <https://www.theatlantic.com/ideas/archive/2019/05/facebook-algorithms-are-making-it-harder/588931/> (accessed 2 July 2019) and S. Dubberly, ‘Facebook just blindfolded war crimes investigators’, *News Week*, 17 June 2019, available at: <https://www.newsweek.com/facebook-graph-search-war-crimes-investigators-1444311> (accessed 2 July 2019).

uploaded, but is stored safely somewhere by tech companies so it could possibly be analysed for criminal prosecution purposes.

VII.3 Concluding

It becomes clear that there are no satisfactory or clear-cut answers to what the future may hold for international justice. Concluding, I would say that the impact of digital technologies on who is investigating and how is being investigated is substantial. Future investigative mechanisms should be designed to collaborate closely with civil society actors in order to collect and analyse this digital evidence and provide domestic courts with sufficient evidence of international crimes. The role of the ICC in future investigations and the penal and institution-focused interpretation of justice can be challenged. In the end, we should all help “make” justice, whatever we want that to be.