

HARDWIRING ACCOUNTABILITY FOR MASS ATROCITIES

*David Mandel-Anthony**

ABSTRACT

Three important trends in the global system of accountability for atrocity crimes are reshaping the architecture of global justice by increasing the available fora and avenues to achieve accountability for atrocity crimes. One is a redesign of international fact-finding and investigative mechanisms mandating those bodies to collect evidence for potential use in national judicial systems. A second is the increasing establishment of specialized, national investigative and prosecutorial units facilitating the exercise of foreign jurisdiction over atrocity crimes. The final trend is a growing milieu of sophisticated, non-governmental actors and organizations seeking criminal justice and accountability for atrocity crimes. These three developments interact with and shape each other, leading to increased possibilities for justice and an expansion of accountability norms.

* Adjunct Professor at Georgetown University Law School and Senior Advisor at the Office of Global Criminal Justice, U.S. Department of State. The author is grateful for the reviewers who provided their wise feedback and expertise on drafts of this Article and were generous with their time, including Beth Van Schaack, Elise Keppler, Doutje Lettinga, Naomi Roht-Arriaza, and Zachary D. Kaufman. The views expressed in this Article are entirely my own, and do not necessarily reflect those of the U.S. Department of State or the U.S. Government.

TABLE OF CONTENTS

INTRODUCTION	905
I. INTERNATIONAL INVESTIGATIVE BODIES FOR ATROCITY	
CRIMES.....	908
A. <i>Overview</i>	908
B. <i>Mandates to Share Evidence with National Prosecutions</i>	909
1. <i>The Independent International Commission of Inquiry on the Syrian Republic</i>	911
2. <i>Syria: International, Impartial and Independent Mechanism</i>	913
3. <i>Investigative Team on ISIL/Da'esh</i>	915
4. <i>Independent, International Fact-Finding Mission to Myanmar</i>	918
5. <i>Independent Investigative Mechanism for Myanmar</i>	920
C. <i>Explanations for the Shift in Mandates</i>	922
1. <i>A lack of other options</i>	923
2. <i>Transnational impact of the crimes under investigation</i>	924
3. <i>Normative shift toward recognizing the legitimacy of foreign jurisdictions</i>	925
D. <i>Challenges of This Shift</i>	926
1. <i>The mystery of the ultimate forum</i>	926
a. <i>Gaining informed consent</i>	927
b. <i>Receiving and transmitting information</i>	928
c. <i>Increased complexity and burden on COIs</i>	928
d. <i>Tension between human rights documentation and criminal investigations</i>	929
E. <i>A Partial Solution: Standing Capacity at the International Level</i>	930
II. NATIONAL ATROCITY CRIMES UNITS	932
A. <i>Overview</i>	932
B. <i>Challenges and Limitations</i>	935
1. <i>Jurisdictional limitations</i>	935
2. <i>Capacity, investigative, and operational challenges</i>	937
3. <i>Reactive versus structural investigative approaches</i>	939
C. <i>Benefits of This Trend</i>	941

2019]	<i>HARDWIRING ACCOUNTABILITY</i>	905
	1. <i>Institutional benefits</i>	941
	2. <i>Innovative, tailored procedures</i>	943
	3. <i>Increased cooperation between specialized national units</i>	948
III.	ROLE OF CIVIL SOCIETY: JUSTICE ACTIVISTS AND ENTREPRENEURS	951
IV.	CONCLUSION: INTEROPERABILITY OF JUSTICE ACTIVISTS, SPECIALIZED WAR CRIMES UNITS, AND INTERNATIONAL INVESTIGATIVE MECHANISMS	962

INTRODUCTION

This paper identifies and examines three important trends in the development of the global architecture governing accountability for atrocity crimes.¹ First, U.N. political bodies have increasingly established fact-finding and investigative missions with an explicit mandate to collect evidence for use in criminal prosecutions in a variety of potential jurisdictions.² This paper examines such fact-finding and investigative mechanisms created by different U.N. bodies for atrocity situations in Iraq, Myanmar, and Syria. These mechanisms face challenging and novel methodological questions in gathering and sharing evidence.

Second, the recognition by international bodies of the potential value of national courts reflects the urgency of seeking justice for horrific atrocities occurring seemingly without end.³ The reach toward national jurisdictions by international bodies lays bare the lack of political consensus in the international community on whether to use international courts or create new hybrid or ad hoc courts for the atrocity situations in Syria, Iraq, and Myanmar. But it also reflects a growing recognition at the international level of the normative legitimacy of pursuing justice in foreign, national courts. Concurrently, a growing

1. This Article will use the terms “core international crimes,” “serious international crimes,” “atrocity crimes,” and “mass atrocities” interchangeably to refer to war crimes, crimes against humanity, and genocide.

2. See *infra* Part I.

3. See *infra* Part I.

number of states are bolstering their ability to pursue justice by establishing specialized national investigation and prosecution units to exercise foreign jurisdiction over atrocity crimes.⁴ These units interact with each other and with the new international investigative mechanisms to enhance the possibilities for justice.

Third, a growing milieu of sophisticated, non-governmental actors and organizations are seeking criminal justice and accountability for atrocity crimes by collecting evidence for eventual use in criminal prosecutions, filing cases themselves, or compelling national authorities to prosecute.⁵ Some of these groups augment their efforts with advocacy, or complement their litigation-focused work by partnering with grassroots mobilization campaigns that increase the demands on national justice authorities at the domestic level.

These developments are not a rejection of the principle of accountability, even if there is inaction in creating or using international or hybrid courts. Rather, the resort to national jurisdictions can be seen as both a continuing affirmation of the justice imperative in international relations and a pragmatic recognition of the need for multiple accountability fora, including at the domestic level, amidst the reality of the lack of international political consensus over when and how existing international courts can and should exercise jurisdiction over ongoing atrocity crimes. This domestic turn is conceptually, legally, and normatively concordant with the modern emphasis on accountability for atrocity crimes. The ad hoc, international criminal tribunals for Rwanda and Yugoslavia created by the U.N. Security Council (UNSC) in the mid-1990s, as well as subsequent international and hybrid tribunals (such as the International Criminal Court (ICC), the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia), were never intended to be the sole or primary venues for justice. Instead, these tribunals were all established

4. See *infra* Part II.

5. See *infra* Part III.

with different legal and institutional prerogatives to embed justice in national systems. The ICC operates on the principle of complementarity;⁶ the International Criminal Tribunals for Rwanda and the Former Yugoslavia operated with jurisdictional primacy, but were also tasked by the UNSC with transferring cases and capacity to relevant national systems.⁷ Most international tribunals existed in addition to, not in place of, national prosecutions. As international jurist Catherine Marchi-Uhel argues, facilitating national, foreign prosecutions “is not so far removed from the principles laid down by the Rome Statute,” namely, that the ICC “is a court of last resort.”⁸

Viewed from this light, the developments profiled in this paper are core expressions of the justice and accountability imperative marking international relations since the 1990s, although in a new configuration. While these developments occur at seemingly different levels—internationally, nationally, and at the grassroots—they all point to a continuation and diffusion of the accountability norm. The endorsement by international and regional political organizations of the creation of specialized national war crimes units or judicial cooperation in pursuing atrocity crimes are not disconnected from the creation of international investigative mechanisms explicitly mandated to make their work available to national prosecutors. Both are justice responses compelled in part by civil society and some NGOs that increasingly engineer their work for use by national judicial systems and international investigative mechanisms. All of these developments intersect and shape each other to create a more comprehensive, dynamic, and intertwined system of international justice.

6. PAUL SEILS, HANDBOOK ON COMPLEMENTARITY: AN INTRODUCTION TO THE ROLE OF NATIONAL COURTS AND THE ICC IN PROSECUTING INTERNATIONAL CRIMES 3 (2016).

7. S.C. Res. 1503, at 1–2 (Aug. 28, 2003).

8. Frédéric Burnand, *Catherine Marchi-Uhel: A Strong Signal to Those Committing Crimes in Syria*, JUSTICEINFO.NET (Jan. 25, 2019), <https://www.justiceinfo.net/en/other/40107-catherine-marchi-uhel-a-strong-signal-to-those-committing-crimes-in-syria.html>.

I. INTERNATIONAL INVESTIGATIVE BODIES FOR ATROCITY CRIMES

A. Overview

Since the 1990s, the United Nations and regional organizations have increasingly established international commissions of inquiry (COIs), fact-finding missions (FFMs), independent, international investigative mechanisms (IIIMs), and other monitoring and reporting bodies to document and investigate human rights violations and violations of international humanitarian law.⁹ These commissions range in legal and political functions and objectives. Their activities encompass documentation, analysis, fact-finding, monitoring, and public reporting.¹⁰ They vary significantly, as “each one relies on different financial and human resources, adopts different methodologies, and therefore produces different results.”¹¹

Generally, these bodies do not apply a standard of proof used by most criminal jurisdictions, instead using lower standards (“reasonable grounds to believe,” “reasonable suspicion,” or “balance of probabilities”) in reaching their legal and factual

9. See S.C. Res. 780, at 1–2 (Oct. 6, 1992) (reaffirming a call to states and international organizations to gather and document information about humanitarian law violations); S.C. Res. 935, at 2 (July 1, 1994) (requesting information and evidence regarding violations of humanitarian law in Rwanda). A slightly later commission, the United Nations International Independent Investigation Commission (UNIIC), established by the UNSC in 2005, preceded the creation of the Special Tribunal for Lebanon. Other commissions have led to proposals for international or hybrid courts that did not materialize. See generally Open Soc’y Found., *Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes* (2018) [hereinafter *Options for Justice*] (describing proposed courts in Kenya, Sudan, Burundi, Liberia, and the Democratic Republic of the Congo). A variety of bodies, including the UNSC, the U.N. Human Rights Council, the U.N. General Assembly, treaty-monitoring bodies, regional organizations, and national institutions have established investigative and fact-finding missions. See INT’L INST. OF HIGHER STUDIES IN CRIMINAL SCI., SIRACUSA GUIDELINES FOR INTERNATIONAL, REGIONAL, AND NATIONAL FACT-FINDING BODIES xiii (M. Cherif Bassiouni & Christina Abraham eds., 2013), http://intersentia.be/nl/pdf/viewer/item/id/9781780681931_0/ [hereinafter SIRACUSA GUIDELINES]; *International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding Missions and Other Investigations*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx> (last visited Mar. 30, 2019). Although distinct, for the purposes of this Article, these bodies will be referred to as COIs, FFMs, or IIIMs.

10. SIRACUSA GUIDELINES, *supra* note 9, at xiii–xiv.

11. *Id.* at xiv.

conclusions.¹² While COIs and FFMs often issue “[i]nvestigation, prosecution and accountability-related recommendations,”¹³ and at times compile a confidential list of individual senior perpetrators,¹⁴ they are not usually designed or implemented in a manner that makes them “interoperab[le]” with international or national courts or tribunals.¹⁵

B. Mandates to Share Evidence with National Prosecutions

Since the early 2010s, however, and especially in the past three years, a growing trend has emerged. The U.N. entities that authorize COIs, FFMs, and IIIMs now more explicitly mandate the collection of evidence to share with national, international, or hybrid courts for use in criminal prosecutions.¹⁶ This contrasts with many earlier COIs, whose main function was to document and report on violations.¹⁷ While some previous mandates called for international mechanisms to generally share information with other international bodies, the degree of specificity in the new generation of mandates, as well as identifying national courts as potential recipients, is a signifi-

12. Rob Grace & Jill Coster van Voorhout, *From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-Finding Missions and International Criminal Courts and Tribunals* 15 (Hague Inst. for Glob. Justice, Working Paper No. 4, 2014), <http://www.thehagueinstitute.org/globaljustice/wp-content/uploads/2015/10/working-paper-4-fact-finding.pdf>; U.N. Office of the High Comm’r for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, U.N. Doc. HR/PUB/14/7, at 62 (2015), https://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf [hereinafter OHCHR COI Guidelines].

13. OHCHR COI Guidelines, *supra* note 12, at 95.

14. The Syria COI has prepared such a list, as have many other COIs, including the Commission on Human Rights in South Sudan. See Human Rights Council, Rep. of the Int’l Comm’n of Inquiry on the Syrian Arab Republic, ¶ 87, U.N. Doc. A/HRC/19/69 (2012) [hereinafter Syria COI Feb. 2012 Report]; *Statement of Ms. Yasmin Sooka, Chairperson of the Commission on Human Rights in South Sudan, at 40th Human Rights Council Session*, U.N. HUM. RTS. COUNCIL (Mar. 12, 2019), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24309&LangID=E>.

15. See Rob Grace, *Recommendations and Follow-Up Measures in Monitoring, Reporting, and Fact-Finding Missions* 12 (Aug. 2014) (unpublished working paper) (available on SSRN).

16. See, e.g., TED PICCONE, U.N. HUMAN RIGHTS COMMISSIONS OF INQUIRY: THE QUEST FOR ACCOUNTABILITY 4 (2017); Zachary D. Kaufman, *The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations*, 16 J. INT’L CRIM. JUST. 93, 96 (2018).

17. PICCONE, *supra* note 16, at 5.

cant shift.¹⁸ Earlier COIs left decisions about accountability follow-up measures to the purview of international organizations and bodies.¹⁹ Now, from the outset, the United Nations is hardwiring the mandates of FFMs, COIs, and IIIMs to be “interoperable,” designing their operations and conducting their investigations to be compatible with criminal justice mechanisms.²⁰ In practice, this presents a thicket of practical and legal issues, but may have the effect of multiplying the fora available for ensuring accountability for mass atrocities, thus bolstering the prospects of justice.

The following sections examine five COIs, FFMs, and IIIMs established for atrocity situations in Syria, Myanmar, and Iraq since 2011. Two of these mechanisms—the Syria COI and the Myanmar FFM—illuminate the limitations of a fact-finding and documentation model in encouraging accountability processes, as well as political blockages within the UNSC.²¹ These limitations provide a partial explanation for why another model was developed for successor mechanisms in Syria and Myanmar. The UNSC’s ability to find political consensus regarding the need for accountability for non-state actors in Iraq, as well as Iraq’s consent, may also provide a partial explanation for the Iraqi investigative mechanism profiled in this piece.²²

The five mechanisms demonstrate variances and a perceptible move away from pure documentation of human rights abuses and toward investigations—gathering such information in ways that can be more useful to criminal prosecutions. The tension between these two approaches is discussed later in this Article.²³ Other COIs could furnish relevant examples, such as the Commission for Human Rights in South Sudan.²⁴ But

18. See, e.g., Kaufman, *supra* note 16, at 96.

19. PICCONE, *supra* note 16, at 4–5.

20. See Grace & Coster van Voorhout, *supra* note 12, at 2 (defining “interoperability”).

21. See Kaufman, *supra* note 16, at 96–98.

22. See *id.* at 94.

23. See *infra* Part I.D.

24. Human Rights Council Res. 34/25, U.N. Doc. A/HRC/RES/34/25, at 6 (Mar. 24, 2017) (directing the Commission to “collect and preserve evidence” and to make this evidence

examined together, the five mechanisms profiled in this Article demonstrate a significant change in the international architecture of accountability for atrocity crimes.

1. *The Independent International Commission of Inquiry on the Syrian Republic*

In August 2011, the U.N. Human Rights Council (HRC) created the Independent International Commission of Inquiry on the Syrian Republic (Syria COI),²⁵ during the relatively early stages of a spiraling human rights crisis that grew out of the violent response by President Bashar al-Assad's regime to anti-government protest. The conflict has since become one of the most horrendous humanitarian catastrophes of the modern era.²⁶ The Syria COI has documented allegations that government forces and a proliferating array of non-state armed groups have committed systematic human rights violations and abuses against civilians, resulting in hundreds of thousands of deaths.²⁷ The Syria COI is mandated to

investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.²⁸

"available also to all transitional justice mechanisms . . . including the hybrid court for South Sudan").

25. See generally Human Rights Council Res. S-17/1, U.N. Doc. A/HRC/S-17/2 (Aug. 22, 2011) (establishing the Syria COI).

26. Kaufman, *supra* note 16, at 96.

27. Syria COI Feb. 2012 Report, *supra* note 14, at 5.

28. H.R.C. Res. S-17/1, *supra* note 25, ¶ 13 (emphasis added).

As a political solution to the grueling conflict in Syria proved elusive, the HRC renewed the mandate of the Syria COI multiple times, most recently in March 2019.²⁹ There has been growing frustration at the lack of an effective forum to pursue accountability for the crimes documented by the COI, reflected by the increasingly urgent, although hortatory, language about the need for accountability in the resolutions renewing the mandate.³⁰ Still, the HRC has not substantively changed the operational provisions of the mandate, hindering efforts at accountability.³¹ One commissioner resigned in frustration at the lack of follow-up to the COI's recommendations for international justice.³² Although the Syria COI recommended the UNSC refer the situation in Syria for investigation by the Prosecutor of the ICC,³³ such a resolution was vetoed by Russia and China in 2014.³⁴ Justice is effectively blocked at the international level for the crimes committed in Syria, because of lack of political consensus at the UNSC.

The persistent demand for justice led to pressure on the Syria COI to reorient its documentation work to more usefully serve accountability processes in foreign, national jurisdictions, including by sharing information with national prosecutors. In

29. See *Independent International Commission of Inquiry on the Syrian Arab Republic: About the Commission of Inquiry*, U.N. HUMAN RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/AboutCoI.aspx> (last visited Apr. 17, 2019).

30. The resolution renewing the mandate in March 2013 “[e]ncourage[d] . . . the international community to ensure that there is no impunity for . . . violations or abuses.” Human Rights Council Res. 22/24, U.N. Doc. A/HRC/RES/22/24, ¶ 19 (Mar. 22, 2013) (emphasis omitted).

31. One change in language underscores the almost imperceptible, subtle shifts in accountability directives of the HRC. Core language in the 2013 mandate authorizing the COI to “identify those responsible *with a view of ensuring* that perpetrators . . . are held accountable,” *id.* ¶ 29 (emphasis added), was modified in the 2016 mandate to “*support efforts to ensure* that perpetrators . . . are held accountable,” Human Rights Council Res. 31/17, U.N. Doc. A/HRC/RES/31/17, ¶ 4 (Mar. 23, 2016) (emphasis added).

32. Somini Sengupta, *War-Crimes Prosecutor, Frustrated at U.N. Inaction, Quits Panel on Syria*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/world/middleeast/syria-war-crimes-del-ponte-resigns.html>.

33. Human Rights Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 148, U.N. Doc. A/HRC/27/60 (Aug. 13, 2014).

34. Meetings Coverage, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014).

part, this was driven by the HRC's own recognition of the potential value to prosecutors of the growing cache of information collected and held by the Syria COI, including testimonies, photographs, satellite imagery, and Syrian government documents.³⁵ The COI has gradually responded by making its cache more accessible and developing modes of cooperation with national prosecutions.

However, the COI does not collect information using criminal standards of proof, which hampers admissibility in criminal proceedings, and it does not gather information explicitly for use as evidence in criminal proceedings, which hinders the usefulness of its information to national prosecutors.³⁶ As one observer notes, "[T]he COI for Syria [is] not tasked with writing case briefs."³⁷ Typical of many COIs and FFMs created by the HRC, the Syria COI is not specifically designed to be fully interoperable with international criminal tribunals or courts, much less national courts.³⁸

2. Syria: International, Impartial and Independent Mechanism

Responding to both the growing demand for an interoperable international investigative mechanism as well as blockages and vetoes at the UNSC for a referral of the situation in Syria to the ICC, the U.N. General Assembly (UNGA) in 2016 created a new investigative body with a significantly different mandate, struc-

35. Human Rights Council Res. 34/26, U.N. Doc. A/HRC/34/L.37, ¶ 2 (Mar. 20, 2017) (acknowledging "the importance of the work of the Commission of Inquiry and the information it has collected in support of future accountability efforts").

36. Human Rights Watch, "*These Are the Crimes We Are Fleeing*": Justice for Syria in Swedish and German Courts, at 3–4 (Oct. 3, 2017), https://www.hrw.org/sites/default/files/report_pdf/ijsyria1017_web.pdf [hereinafter *These Are the Crimes We Are Fleeing*].

37. Melinda Rankin, *The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability*, 20 J. GENOCIDE RES. 392, 407 (2018).

38. Grace & Coster van Voorhout, *supra* note 12, at 4. One exception to this was a special mission authorized by the HRC in June 2012 for the Syria COI to investigate a massacre of civilians in the village of El-Houleh. The COI was mandated to "publicly identify those who appear responsible for these atrocities, and to preserve the evidence of crimes for possible future criminal prosecutions or a future justice process." Human Rights Council Res. S-19/1, U.N. Doc. A/HRC/RES/S-19/1, ¶ 8 (June 4, 2012) (emphasis added).

ture, and orientation: the Syria IIIM.³⁹ Many observers heralded this body as “unprecedented”⁴⁰ on several counts, foremost being its creation by the UNGA.⁴¹ While the UNGA has previously created justice institutions, it had “always [done so] with the consent and participation of the state involved.”⁴² Because UNGA created the IIIM without Syria’s consent, it is “significantly more coercive than anything previously conceived” by the UNGA.⁴³ Further, the mandate of the Syria IIIM contrasts dramatically with the Syria COI, clearly aiming at criminal accountability:

*to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.*⁴⁴

By explicitly including national courts as potential receiving fora for “evidence,” the UNGA articulated a two-fold shift from a more traditional COI: first, this mechanism was to collect information in ways that could allow it to be used as criminal *evidence*, and second, the IIIM was to look beyond the blocked avenues for justice at the international level. In the words of

39. G.A. Res. 71/248, ¶ 4 (Dec. 21, 2016); see also Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps into the Breach*, 15 J. INT’L CRIM. JUST. 231, 231–37 (2017) (describing the circumstances under which the UNGA created the Syria IIIM and how it was structured).

40. Kaufman, *supra* note 16, at 96.

41. See Whiting, *supra* note 39, at 232.

42. Beth Van Schaack, *The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide*, 16 J. INT’L CRIM. JUST. 113, 114 (2018).

43. *Id.*

44. G.A. Res. 71/248, *supra* note 39, ¶ 4 (emphasis added).

French judge Catherine Marchi-Uhel, appointed as Head of the Syria IIIM in July 2017, the body was meant to “become the central repository of evidence on mass crimes committed in Syria.”⁴⁵ Civil society and human rights groups also played a significant role in pushing for this type of evidence-gathering investigative mechanism, and had been in “close contact . . . during the drafting of the GA Resolution” with the leading states proposing the measure.⁴⁶

The Syria IIIM set to work developing terms of reference, establishing operations, and securing voluntary contributions. The IIIM issued two reports in 2018⁴⁷ and “launched negotiations to establish a legal framework for the transfer of information and pieces of evidence” to relevant bodies, including the Syria COI and national war crimes units, as discussed below.⁴⁸

3. *Investigative Team on ISIL/Da’esh*

In September 2017, the UNSC created the United Nations Investigative Team to Promote Accountability for Crimes Committed by ISIL/Da’esh (UNITAD).⁴⁹ In contrast to the two Syria mechanisms, UNITAD was created at the invitation and with the consent of the government of Iraq.⁵⁰ Iraqi consent was likely politically necessary for the UNSC to create this powerful investigative mechanism, although it came with trade-offs that have been criticized—namely, UNITAD’s exclusive focus on crimes committed by non-state actors.⁵¹ A strength arising from

45. Burnand, *supra* note 8.

46. Rankin, *supra* note 37, at 407.

47. U.N. General Assembly, Rep. of the Int’l, Impartial and Ind. Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under Int’l Law Committed in the Syrian Arab Republic Since March 2011, U.N. Doc. A/72/764 (Feb. 28, 2018); U.N. General Assembly, Rep. of the Int’l, Impartial and Ind. Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under Int’l Law Committed in the Syrian Arab Republic Since March 2011, U.N. Doc. A/73/295 (Aug. 3, 2018).

48. Burnand, *supra* note 8.

49. S.C. Res. 2379, ¶ 2 (Sept. 21, 2017).

50. Van Schaack, *supra* note 42, at 114–15.

51. *Id.* at 116–17.

the mechanism's creation by the UNSC is stable and secure funding from U.N.-assessed contributions in addition to voluntary trust fund contributions.⁵² These differences are noteworthy, but UNITAD is more similar to the Syria IIIM in the core imperative of its mandate to investigate and collect evidence for prosecutions:

*to support domestic efforts to hold ISIL (Da'esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da'esh) in Iraq, to the highest possible standards . . . to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request.*⁵³

In February 2018, the UNSC approved the terms of reference, and in May 2018, international lawyer Karim Khan was appointed as Head.⁵⁴ An initial team deployed to Baghdad in October 2018, and a first report was submitted to the UNSC in November 2018.⁵⁵ Although Iraq is a "primary intended recipient" of the evidence collected by UNITAD,⁵⁶ evidence can be shared with third-country national courts as determined in

52. S.C. Res. 2379, *supra* note 49, ¶ 13.

53. *Id.* ¶ 2 (emphasis added).

54. U.N. Secretary-General, Letter dated Feb. 9, 2018 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2018/118 (Feb. 14, 2018); Press Release, Secretary-General Appoints Karim Asad Ahmad Khan of United Kingdom to Head Team Investigating Islamic State Actions in Iraq, U.N. Press Release SG/A/1806-BIO/5091 (May 31, 2018).

55. Special Adviser and Head of the U.N. Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant, Letter dated Nov. 15, 2018 from the Special Adviser and Head of the U.N. Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, U.N. Doc. S/2018/1031 (Nov. 16, 2018) [hereinafter UNITAD First Report].

56. See S.C. Res. 2379, *supra* note 49, ¶ 5.

agreement with the government of Iraq and the UNSC.⁵⁷ Mandate language allows UNITAD to investigate war crimes or crimes against humanity committed by ISIL/Da'esh outside of Iraq, subject to certain conditions.⁵⁸ Some have suggested this could lead to investigations of crimes against Yazidis in Syria.⁵⁹

Perhaps also as a result of obtaining Iraqi consent prior to its creation, UNITAD is hiring a hybrid staff of Iraqi and international criminal experts and investigative judges⁶⁰ and, unlike many other investigative mechanisms, will provide technical capacity-building assistance to the national judicial system.⁶¹ UNITAD has engaged with a wide array of stakeholders, including national authorities, to “explore how the investigative activities of the Team can be conducted in a way that maximizes the potential use of its evidentiary material in domestic proceedings.”⁶²

UNITAD's model has drawbacks and has been criticized for its one-sided mandate to investigate violations committed by ISIS, at the exclusion of crimes committed by other armed groups, paramilitaries, or Iraqi security forces.⁶³ This stipulation likely was the cost of obtaining Iraq's full consent to the UNSC Resolution⁶⁴ and for the UNSC to “reach consensus around the need to promote criminal accountability,” at least for ISIL/Da'esh.⁶⁵ Further, abolitionist states were concerned that UNITAD-provided evidence could be used to apply the death penalty in Iraqi courts, leading to delays as states negotiated the terms of reference.⁶⁶ Further, the Iraqi legal system carries

57. *Id.* ¶ 10.

58. *Id.* ¶ 11 (noting that such collection of evidence can be done at the request of the Member State and upon approval of the UNSC).

59. See Van Schaack, *supra* note 42, at 118–19.

60. S.C. Res. 2379, *supra* note 49, ¶ 5.

61. UNITAD First Report, *supra* note 55, ¶ 41.

62. *Id.* ¶ 65.

63. Zachary D. Kaufman, *New UN Team Investigating ISIS Atrocities Raises Questions About Justice in Iraq and Beyond*, JUST SECURITY (Sept. 28, 2017), <https://www.justsecurity.org/45411/expect-team-investigating-isis-atrocities-iraq/>; Van Schaack, *supra* note 42, at 118.

64. Kaufman, *supra* note 63; Van Schaack, *supra* note 42, at 115.

65. Van Schaack, *supra* note 42, at 115.

66. *Id.* at 135.

significant substantive and procedural lacunae and limitations, such as regressive criminal definitions of rape.⁶⁷ Most glaringly, the Iraqi Penal Code does not contain full criminal definitions for genocide, war crimes, and crimes against humanity.⁶⁸ These shortcomings in the legal system of the “primary intended recipient” of UNITAD’s investigations ultimately reduce the potential impact of UNITAD’s work itself.

However valid these criticisms, UNITAD drastically improves the chances of achieving justice in various fora, if only for ISIL/Da’esh crimes.⁶⁹ UNITAD offers a tantalizing, multi-faceted model of an investigative mission mandated to connect with and enter into agreement with various actors also seeking accountability: national criminal justice authorities, other U.N. bodies, non-governmental organizations (NGOs), and survivors of mass atrocities. The UNSC situated UNITAD, like the Syria IIIM, within the layered field of global criminal justice, calling on states to “cooperate with the Team . . . through mutual arrangements on legal assistance . . . and in particular to provide it with any relevant information as appropriate they may possess pertaining to its mandate.”⁷⁰ UNITAD is meant to be a three-way vector to exchange information with states and NGOs and to facilitate the collection of evidence that could be used to “produce comprehensive analytical case files capable of supporting domestic proceedings, both in Iraq and other Member States.”⁷¹

4. *Independent, International Fact-Finding Mission to Myanmar*

A strikingly similar response would play out in the United Nations’ response to designing bodies to address mass atrocities in Myanmar. First, the United Nations created a documentation-focused human rights body with limited coercive powers that received no cooperation from the state under

67. *Id.* at 126.

68. *Id.* at 127.

69. *Id.* at 138–39.

70. S.C. Res. 2379, *supra* note 49, ¶ 10.

71. UNITAD First Report, *supra* note 55, ¶ 30.

scrutiny. The body would issue dire recommendations about the need for accountability through international courts, which went unheeded because of political recalcitrance. Second, the United Nations responded to growing demand from civil society and concerned states by creating a more robust investigative mechanism with a clearer mandate to collect evidence in furtherance of prosecutions in multiple fora.

In March 2017, the HRC dispatched an “independent international fact-finding mission” to Myanmar (Myanmar FFM) in response to massive violence against the Rohingya Muslims, particularly in Rakhine State, which led thousands of Rohingya to flee to Bangladesh.⁷² The mandate of the FFM echoed the focus on documenting the facts and circumstances of human rights abuses, similar to the Syria COI and previous human rights monitoring bodies:

to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State . . . with a view to ensuring full accountability for perpetrators and justice for victims.⁷³

The government of Myanmar refused to cooperate with the FFM and instead set up two commissions, neither of which were viewed as credible by independent observers.⁷⁴ After fifteen months of investigations, the Myanmar FFM released a report, concluding on “reasonable grounds” that “gross human rights violations and serious violations of international humanitarian law have been committed in Myanmar since 2011” by the Tatmadaw, the armed forces of Myanmar.⁷⁵ The FFM recom-

72. Yanghee Lee (Special Rapporteur on the Situation of Human Rights in Myanmar), *Rep. on the Situation of Human Rights in Myanmar*, ¶ 68, U.N. Doc. A/HRC/34/67 (Mar. 14, 2017).

73. Human Rights Council Res. 34/22, U.N. Doc. A/HRC/RES/34/22, ¶ 11 (Apr. 3, 2017).

74. Kaufman, *supra* note 16, at 97–98.

75. Human Rights Council, *Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, ¶ 1671, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018) [hereinafter Myanmar FFM Report].

mended the UNSC “ensure accountability . . . preferably by referring the situation to the [ICC] or alternatively by creating an ad hoc international criminal tribunal.”⁷⁶ Weeks before the release of the report, the ICC Prosecutor announced the opening of a preliminary examination into the alleged deportation of the Rohingya from Myanmar to Bangladesh, a State Party to the Rome Statute.⁷⁷ This would lead to an ICC decision asserting partial jurisdiction over at least one type of crime against humanity—the act of forcible transfer and deportation as completed in Bangladesh—allegedly carried out against the Rohingya.

While the Myanmar FFM was not specifically mandated to collect justiciable evidence for use in criminal proceedings, its documentation and reporting surely added momentum to the global outcry about the victimization of the Rohingya. However valuable these contributions, the FFM’s shortcomings may have also galvanized the HRC’s creation of a new investigative mechanism at the same session in which the FFM presented its final report.

5. Independent Investigative Mechanism for Myanmar

In September 2018 the HRC established a new independent investigative mechanism for Myanmar (Myanmar IIMM), to

collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate

76. *Id.* ¶ 1700. The UNSC has not brought a referral.

77. See *Statement of ICC Prosecutor, Fatou Bensouda, on Opening a Preliminary Examination Concerning the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh*, INT’L CRIM. CT. (Sept. 18, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>. The ICC Prosecutor’s announcement followed a ruling by the Pre-Trial Chamber of the ICC, in response to a request from the ICC Prosecutor, that the Prosecutor could exercise jurisdiction over the “alleged deportation of the Rohingya people from Myanmar to Bangladesh,” a State Party to the Rome Statute. Press Release, Int’l Criminal Court, ICC Pre-Trial Chamber I Rules that the Court May Exercise Jurisdiction Over the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh (Sept. 6, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1403>.

and expedite fair and independent *criminal proceedings*, in accordance with international law standards, *in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes.*⁷⁸

The Myanmar IIMM is further tasked to use the information gathered by the Myanmar FFM⁷⁹—an acknowledgment of the inefficiencies and risks resulting from iterative mechanisms, such as retraumatizing witnesses by conducting multiple interviews. It is significant that the Myanmar IIMM, similar in scope and mandate to the UNGA-created Syria IIMM, was created by the HRC. The HRC carries strong legitimacy as a subsidiary organ of the United Nations, but UNGA represents all U.N. member states.⁸⁰

To date, the Myanmar IIMM is still establishing operations and hiring staff. The United Nations approved a budget in late December 2018, after attempts to slash funding for the Mechanism failed.⁸¹ Like the Syria IIMM and UNITAD, the Myanmar IIMM will need to engage in extensive consultations to determine how best to share information and evidence with states, international bodies, victims groups, and others as it builds case files.⁸² The impact of the IIMM on justice and accountability remains to be seen, but it is clear that the mandate was designed specifically to meet the strong demand for multiplying the avenues for justice and accountability, especially given the absence of credible national proceedings and the limited

78. Human Rights Council Res. 39/2, U.N. Doc. A/HRC/RES/39/2, ¶ 22 (Oct. 3, 2018) (emphasis added).

79. See H.R.C. Res. 34/22, *supra* note 73, ¶ 12.

80. See *General Assembly of the United Nations*, UNITED NATIONS, <https://www.un.org/en/ga/72/resolutions.shtml> (last visited Apr. 16, 2019).

81. See Louis Charbonneau, *UN Members Thwart China's Bid to Gut Funds for Myanmar Probe*, HUM. RTS. WATCH (Dec. 24, 2018, 11:37 AM), <https://www.hrw.org/news/2018/12/24/un-members-thwart-chinas-bid-gut-funds-myanmar-probe>.

82. Kingsley Abbott, *Myanmar's Ongoing Independent Mechanism: Careful Planning Needed*, OPINIOJURIS (June 12, 2018), <http://opiniojuris.org/2018/12/06/myanmars-ongoing-independent-mechanism-careful-planning-needed/>.

potential for jurisdiction of the ICC in this instance.⁸³ Although established primarily to investigate crimes against the Rohingya Muslim population, the IIMM could contribute to justice and accountability for victims in other long-running conflicts, since the IIMM's mandate applies to the entire territory of Myanmar.⁸⁴

As the IIMM establishes operations, observers and advocates have urged it to consider the specific technical and evidentiary manner in which it could fulfill its aspirational mandate and lead to criminal prosecutions—explicitly drawing on lessons learned from the establishment of UNITAD and the Syria IIM.⁸⁵ The IIMM could potentially assist a range of accountability institutions—including both the ICC⁸⁶ and foreign states with requisite jurisdiction over victims or perpetrators physically present in their territory—by providing to national authorities “evidence that has already been gathered, stored, and analyzed.”⁸⁷ The IIMM could “develop strategies to assist states” facing “difficulties with respect to resources, capacity, coordination with other actors, access to evidence and the ability to take into account the wider context in which crimes were committed.”⁸⁸

C. Explanations for the Shift in Mandates

The Myanmar IIMM, UNITAD, and Syria IIM demonstrate a trend toward mandating U.N.-created fact-finding bodies to gather evidence for use in a range of potential criminal jurisdictions at national and international levels. While these mech-

83. *Myanmar: Creation of UN Mechanism a Step Toward Accountability*, ICJ (Sept. 27, 2018), <https://www.icj.org/hrc39-myanmarres/>.

84. See Abbott, *supra* note 82; H.R.C. Res. 39/2, *supra* note 78, ¶ 22.

85. See Abbott, *supra* note 82; Polina Levina Mahnad, *An Independent Mechanism for Myanmar: A Turning Point in the Pursuit of Accountability for International Crimes*, EJIL TALK! (Oct. 1, 2018), <https://www.ejiltalk.org/a-turning-point-in-the-pursuit-of-accountability-for-international-crimes/>.

86. See Mahnad, *supra* note 85 (noting that Myanmar “will serve as a test case for how [international investigation mechanisms and the ICC] will co-exist and cooperate”).

87. Abbott, *supra* note 82.

88. *Id.*

anisms were each created to respond to a particular context and thus vary in their designs, there are some common explanations.

1. *A lack of other options*

First, as discussed above, both the absence of available international justice options via existing international or hybrid courts with full jurisdiction over the respective situations and the political intransigence to create new international courts may be motivating factors. The growing frustration over the lack of justice options at the international level and in the conflict-affected states, compounded by frustration with the inadequacy of the models of earlier FFMs, led to the elaboration of a new international investigative model that could supply material for national prosecutions outside the conflict area.⁸⁹ This model was, simply, “an innovation borne out of desperation.”⁹⁰

The mandates of these bodies reflect a growing recognition of the legitimacy and diversity of potential accountability fora and actors. One observer described the Syria IIM, UNITAD, and Myanmar IIMM models as an attempt by the United Nations to set up mechanisms to develop case files through coordinating, leveraging, and

focusing the efforts of a wide spectrum of actors, between domestic civil society, international NGOs, UN human rights components of peace-keeping missions, dedicated monitoring missions, fact-finding missions, commissions of inquiry, and Special Procedures mandates, all of which—to varying degrees—assist national efforts to bring perpetrators of grave violations to

89. See Mahnad, *supra* note 85.

90. *Id.*

justice and assist victims in seeking and obtaining remedies for these violations.⁹¹

The need to create such a focalizing investigative mechanism also raises troubling consequences. The proliferation of documentation initiatives (some official, some non-governmental) carries risks and inefficiencies, such as duplication of work, re-traumatization of victims, contradictory information provided by witnesses, and a lack of coordination.⁹² Even while these mechanisms may represent design improvements, some have criticized and questioned the United Nations for establishing an inefficient welter of mechanisms, operating successively or concurrently, to address the same atrocity crimes situations or countries.⁹³ The IIIM model is both a symptom of these inefficiencies and an aspirational remedy, creating bodies that can serve as clearinghouses to consolidate disparate information gathered by duplicative bodies and then disperse trial-ready dossiers to various jurisdictions.

2. *Transnational impact of the crimes under investigation*

The second main impetus might simply be growing recognition of the transnational nature and impact of the mass atrocities committed in specific contexts: hundreds of thousands of refugees, victims, and civilians arriving in foreign countries;⁹⁴ global terrorist networks;⁹⁵ and the presence of alleged perpetrators in foreign states.⁹⁶ This in itself is not a new development. The ad hoc tribunals for Yugoslavia and Rwanda were

91. *Id.*

92. Rankin, *supra* note 37, at 404–05.

93. See generally Kaufman, *supra* note 16 (describing investigations into five states and the implications that followed).

94. See Alise Coen, *The Responsibility to Protect and the Refugee Crisis*, OXFORD RES. GROUP (Mar. 9, 2016), <https://www.oxfordresearchgroup.org.uk/blog/the-responsibility-to-protect-and-the-refugee-crisis>.

95. See Meetings Coverage, General Assembly, No Justification for Atrocity Crimes, Prevention Less Costly than Crisis Response, Speakers Tell General Assembly at Opening of Debate on Responsibility to Protect, U.N. Press Release GA/12031 (June 25, 2018).

96. See *id.*

created by the UNSC under its Chapter VII powers, recognizing that the atrocities committed in those conflicts posed a threat to “international peace and security.”⁹⁷ However, what is new is a rewiring of the mandates of U.N. *investigative* bodies to respond to the global impact of such crimes by making those bodies interoperable not only with international courts, but with foreign, national jurisdictions.⁹⁸

3. Normative shift toward recognizing the legitimacy of foreign jurisdictions

Embedded in this pragmatic response to the necessity and utility of foreign jurisdictions when other options are unavailable, is a subtle, normative shift signaling a recognition of the *legitimacy* of foreign jurisdictions. As explored in more depth below, uses of “pure” universal jurisdiction were met with backlash, leading to a contraction of such jurisdiction since the early 2000s.⁹⁹ However, the overblown narrative of this contraction overlooks the growing exercise of foreign jurisdiction, although circumscribed by tighter jurisdictional requirements.¹⁰⁰ The recognition by the United Nations in the IIIM model of the legitimacy of certain limited use of foreign jurisdictions may reflect an easing of concerns at the international level in response to evolving state practice that more narrowly constructs extraterritorial jurisdiction. Further, the international system may be responding to persistent demands for justice by grassroots justice entrepreneurs, civil society, and international human rights groups. These actors often promote the legitimacy of foreign jurisdictions.

All of these contextual factors contribute to some situations in which the UNGA, the UNSC, and the HRC have chosen to design investigative mechanisms that can, in the words of Syria

97. U.N. Charter art. 39, ¶ 1.

98. See *Peace and Security*, UNITED NATIONS, <https://www.un.org/en/sections/issues-depth/peace-and-security/> (last visited Apr. 16, 2019).

99. See *infra* Section II.B.1.

100. Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, EUR. J. INT’L L. (forthcoming 2019) (manuscript on file with the Drexel Law Review).

IIM Head Marchi-Uhel, build “bridge[s]” between “commissions of inquiry and the various avenues of justice available.”¹⁰¹

D. *Challenges of This Shift*

Notwithstanding the significant potential of this new model for international investigative bodies, the shift raises significant legal and methodological challenges.

1. *The mystery of the ultimate forum*

The first challenge might be called the “mystery of the ultimate forum.” The IIMs do not know with certainty what prosecutorial fora will use the evidence they collect and the dossiers they create.¹⁰² This uncertainty raises core methodological questions about how the bodies will structure their work. How will they gather information and evidence in a way that allows it to be justiciable? Will the evidence be used in an adversarial common law system, an inquisitorial civil law system, or a novel jurisdictional blend?

Previous COIs and FFMs faced variants of this problem. Practitioners and experts developed guidelines and standards for collecting and reviewing evidence and other information.¹⁰³ But these guidelines mainly dealt with basic questions of remedying inadequate procedures¹⁰⁴ for assessing and weighing the reliability of evidence, ensuring proper chain of custody, and properly preserving evidence, particularly physical and forensic evidence.¹⁰⁵ To the extent COIs have considered how to make their work functionally useful for criminal prosecutions, it has usually been in relation to potential international criminal tribunals, not a range of diverse, national jurisdictions with differing

101. Burnand, *supra* note 8.

102. Kaufman, *supra* note 16, at 108 (noting that for UNITAD, “the specific prosecutorial fora are critical unknowns”).

103. OHCHR COI Guidelines, *supra* note 12, at v.

104. See Grace & Coster van Voorhout, *supra* note 12, at 1. The Siracusa Guidelines, for example, do not provide specific guidelines or modalities for sharing information with national courts.

105. *Id.* at 19.

evidentiary and procedural rules.¹⁰⁶ What might have been an ancillary or secondary consideration for earlier COIs—gathering evidence in a manner that allows it to be used in criminal proceedings—is now central to the task. The difficulty of this is compounded by the “multiplication of judicial channels” that the IIIM must consider.¹⁰⁷ Inadequate due process standards or lacunae in the legal frameworks of potential national jurisdictions add a further political-legal dimension to this knotty problem.¹⁰⁸

a. *Gaining informed consent*

Further, eliciting statements from witnesses and victims becomes harder when the ultimate accountability forum is not able to be identified to the person providing information. Individuals may be reluctant to expose themselves to risk without knowing who might eventually receive their information. Again, the methodological problem of obtaining informed consent with sufficient specificity has always been a consideration for COIs and FFMs,¹⁰⁹ but is now central to the primary task of IIIMs, according to their mandates.¹¹⁰ The OHCHR Guidelines for COIs do not provide satisfactory instructions to address the new complexity, stating flatly that

[a]n investigator has to obtain the informed consent of an interviewee or source to use and share the information. The consent has to *be specific regarding how the information can be used and the entity with which it can be shared*. . . . In the absence of consent, the information should not be shared.¹¹¹

106. See, e.g., OHCHR COI Guidelines, *supra* note 12, at 7.

107. See Burnand, *supra* note 8.

108. Van Schaack, *supra* note 42, at 140–42.

109. On the difficulties for FFMs and COIs of gaining informed consent with sufficient specificity, see Grace & Coster van Voorhout, *supra* note 12, at 18–19.

110. See OHCHR COI Guidelines, *supra* note 12, at 61.

111. *Id.* (emphasis added).

These “best practices” could be amended in ways that ethically satisfy informed consent but also leave some flexibility. Otherwise, in practice, this leads to frustration that “there is little to be given to national or international investigators who make contact with [COIs] or with the OHCHR seeking relevant information.”¹¹²

b. Receiving and transmitting information

Similarly, states and human rights organizations may be reluctant to provide information or sensitive data if they are unsure of who might receive that information in the future. To mitigate concerns, states and IIIMs negotiate safeguards and controls on the further transmission of any information shared with an international investigative body.

c. Increased complexity and burden on COIs

In practice, the complexity of the mystery of the ultimate forum means that engaging with states and NGOs to request and exchange information becomes a more challenging and burdensome task for IIIMs and COIs, adding a plethora of time-consuming activities to their operationalization and requiring the initial development of a terms of reference to guide that work, which can itself take time. UNITAD’s first report, issued over a year after its creation by the UNSC, provides a glimpse of the extensive efforts undertaken to develop “legal and practical frameworks” with states and national authorities, and to strengthen “institutional relationships” with NGOs, victims groups, and international organizations in order to “facilitate the transfer of [relevant] information.”¹¹³ Similarly, the Syria IIIM has “launched negotiations to establish a legal framework for the transfer of information and pieces of evidence” with a

112. Stephen J. Rapp, *Bridging the Hague-Geneva Divide: Strengthening the Capacity of Human Rights Inquiries to Collect and Preserve Evidence of Legal Responsibility* 4 (Georgetown Law Human Rights Inst. Perspectives on Human Rights, Paper No. 5, 2018).

113. UNITAD First Report, *supra* note 55, at 15–16.

range of actors and institutions, including the “[Syria COI], . . . Syrian civil society, [and] international and State actors.”¹¹⁴

This burden comes on top of the myriad staffing, operational, and practical challenges and delays COIs already encounter.¹¹⁵ The OHCHR headquarters in Geneva administratively operates and supports most U.N.-created COIs and FFMs. However, despite the multiplication of COIs since the early 2000s, OHCHR devotes limited resources and scant few staff to standing them up.¹¹⁶

d. *Tension between human rights documentation and criminal investigations*

The more explicit mandates for international investigative mechanisms to develop evidence for use in criminal prosecutions bring to the forefront the long-standing tension and disagreement between what are often perceived as the differing objectives and methodologies of human rights documentation and criminal investigations.¹¹⁷ This tension, pithily summarized as “The Hague-Geneva Divide,”¹¹⁸ refers to the “traditional” human rights reporting and documentation activities usually

114. Burnand, *supra* note 8.

115. See generally SIRACUSA GUIDELINES, *supra* note 9, at 8–11, 82–86, 93–97 (identifying challenges faced by COIs and proposing solutions for FFMs).

116. See, e.g., Rapp, *supra* note 112, at 11. Although OHCHR has made progress to not “reinvent the wheel,” many cumbersome procedures, methods, and administrative and staffing issues are dealt with de novo for each COI, leading to frustrating delays. See *id.* at 3. U.N. procedures for hiring qualified, expert staff can delay the beginning of substantive work for up to the first five or six months of what are often initially only twelve-month mandates for COIs, meaning that many COIs spend their initial months focused on staffing issues, rather than substantive investigative work. Of note, one intergovernmental organization, Justice Rapid Response, seeks to ameliorate staffing problems by maintaining a roster of trained personnel for rapid deployment to investigate situations of human rights, often through deployment to national, regional, and international accountability mechanisms. See *About Us*, JUST. RAPID RESPONSE, <http://www.justicerapidresponse.org/who-we-are/about-us/> (last visited Apr. 17, 2019).

117. See generally David Kaye, *Human Rights Prosecutors? The High Commissioner for Human Rights, International Justice, and the Example of Syria*, in THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS: CONSCIENCE FOR THE WORLD 245 (Felice D. Gaer & Christen L. Broecker eds., 2013) (positing that human rights lawyers may have different objectives than human rights prosecutors).

118. Rapp, *supra* note 112, at 1.

performed by Geneva-based organizations, and the criminal investigations and prosecutions performed by Hague-based international courts and tribunals.¹¹⁹

Many of those engaged in traditional human rights documentation note the institutional risks of exercises designed to gather criminal evidence, especially “linkage” evidence of criminal responsibility by senior leaders for atrocity crimes.¹²⁰ Human rights documentation units within U.N. peacekeeping missions, HRC special mandate holders, and COIs, for example, often operate with the consent of host governments, or may be uneasily located within striking distance of hostile non-state armed groups, who could see investigative activities, versus more general human rights reporting, as a direct and often personal threat.¹²¹ Such considerations lead to understandable wariness by human rights documenters and disagreements “concerning the desirability of blurring the lines between the domains of [monitoring, reporting, and fact-finding missions] and international criminal justice.”¹²² While these particular considerations have merit and should be carefully taken into account, the tension may also be explained in part by institutional behaviors and attitudes, a “clash of cultures between those who pursue compliance with human rights standards and those who seek criminal prosecution of the most serious violators.”¹²³

E. A Partial Solution: Standing Capacity at the International Level

These challenges, while serious, are not fatal. This section will discuss some proposals to “bridg[e] the divide between the worlds of criminal justice and human rights.”¹²⁴ Recognizing

119. *Id.* at 2.

120. The OHCHR COI International Guidelines, for example, favor methods of gathering information on the “crime base” rather than on “linkage” evidence. *See* OHCHR COI Guidelines, *supra* note 12, at 12–14.

121. Rapp, *supra* note 112, at 4; *see also* OHCHR COI Guidelines, *supra* note 12, at 61; Grace & Coster van Voorhout, *supra* note 12, at 14.

122. Grace & Coster van Voorhout, *supra* note 12, at 1.

123. Rapp, *supra* note 112, at 6.

124. *Id.* at 10.

the increasingly burdensome and proliferating tasks for COIs, IIMs, and FFM, the first recommendation of an expert group of practitioners convened in 2017 by former U.S. Ambassador for War Crimes Stephen Rapp¹²⁵ was the “creation of a small permanent secretariat in the OHCHR,” called a “Support Team,” to “plan, prepare, and resource the work of [COIs] and FFM and to respond appropriately to the requests of national or international authorities.”¹²⁶ The United Nations has considered but not yet adopted this recommendation. Variants of this proposal have previously been suggested, including creating a “standing capacity” on COIs in light of the fact that OHCHR “does not maintain standing capacities to analyze digital material or monitor open sources in country situations that are likely to come under investigation.”¹²⁷ The Siracusa Guidelines for International, Regional, and National Fact-Finding Bodies, developed in 2013 by an expert group helmed by international legal scholar and jurist Cherif Bassiouni, suggested that “lack of coordination . . . and inconsistencies in approaches and methodologies [of different human rights fact-finding bodies]” could be effectively remedied by creating a “permanent body or pool of experts from which individuals could be selected to serve as Commissioners on these . . .

125. See *id.* at 9–10 (providing an overview of this project, which was launched under the auspices of the Center for the Prevention of Genocide at the U.S. Holocaust Memorial Museum and The Hague Institute for Global Justice); see also Stephen J. Rapp & Jill Coster van Voorhout, *Bridging The Hague–Geneva Divide*, HAGUE INST. FOR GLOBAL JUST. (Jan. 13, 2017), <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/news-brief/bridging-the-hague-geneva-divide-recommendations-concluded-by-the-group-of-practitioners-in-fact-finding-accountability/>. The project sought to “increase the capacity of UN [COIs] and FFM to gather, analyze, preserve and share evidence for use in criminal prosecutions of alleged perpetrators today in third countries, and tomorrow in international, hybrid, or independent courts in the territorial state.” Rapp, *supra* note 112, at 9.

126. *Id.* at 11. The annex to the paper contains all the Group of Practitioners’ recommendations.

127. See *id.* at 4–5; see also Kingsley Abbott & Saman Zia-Zarifi, *Is It Time to Create a Standing Independent Investigative Mechanism (SIIM) (Part I)*, OPINIOJURIS (Apr. 10, 2019), <http://opiniojuris.org/2019/04/10/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim/>; Kingsley Abbott & Saman Zia-Zarifi, *Is It Time to Create a Standing Independent Investigative Mechanism (SIIM)? (Part II)*, OPINIOJURIS (Apr. 11, 2019), <http://opiniojuris.org/2019/04/11/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim-part-ii/>.

bodies.”¹²⁸ Others have noted the inchoate “[d]iscussions . . . on the side-lines of the [HRC] and in media about how a standing or permanent body [modeled] after the IIIM for Syria and Myanmar could be the missing link” to promote a “more comprehensive and integrated accountability strategy” and standardize how the United Nations records and preserves evidence.¹²⁹

While practitioners exhort the United Nations to recognize the potential benefits of a standing, specialized capacity in the international system for the investigation of atrocity crimes, national systems offer a rich experience of how specialized units can advance the prospects of justice.

II. NATIONAL ATROCITY CRIMES UNITS

A. Overview

In parallel and prior to the establishment of the IIIM models, national judicial systems have increased their ability to gather evidence, conduct investigations, and prosecute atrocity crimes. The past decades have seen the increasing establishment of specialized, dedicated national units to investigate and prosecute atrocity crimes, including war crimes, crimes against humanity, and genocide. This trend is globally diffuse, including countries in Africa, Latin America, and Europe,¹³⁰ but has been

128. SIRACUSA GUIDELINES, *supra* note 9, at xiv.

129. Mahnad, *supra* note 85. Another possibility is to use an extant but until recently dormant body, the International Humanitarian Fact-Finding Commission (IHFFC), established pursuant to Additional Protocol I of the Geneva Conventions to conduct inquiries into violations of international humanitarian law. See Cristina Azzarello & Matthieu Niederhauser, *The Independent Humanitarian Fact-Finding Commission: Has the ‘Sleeping Beauty’ Awoken?*, INT’L COMMITTEE RED CROSS: HUMANITARIAN L. & POL’Y BLOG (Jan. 9, 2018), <https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/>. Although established in 1992, the IHFFC activates its mandate to conduct inquiries only through formal requests and did not conduct its first investigation until 2017, related to an incident affecting the Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission in Ukraine. See *id.* While the IHFFC may be positioned to provide some standing capacity, it is not intended to be a criminal investigative body, and its activation is limited by strict triggering conditions. See *id.*

130. See *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, HUM. RTS. WATCH (Sept. 16, 2014), <https://www.hrw.org/report/2014/09/16>

especially pronounced and accelerated among member states of the European Union, in part because of policy recommendations and guidelines promulgated by the Council of the European Union in the early 2000s and further developed since then by legal frameworks and platforms facilitating cooperation between these European national units.¹³¹

Specialized national judicial and prosecutorial units provide an increasingly sophisticated and institutionalized structure, staffed with subject-matter experts to receive and collect information and evidence of atrocity crimes.¹³² The units vary widely in their legal frameworks, institutional structures, staffing composition, rules of procedure and evidence, and

/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and# [hereinafter *The Long Arm of Justice*]; Franck Petit, *International Crimes: Spotlight on France's War Crimes Unit*, JUSTICEINFO.NET (Dec. 17, 2018), <https://www.justiceinfo.net/en/tribunals/national-tribunals/39791-international-crimes-spotlight-on-france-s-war-crimes-unit.html>; Benjamin Duerr, *International Crimes: Spotlight on Germany's War Crimes Unit*, JUSTICEINFO.NET (Jan. 10, 2019), <https://www.justiceinfo.net/en/tribunals/national-tribunals/39936-international-crimes-spotlight-on-germany-s-war-crimes-unit.html>; see also *Options for Justice*, supra note 9 (providing profiles of accountability mechanisms in domestic systems with hybrid international elements); Open Soc'y Found., *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya* (2011), <https://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf> [hereinafter *Putting Complementarity into Practice*]; William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279, 287–89 (2008); "Looking for Justice": *The Special Criminal Court, a New Opportunity for Victims in the Central African Republic*, HUM. RTS. WATCH (May 17, 2018), <https://www.hrw.org/report/2018/05/17/looking-for-justice/special-criminal-court-new-opportunity-victims-central-african> [hereinafter *Looking for Justice*]; Bogdan Ivanisevic, Int'l Ctr. for Transitional Justice, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, at 5–8 (Jan. 1, 2008); Leonardo Filippini, Int'l Ctr. for Transitional Justice, *Criminal Prosecutions for Human Rights Violations in Argentina*, at 2–3 (Nov. 1, 2009); Open Soc'y Justice Initiative & TRIAL Int'l, *Universal Jurisdiction Law and Practice in France* (Feb. 2019), <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-France.pdf>; Open Soc'y Justice Initiative & TRIAL Int'l, *Universal Jurisdiction Law and Practice in Germany* (Apr. 2019), <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-Germany.pdf>; Open Soc'y Justice Initiative & TRIAL Int'l, *Universal Jurisdiction Law and Practice in the Netherlands* (Apr. 2019), <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-The-Netherlands.pdf>.

131. See E.U. Genocide Network, *Strategy of the EU Genocide Network to Combat Impunity for the Crime of Genocide, Crimes Against Humanity and War Crimes Within the European Union and Its Member States*, at 4–5 (2014) [hereinafter *Genocide Network Strategy*] (noting E.U. Council Decision 2003/335/JHA to recommend that member states establish "war crimes units," and E.U. Council Decision 2002/494/JHA, which established the Genocide Network).

132. See, e.g., *The Long Arm of Justice*, supra note 130.

jurisdiction.¹³³ Although rooted in domestic legal frameworks, some national war crimes units and courts contain hybrid domestic and international legal elements or hybrid international/national staffing composition.¹³⁴ Some units may remain in perpetuity, while phasing out international elements over time, as with the War Crimes Chamber of the Courts of Bosnia and Herzegovina.¹³⁵ Some countries establish separate, specialized units for prosecutors, police, investigators, or immigration authorities; others establish working groups and fusion units bringing together authorities from different agencies to focus on atrocity crimes.¹³⁶ Many of these units, such as in Uganda, operate under jurisdictional limitations, low capacity, and paltry resources, prioritizing crimes committed within their own territory by predecessor regimes or non-state actors.¹³⁷ A small but impactful number of specialized units look outside their national borders, although can often only exercise that jurisdiction when the perpetrator or victim is present in the country.¹³⁸

133. See Howard Varney & Katarzyna Zdunczyk, Int'l Ctr. for Transitional Justice, *Legal Frameworks for Specialized Chambers: Comparative Studies for the Tunisian Specialized Criminal Chambers* (Dec. 2017), https://www.ictj.org/sites/default/files/ICTJ-Legal_Frameworks_for_Specialized_Chambers-Final-EN.pdf (discussing various models of legal and structural elements); see also Ivanisevic, *supra* note 130 (analyzing the work of the War Crimes Chamber of the Court of Bosnia and Herzegovina and its use of "hybrid" courts from 2005 to 2008).

134. See, e.g., Varney & Zdunczyk, *supra* note 133, at 1.

135. See *Options for Justice*, *supra* note 9, at 45; see also Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENVER J. INT'L L. & POL'Y 101, 143-44 (2015).

136. In the United States, for example, both structures are used. There is a specialized prosecutions unit within the DOJ, a specialized investigation unit within the FBI, and a specialized unit within the Immigration and Customs Enforcement agency that also serves as a fusion cell for DOJ and FBI specialists, named the Human Rights Violators and War Crimes Center. See, e.g., *Human Rights and Special Prosecutions (HRSP)*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-hrsp> (last visited Mar. 30, 2019); *International Human Rights Violations*, FBI, <https://www.fbi.gov/investigate/civil-rights/international-human-rights-unit> (last visited Apr. 12, 2019); *Human Rights Violators & War Crimes Unit*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/human-rights-violators-war-crimes-unit> (last visited Mar. 30, 2019).

137. See *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division*, HUM. RTS. WATCH (Jan. 15, 2012), <https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division#>.

138. *Options for Justice*, *supra* note 9, at 60-61.

B. Challenges and Limitations

1. Jurisdictional limitations

Although specialized national units confer distinct advantages and benefits, national systems face a plethora of capacity, institutional, operational, jurisdictional, and legal challenges, which are particularly amplified in the investigation and prosecution of core international crimes.¹³⁹ The most foundational of these challenges is exercising jurisdiction.¹⁴⁰

The prosecution of atrocity crimes committed extraterritorially is often referred to as “universal jurisdiction” (UJ).¹⁴¹ The use of “pure” UJ—whereby a state exercises jurisdiction over core international crimes committed outside its territory absent a clear link to the perpetrator or the victim, claiming instead to bring cases on behalf of humanity—has been rare, although used to spotlight abuses committed in a wide array of countries, from Argentina to Afghanistan.¹⁴² “Pure” UJ came under intense political pressure in the first half of the 2000s, especially in Spain and Belgium, where UJ laws were then “heavily restricted . . . [and] applied only in a small number of cases with territorial or personality links to both countries.”¹⁴³ Since then, there has been an “an extraterritorial backfire

139. *Looking for Justice*, *supra* note 130.

140. See Langer & Eason, *supra* note 100, at 15; see also Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?*, 16 J. INT’L CRIM. JUST. 165, 168 (2018) (describing jurisdictional challenges through the lens of Syria).

141. The shift perhaps calls into question whether the term “universal jurisdiction” still accurately describes the range of jurisdictional bases for prosecution of core international crimes in foreign courts, and whether the term itself, especially when used without qualifiers, unnecessarily carries over the political baggage that triggered the backlash against “pure” UJ laws in the 2000s. Such a discussion is beyond the scope of this paper.

142. In Europe, only Germany, Sweden, and Norway have laws providing for “pure” UJ over core international crimes, meaning that “no link is required between the countries and the crime for national authorities to have jurisdiction, and investigations into these cases can proceed even if the suspect is not present on their territory or a resident.” See *These Are the Crimes We Are Fleeing*, *supra* note 36, at 16. Even these laws are tempered by various procedural restrictions. *Id.* at 25.

143. Kaleck & Kroker, *supra* note 140, at 171.

effect”¹⁴⁴ rooted in foreign relation concerns that such UJ would “substantially disturb international relations or deeply infringe upon states’ sovereignty.”¹⁴⁵

However, a comprehensive database maintained by the scholars Máximo Langer and Mackenzie Eason examines and analyzes the use of foreign prosecutions, especially in Europe.¹⁴⁶ This database shows that reports of the death of UJ are greatly exaggerated. An annual review of ongoing foreign litigation cases shows significant, geographically dispersed use.¹⁴⁷ Instead of an end to foreign prosecutions, there has been a focus more on foreign prosecutions where some additional legal requirements are met; the net result is that cases of atrocity crimes committed abroad continue and arguably are increasing in practice.¹⁴⁸ According to the Langer-Eason database, foreign prosecutions for core international crimes are expanding, in terms of the total cases initiated, defendants tried, geographic distribution of venues, and national origin of defendants.¹⁴⁹

Still, significant jurisdictional requirements limit the use of foreign prosecutions. For example, more than sixty cases have been referred to the Swiss specialized war crimes unit since its establishment in 2011, yet all but a handful have been dismissed or closed because they failed to “fulfill the contextual requirements laid down by law . . . and/or the requirements for opening proceedings (e.g. perpetrators not in Switzerland).”¹⁵⁰ In the

144. Langer & Eason, *supra* note 100, at 34.

145. *Id.* at 5.

146. See Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 7 (2011); Máximo Langer, *Universal Jurisdiction Is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction*, 13 J. INT’L CRIM. JUST. 245, 248 (2015); Langer & Eason, *supra* note 100, at 2.

147. See Langer & Eason, *supra* note 100, at 3; see also TRIAL INT’L, EVIDENTIARY CHALLENGES IN UNIVERSAL JURISDICTION CASES: UNIVERSAL JURISDICTION ANNUAL REVIEW 2019, at 11 (2019), https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf (finding that UJ was used against 149 named suspects across fifteen countries in 2018).

148. Kaleck & Kroker, *supra* note 140, at 172, 189.

149. Langer & Eason, *supra* note 100, at 2.

150. Julia Crawford, *International Crimes: Spotlight on Switzerland’s War Crimes Unit*, JUSTICEINFO.NET (Feb. 15, 2019), <https://www.justiceinfo.net/en/tribunals/national-tribunals/40328-international-crimes-spotlight-on-switzerland-s-war-crimes-unit.html>.

United States, many human rights violators are prosecuted for immigration and visa fraud, reflecting the limited jurisdictional bases available to prosecutors.¹⁵¹

2. Capacity, investigative, and operational challenges

In addition to jurisdictional limitations, national war crimes units confront numerous capacity, legal, investigative, and operational challenges. A 2014 strategy document produced by the European Union Genocide Network, profiled later in this Article, lists the daunting, complex challenges facing national units in investigating and prosecuting mass atrocity situations.¹⁵² These include (1) the nature and scale of atrocity crimes, (2) the wide geographic scope of crimes, (3) the difficulty of reaching and maintaining contact with and furnishing appropriate protective measures to witnesses and victims in conflict or post-conflict areas, (4) the large number of persons and potential perpetrators involved, (5) numerous challenges in investigation and prosecution of sex- and gender-based violent crimes, (6) security risks for investigative missions in conflict or post-conflict areas, (7) the passage of time between the commission of the crime and the investigation, (8) the volume of potentially relevant information, and (9) the need to rely on specific expertise.¹⁵³

One significant challenge to national prosecutions of core international crimes is simply gathering the evidence in far-off

151. See, e.g., Press Release, U.S. Dep't of Justice, Liberian War Criminal Living in Delaware County Convicted of Immigration Fraud and Perjury (July 3, 2018), <https://www.justice.gov/usao-edpa/pr/liberian-war-criminal-living-delaware-county-convicted-immigration-fraud-and-perjury>.

152. Genocide Network Strategy, *supra* note 131, at 6. Although not within the scope of this paper, it should be noted that defense counsel in national proceedings face many of the same challenges, compounded by a lack of resources to conduct foreign investigatory missions, raising concerns about the respect of fair trial guarantees. This may present a less acute problem in civil law systems, where police, prosecutors, and investigative judges are responsible for uncovering incriminating and exculpatory evidence, although measures could be adopted to strengthen the equality of arms for independent defense counsel. See *The Long Arm of Justice*, *supra* note 130.

153. Genocide Network Strategy, *supra* note 131, at 15–23.

and dangerous locations.¹⁵⁴ Technological changes—such as smartphone, video, and photographic applications that allow citizen-activists to record and document abuses—“have reduced the logistical and economic costs of gathering the evidence needed for international criminal cases.”¹⁵⁵ But without the efforts of legal and advocacy groups to train local actors on how to use such technology, much of what is captured would not retain evidentiary validity.¹⁵⁶ The potential value of materials generated by international investigative mechanisms and non-governmental investigations is tempered by the limits and prohibitions some national prosecutors face in relying on externally-gathered information, particularly in legal systems where prosecutors and investigators “seek to and are often even obliged to conduct investigations themselves.”¹⁵⁷ This may be eased in systems where the law allows representatives of victims to introduce their own evidence.

The Swiss war crimes unit illustrates some of the baseline capacity and resource challenges facing many national war crimes units. Small national units “are too strapped for resources to comb through voluminous materials from human rights NGOs or victim groups regarding widespread atrocities.”¹⁵⁸ A founding prosecutor recounted that at the outset, “we were only two prosecutors, two judicial staff and one person in charge of the secretariat.”¹⁵⁹ At times, even those few personnel and resources were reallocated to terrorism cases,¹⁶⁰ and in 2015, the unit was merged with another division.¹⁶¹

A report on specialized war crimes units in France, Germany, and the Netherlands outlines additional challenges, including inadequate collaboration between various immigration and police services, the need to rely on often-faulty third party

154. *The Long Arm of Justice*, *supra* note 130.

155. Langer & Eason, *supra* note 100, at 18.

156. *See id.*

157. Kaleck & Kroker, *supra* note 140, at 170.

158. Mahnad, *supra* note 85.

159. Crawford, *supra* note 150.

160. *See id.*

161. *See id.*

intermediaries to locate witnesses, and the need to employ trusted interpreters.¹⁶² National units must strike a balance between “respect[ing] the sovereignty and national laws of the country where the investigation is being carried out,” and recognizing “the potential risks of relying too heavily on national authorities . . . for assistance, particularly the risk of possible interference . . . in the investigation.”¹⁶³

A compounding difficulty, perhaps inherent to “foreign” prosecutions, lies in making legal sense of “a different or unfamiliar culture, set of values or patterns of behavior . . . [and] crimes . . . perpetrated by or against actors who belong to different groups with contrasting political or economic views and different cultural, ethnic and historical characteristics.”¹⁶⁴

3. *Reactive versus structural investigative approaches*

Lastly, challenges may arise from the chosen investigative and prosecutorial approach. Some dedicated war crimes units use a “global enforcer approach,” “according to which states may exercise UJ as a result of their role in preventing and punishing international crimes committed anywhere in the world.”¹⁶⁵ Alternatively, many states adopt a “no safe haven” approach, “according to which states prefer[] to exercise UJ in order for their territory not to be a refuge for suspects involved in the commission of international crimes.”¹⁶⁶ Such an investigative posture may also be informed by jurisdictional limitations and requirements, such as territorial presence of the perpetrator, a link to the forum state, or a victim who is a resident or citizen of the forum state.¹⁶⁷ States may prosecute, incarcerate, and remove or deport individuals in fulfillment of the “no safe haven” paradigm.¹⁶⁸ Practically, this may mean that

162. See *The Long Arm of Justice*, *supra* note 130.

163. *Id.*

164. Genocide Network Strategy, *supra* note 131, at 20.

165. Kaleck & Kroker, *supra* note 140, at 172.

166. *Id.*

167. See *id.* at 189.

168. Langer & Eason, *supra* note 100, at 33.

national investigators and prosecutors are more “reactive” in collecting evidence, opening investigations, and filing arrest warrants.¹⁶⁹

In Europe, the trend toward this posture meant that “resources were almost exclusively devoted to prosecutions involving defendants who were residents, asylum seekers, or people otherwise present in their territories.”¹⁷⁰ For example, prosecutions in European countries of atrocities committed in Syria may disproportionately target lower-level foreign fighters present on their territory, rather than senior regime officials,¹⁷¹ in part because these individuals more readily fit within the “no safe haven” approach—investigations were triggered by the territorial presence of the suspect.¹⁷² Such outcomes, while understandable from an evidentiary perspective, may negatively affect perceptions of the priorities of prosecuting governments.¹⁷³

While recognizing the “no safe haven” approach may arise from jurisdictional requirements in the national framework,¹⁷⁴ enterprising prosecutors may have flexibility to adopt other approaches. Some European national war crimes units, notably in Germany, Sweden, and France,¹⁷⁵ have opened “structural investigations,” a different prosecutorial and investigative strategy that may serve as a corrective to the limitations of “no safe haven” approaches.¹⁷⁶ Generally, structural investigations are “investigations with full investigatory powers that are not (yet)

169. *Id.* at 5.

170. *Id.* at 33.

171. See *These Are the Crimes We Are Fleeing*, *supra* note 36 (“The few cases to reach trial have mostly implicated low-level members of ISIS, Jabhat al-Nusra, and non-state armed groups opposed to the government . . .”).

172. See Kaleck & Kroker, *supra* note 140, at 176 (noting that “[t]he result is that only (mostly low- or mid-level) perpetrators accidentally in Europe can be made to face prosecution in the near future for atrocities committed in Syria”).

173. See *These Are the Crimes We Are Fleeing*, *supra* note 36.

174. See Kaleck & Kroker, *supra* note 140, at 182.

175. See *The Long Arm of Justice*, *supra* note 130 (recommending that countries draw lessons from Germany’s use of structural investigations); *These Are the Crimes We Are Fleeing*, *supra* note 36 (discussing structural investigation in Sweden).

176. As of 2018, Germany had at least six ongoing structural investigations. See Kaleck & Kroker, *supra* note 140, at 180.

directed against specific persons but that exist for the purpose of investigating (and collecting evidence on) specific structures, within which international crimes have been allegedly committed.”¹⁷⁷ Structural investigations can allow national prosecutors to act swiftly when a suspect enters the territorial state, and can also be seen as a form of “anticipated legal assistance” to third states or international courts.¹⁷⁸

Especially when combined with the use of joint investigation teams, discussed further below, these approaches expand the ability of national war crimes units to both conduct high-profile investigations without “directly being exposed to political pressure”¹⁷⁹ and issue indictments and seek extraditions against senior level government officials for atrocity crimes, as shown by recent arrest warrants issued in France against three high-level Syrian government officials and the arrest in Germany of another former senior Syrian government official.¹⁸⁰

C. Benefits of This Trend

1. Institutional benefits

Specialized national units offer many structural benefits to address the myriad challenges inherent to foreign prosecutions of atrocity crimes. Langer and Eason describe this simply as establishing an “institutional nexus” that makes accountability more “logistically possible.”¹⁸¹ National units establish points of contact to receive, analyze, coordinate, and gather information, creating a process of knowledge accumulation, retention, and

177. *Id.* at 179.

178. *See id.*

179. *Id.* at 190.

180. *See* Press Release, European Ctr. for Constitutional and Human Rights, Torture in Syria: Senior Ex-Official from Assad Government Arrested in Germany (Feb. 13, 2019), <https://www.ecchr.eu/nc/en/press-release/torture-in-syria-senior-ex-official-from-assad-government-arrested-in-germany/>; *see also* Press Release, Worldwide Movement for Human Rights, Breaking: French Judges Issue International Warrants Against Three High-Level Syrian Regime Officials (May 11, 2018), <https://www.fidh.org/en/issues/litigation/breaking-french-judges-issue-international-arrest-warrants-against>.

181. Langer & Eason, *supra* note 100, at 15.

learning.¹⁸² Such units “effectively institutionalize[] the investigation and prosecution of grave international crimes by bringing together the necessary resources, staff, and expertise. The result is better, more focused investigations, and with time, the ability of practitioners in these units to take on a larger caseload and complete investigations more quickly.”¹⁸³ In addition to retaining legal professionals with tailored expertise in investigating and prosecuting complex “system crimes,” national units often fuse multidisciplinary teams of experts, including historians, sociologists, anthropologists, financial and asset recovery specialists, and experts in military structures and operations.¹⁸⁴ The concentration of specialized and multidisciplinary teams helps address the complex evidentiary and legal burdens of prosecuting core international crimes, such as proving contextual elements and building extensive linkage evidence necessary to prove command or superior responsibility for war crimes or crimes against humanity.¹⁸⁵

Building the institutional and legal capacity of specialized units in non-conflict countries can also shift burdens away from low-capacity judicial systems in conflict or fragile, post-conflict countries, or where justice is blocked politically.¹⁸⁶ Specialized units in foreign countries gather and analyze evidence, build databases, identify perpetrators, and perform deterrence func-

182. See Genocide Network Strategy, *supra* note 131, at 34 (“[T]he creation of dedicated units . . . allows for the gradual gaining of experience as well as retention of that knowledge, best practice and lessons learned within the same unit.”).

183. *The Long Arm of Justice*, *supra* note 130.

184. Genocide Network Strategy, *supra* note 131, at 34; *The Long Arm of Justice*, *supra* note 130.

185. Because of the “difficulties finding evidence linking alleged perpetrators to underlying crimes,” some national prosecutors have found it “easier to bring terrorism charges rather than prosecute for war crimes or crimes against humanity,” since authorities only have to prove membership in a designated terrorist organization. However, terrorism charges may carry less normative significance than war crimes or crimes against humanity. *These Are the Crimes We Are Fleeing*, *supra* note 36.

186. Although there may be a valid neocolonialist critique, other examples, such as the foreign litigation filed in Argentina against Spain and the prosecution of Hissène Habré in a hybrid African Union/Senegalese court provide a counterpoint. See *infra* note 234 and accompanying text.

tions until independent, capable accountability processes are operational in the country where the crimes were committed.

2. *Innovative, tailored procedures*

Specialized domestic courts provide an opportunity to develop innovative legal practices (such as structural investigations), rules of procedure and evidence, and institutional techniques to respond to particular needs arising in accountability proceedings and to integrate such practices into more general rule-of-law programming in post-conflict states.¹⁸⁷ The particular legal and procedural frameworks of domestic specialized judicial chambers and prosecution units vary widely, providing for heterogeneous practice and judicial innovations.¹⁸⁸ These include the development, especially in common law systems, of jurisprudence and legal procedures to facilitate broader victim participation, the acceptance of amicus curiae briefs, and the allowance of foreign expert testimony on specific topics relevant to atrocity crimes prosecutions, such as military structures.¹⁸⁹ Even in inquisitorial-based systems, which offer a broader right to legal participation for plaintiff-victims in criminal proceedings as “civil parties,” specialized procedures may need to be developed to accommodate the sheer number of potential victim-plaintiffs for atrocities crimes.¹⁹⁰ Prosecutors may need to develop specialized techniques and sensitive procedures for interviewing mass atrocity victims and witnesses. Developing such procedural imperatives for atrocity crime prosecutions can also fulfill a broader justice goal of

187. See generally Open Soc’y Founds., *International Crimes, Local justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (2011) (providing guidance and practical aid to support states seeking to provide local justice for international crimes); *Putting Complementarity into Practice*, *supra* note 130 (addressing the domestic justice issues arising from atrocity crimes in the Democratic Republic of Congo, Uganda, and Kenya).

188. Varney & Zdunczyk, *supra* note 133, at 10–14.

189. See, e.g., Human Rights Ctr., Int’l Ctr. for Transitional Justice, *Victim Participation at the International Crimes Division in Uganda: Stakeholder Roundtable* (2017), https://redress.org/wp-content/uploads/2017/12/ICD-Victim-Participation-Round-table_Report.pdf.

190. Howard Varney et al., Int’l Ctr. for Transitional Justice, *The Role of Victims in Criminal Proceedings*, at 13–15 (2017), https://www.ictj.org/sites/default/files/ICTJ-Victims_in_Criminal_Proceedings-Final-EN.pdf.

expanding engagement and building trust of citizens in formerly abusive or neglectful justice systems.

Specialized units could also develop apply prosecutorial strategies and procedures to increase focus and attention on acts that ordinary criminal justice systems may not otherwise prioritize or stigmatized.¹⁹¹ National war crimes units may, for example, develop techniques and procedures on conflict-related sexual violence, which poses unique challenges to investigation and prosecution, and require specialized, victim-tailored services and evidence gathering methods.¹⁹² Members of a specialized prosecution unit

can be trained intensively and continually on sexual and gender-based violence, and they can build legal competence by repeatedly trying cases under a closed set of relevant substantive and procedural rules. They may also develop superior skills in interviewing survivors of sexual violence, preparing them for trial, assessing evidence of sexual and gender-based crimes, and conducting effective witness examinations in court.¹⁹³

When national courts focus on crimes that are often neglected or are emblematic of a conflict, such as recruitment and use of child soldiers, religious or ethnically motivated attacks, or attacks on sites of national or cultural heritage, they establish

191. For a discussion of model elements of and the rationale for developing and publicly communicating a prosecutorial strategy for atrocity crimes, see U.N. Office of the High Comm'r for Human Rights et al., *Report of the Mapping Project Documenting Serious Violations of International Human Rights Law and International Humanitarian Law Committed Within the Territory of the Central African Republic Between January 2003 and December 2015*, at 38–78 (May 2017), https://www.ohchr.org/Documents/Countries/CF/Mapping2003-2015/2017CAR_Mapping_Report_EN.pdf. See also Jared O. Bell, Forum for Int'l Criminal and Humanitarian Law, *The Bosnian War Crimes Justice Strategy a Decade Later* (2018), <http://www.legal-tools.org/doc/eff713/pdf/>.

192. Kim Seelinger, *Domestic Accountability for Sexual Violence: The Potential of Specialized Units in Kenya, Liberia, Sierra Leone and Uganda*, 96 INT'L REV. RED CROSS 539, 555–59 (2014).

193. *Id.* at 555.

and deepen societal norms against certain conduct.¹⁹⁴ Establishing a national unit can increase prosecutions of serious human rights violations and therefore spread accountability norms and create “justice cascades”¹⁹⁵ by anchoring the imperative of justice for atrocity crimes in local and national contexts beyond the legal-cosmopolitan hubs of The Hague, Geneva, and Arusha. Without overstating the difficult-to-quantify transformative effect of foreign human rights and “impact” litigation, such prosecutions may have a normative effect in both the country where the crimes were committed and, perhaps less studied, in the prosecuting country.¹⁹⁶ Foreign prosecutions can contribute to such varied effects as “teaching the general public about international norms of behavior, calling attention to injustices, persuading changes of opinion, provoking a public outcry, and mobilizing grassroots campaigns.”¹⁹⁷ In Europe, some Syrian refugees interviewed by Human Rights Watch “believed that criminal cases in their countries of asylum may help combat xenophobic discourse in Europe by showing that refugees are in fact fleeing the crimes being prosecuted.”¹⁹⁸

Such broader effects may even contribute to “a domestic human rights consciousness and the development of a political constituency supportive of an ethical foreign policy . . . [and] increase pressure on the [prosecuting] government to condemn

194. For an example of a national prosecution strategy, see COUR PÉNALE SPÉCIALE EN RÉPUBLIQUE CENTRAFRICAINE, STRATÉGIE D'ENQUÊTES, DE POURSUITES ET D'INSTRUCTION (2018), <https://www.cps-rca.cf/sites/default/files/inline-files/Strategie%20de%20poursuite%20-%20CP%20S.pdf>. For an English-language discussion of that strategy, see Patryk I. Labuda, ‘Open for Business’: The Special Criminal Court Launches Investigations in the Central African Republic, *EJIL: Talk!* (Feb. 8, 2019), <https://www.ejiltalk.org/open-for-business-the-special-criminal-court-launches-investigations-in-the-central-african-republic/>; Forum for Int’l Criminal and Humanitarian Law, *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Morten Bergsmo ed., 2010), <http://www.toaep.org/ps-pdf/4-bergsmo-second>.

195. See generally KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011) (developing the “justice cascade” concept, which has since become shorthand for Sikkink’s qualitative finding that human rights trials lead to a decrease over time in human rights violations).

196. See Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 *VAND. L. REV.* 2305, 2342–45 (2005).

197. *Id.* at 2338.

198. *These Are the Crimes We Are Fleeing*, *supra* note 36.

abuses and bring its influence to bear on repressive governments.”¹⁹⁹ These goals and claims have long been embedded in the work of grassroots and transnational groups involved in impact and human rights litigation.²⁰⁰

However, specialized national units perform a qualitatively important leap toward advancing such goals—even if not explicitly the aim of specific cases and prosecution—by leveraging the material, political, and symbolic power of the state to address atrocity crimes committed elsewhere.²⁰¹ This exercise requires political and governmental involvement and normative commitment beyond simply allocating budgetary resources to the judiciary.²⁰² In effect, the state is not just rhetorically signaling the importance of combating impunity and promoting accountability, but also devoting resources in visible ways toward actualizing that normative commitment. Political diffusion of the accountability norm is furthered when international organizations such as the European Union and regional organizations in Africa endorse and encourage the creation of specialized national units and the cooperation be-

199. Van Schaack, *supra* note 196, at 2339. The prosecution of Liberian warlord Mohammed “Jungle” Jabateh in the Eastern District of Pennsylvania provides for a personal anecdote from the author. Relatives of the author are multi-generational residents of the Philadelphia area. During the course of the trial, they learned not only about the atrocities committed during Liberia’s war through coverage of the trial in local newspapers, but also learned about contemporary movements in Liberia to seek long-elusive domestic accountability for those crimes. Local residents also served on the jury in the case. See, e.g., Jeremy Roebuck, *At ‘Jungle Jabbah’ Trial, Women Describe Harrowing Life in Wartorn Liberia*, INQUIRER (Oct. 4, 2017, 8:20 PM), <https://www.philly.com/philly/news/crime/at-jungle-jabbah-trial-women-describe-harrowing-life-in-wartorn-liberia-20171004.html>; Jeremy Roebuck, *Jury in Philly Selected to Weigh Alleged Liberian War Criminal’s Case*, INQUIRER (Oct. 2, 2017, 6:38 PM), <https://www.philly.com/philly/news/crime/jungle-jabbah-mohammed-jabateh-liberia-war-criminal-philly-20171002.html>.

200. Van Schaack, *supra* note 196, at 2342–43.

201. See *id.* (“The reparative legislative response to the coram nobis cases brought on behalf of survivors of the WWII Japanese internment in the United States provides a model for the type of political leverage a lawsuit can generate . . .”).

202. The Dutch Parliament, for example, receives and debates an annual report sent by the Ministry of Justice about the activities of three specialized war crime units with the police, prosecution, and immigration services. See *The Long Arm of Justice*, *supra* note 130. The initiative is “key to raising broader awareness and political support for the specialized units’ work.” *Id.*

tween national systems to prosecute atrocity crimes committed extraterritorially.²⁰³

The historic levels of conflict-related population dislocation and refugee flows, especially into Europe from the conflicts in Syria and northern Africa,²⁰⁴ demonstrate the globalized reality of conflicts and mass atrocities. The increasing use of specialized immigration and prosecution units is in one sense a pragmatic response to the need to identify and prosecute perpetrators ‘in the midst’ – in effect, the proximate cause of the increase in cases in Europe involving crimes committed in Syria by returning foreign fighters.²⁰⁵ Such migration “increases opportunities for states” to prosecute core international crimes.²⁰⁶ It should be noted that many NGOs do not associate their work with such prosecutions for immigration offenses, in part because of broader disagreements with the state over immigration policies.

There is also a seemingly banal, but normatively meaningful, effect on the institutions housing such national units. Standing units embedded within larger institutions and bureaucracies normalize investigating atrocities as criminal acts—just like tax fraud or larceny—not only as human rights violations. They are a positive assertion by the state of accountability norms, ethics, and values. This in turn normalizes the criminalization of

203. See Council Decision 335/JHA, 2003 O.J. (L 118) 12 (EC); Council Decision 494/JHA (L 167) 1 (EC). See generally U.N. Dep’t of Pol. Aff., *The Judicial Cooperation Network of Central Authorities and Prosecutors from the Great Lakes Region of Africa (GLJC Network): Terms of Reference* (Nov. 11, 2016), https://ungreatlakes.unmissions.org/sites/default/files/tors_final_eng.pdf (explaining that the GLJC Network was officially launched in November 2016 by heads of prosecution of units of signatory countries to the International Conference on the Great Lakes Region (ICGLR), and is supported by ICGLR and the U.N. Office of the Special Envoy for the Great Lakes).

204. See, e.g., *Migration to Europe in Charts*, BBC (Sept. 11, 2018), <https://www.bbc.com/news/world-europe-44660699> (displaying the flow of refugees from Syria and northern Africa into Europe).

205. Thierry Cruvellier, *European Justice Strikes on Crimes in Syria*, JUSTICEINFO.NET (Feb. 21, 2019), <https://www.justiceinfo.net/en/tribunals/national-tribunals/40383-european-justice-strikes-on-crimes-in-syria.html>.

206. Langer & Eason, *supra* note 100, at 20; Kaleck & Kroker, *supra* note 140, at 167 (noting that “many members of non-state armed groups, be they foreign fighters or fighters from the region, involved in the commission of international crimes fled Syria and are being internationally investigated and prosecuted”).

atrocities, may lessen their political dimension, and inculcates in institutional behavior the norm that all crimes, including atrocities, should be investigated and prosecuted as a matter of course.

3. *Increased cooperation between specialized national units*

As specialized national units for atrocity crimes continue to be created in different countries and accumulate expertise, they increasingly cooperate with each other. Such cooperation takes place through networks and meetings to exchange best practices, and also more formally through legal assistance agreements and joint investigations.²⁰⁷ Such exchanges “allow[] war crimes unit practitioners to share their knowledge and experience, learn from counterparts in other countries, and develop best practices, and work together when cases transcend national borders.”²⁰⁸

The sterling example of such a cooperative network is the European Network of Contact Points in Respect of Persons Responsible for Genocide, Crimes against Humanity, and War Crimes (Genocide Network). The E.U. Council established the Network in 2002 and formally recommended in 2003 that member states establish specialized units dealing with core international crimes.²⁰⁹ The Network is supported by a Hague-based Secretariat under the auspices of the European Union’s judicial cooperation agency.²¹⁰ The Network catalyzes the creation of national units by providing resources, models, and examples of comparative state practice, but also improves the

207. *The Long Arm of Justice*, *supra* note 130.

208. *Id.*

209. See Council Decision 335/JHA, 2003 O.J. (L 118) 12 (EC); Council Decision 494/JHA (L 167) 1 (EC).

210. See Petra Jeney, Directorate-General for Internal Policies, European Parliament, *The Future of Eurojust*, at 97–134 (Apr. 2012), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462451/IPOL-LIBE_ET\(2012\)462451_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462451/IPOL-LIBE_ET(2012)462451_EN.pdf) (discussing the role of judicial cooperation in future developments of Eurojust).

functioning and operations of national units, providing detailed guidance on confronting practical challenges.²¹¹

Network meetings are divided into open sessions, which focus on best practices and exchanges with NGOs, and closed sessions, which allow prosecutors to share sensitive information on specific cases with each.²¹² Meetings are open to flexible participation by both regional organizations and non-E.U. observer states. Human rights groups and NGOs are often invited to present on their work and share information on specific conflict areas or individual cases.²¹³ The Network has generated other relevant initiatives, including establishing a Europol database on atrocity crimes to facilitate information exchanges between European police war crimes units.²¹⁴

The Network helps national prosecution units identify emerging challenges and trends and design effective solutions. The Network helped national immigration agencies develop specialized units of their own to identify suspected perpetrators of core international crimes and exclude them from receiving asylum under the Refugee Convention.²¹⁵ These specialized units created their own European-wide network in 2017,²¹⁶

211. See Council Decision 335/JHA, ¶ 9, 2003 O.J. (L 118) 12 (EN) (“Member States should ensure that law enforcement authorities and immigration authorities have the appropriate resources and structures to enable their effective cooperation and the effective investigation and, as appropriate, prosecution of genocide, crimes against humanity and war crimes.”).

212. See European Network of Contact Points Responsible for Investigating and Prosecuting Persons Responsible for Genocide, Crimes Against Humanity and War Crimes, Eurojust, *Guidelines on the Functioning of the Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes*, at 5 (Nov. 15, 2018), [http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/Guidelines%20on%20the%20Functioning%20of%20the%20Genocide%20Network%20\(November%202018\)/2018-11_Guidelines-functioning-Genocide-Network.pdf](http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetwork/Guidelines%20on%20the%20Functioning%20of%20the%20Genocide%20Network%20(November%202018)/2018-11_Guidelines-functioning-Genocide-Network.pdf) [hereinafter Genocide Network Guidelines].

213. See *id.* at 6.

214. See *These Are the Crimes We Are Fleeing*, supra note 36.

215. See U.N. Convention Relating to the Status of Refugees, art. 1F, Apr. 22, 1954, 189 U.N.T.S. 150 (“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity . . .”).

216. See Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes, Eurojust, *Conclusions of the 24th Meeting of the European Network of Contact Points for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes*, at 3 (May 25, 2018), <http://www.eurojust.europa.eu/doclibrary/genocide-network/genocide-networkmeetings/Conclusions%20of%20the%2024th%20meeting%20of%20the%20Genocide%20Network>

relying on practical guidelines, training, and support from the Genocide Network.²¹⁷ Although such initiatives may be viewed critically by human rights groups amidst more restrictive immigration policies and a rise in xenophobic political rhetoric in Europe, the Genocide Network also advised national units on how to share information with prosecution authorities while also respecting the rights of asylum seekers.²¹⁸

An additional legal tool spurring cooperation between specialized national atrocity crimes units is the increasing use in Europe of “joint investigation teams” (JITs), a legal arrangement based in existing E.U. legal assistance tools and frameworks.²¹⁹ An E.U. Network of National Experts on Joint Investigations Teams (JITs Network), founded in 2005, develops guidelines and evaluates the use of JITs in the European context.²²⁰ As defined by the JITs Network, a “JIT” is an “international cooperation tool based on an agreement between competent authorities . . . of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations in one or more of the involved States.”²²¹

20Network,%2024-25%20May%202018/2018-05_Conclusions-24th-Genocide-Network-Meeting_EN.pdf.

217. See Genocide Network Guidelines, *supra* note 212, at 35–39.

218. See *id.*; see also *These Are the Crimes We Are Fleeing*, *supra* note 36, at 6 (recommending measures to ensure that information provided by asylum seekers is not shared with law enforcement without their express consent, and to guarantee that refugee determinations are not contingent on cooperation with law enforcement).

219. See Council of the European Union, Joint Investigations Team Practical Guide, 6182/1/17 (2017) [hereinafter JITs Practical Guide]. Further elaborating on the potential of joint investigations, some legal scholars have suggested the provocative and innovative idea to “amalgamate” or “pool their existing extra-territorial jurisdiction” to effectively create an “inter-state criminal tribunal,” which, in the context of Syria, could be additionally supported by the Syria IIM. Melinda Rankin, *A Road Map for Germany: Negotiating a Path to Accountability with Assad*, PEACELAB (Dec. 18, 2018), <https://peacelab.blog/2018/12/negotiating-a-path-to-accountability-with-assad> (citing Ingrid Elliot).

220. See *Joint Investigation Teams (JITs)*, EUROJUST, <http://www.eurojust.europa.eu/Practitioners/JITs/jitsnetwork/Pages/JITs-network.aspx> (last visited Apr. 15, 2019).

221. JITs Practical Guide, *supra* note 219, at 4. Note that “the EU legal framework for setting up JITs between Member States can be found in Article 13 of the 2000 EU Mutual Legal Assistance Convention and the 2002 Framework Decision on JITS.” *Id.* at 5 (footnotes omitted). JITs can also be formed via existing mutual legal agreements between the European Union and other countries and entities, including the United States. *Id.*

E.U. JITs have at times included non-E.U. third countries, including Bosnia and Herzegovina, Ukraine, and Malaysia.²²²

JITs particularly benefit investigations of atrocity crimes by allowing national judicial and law enforcement authorities to share information outside the parameters of a case against a specific individual and, at times, in the absence of a domestic investigation—a further shift toward the “Global Enforcer” paradigm of investigations.²²³ JITs offer a “flexible framework for supplying information”²²⁴ for use in various national courts of the states involved, and admissibility issues are discussed earlier in the evidence-gathering process.²²⁵ JITs and structural investigations carry significant complementary potential in atrocity crimes investigations, as they provide a framework for cross-border investigations and for seconded investigators to participate in investigations outside their state of origin.²²⁶ Although the extent of the establishment of JITs is difficult to ascertain as many agreements are not publicly disclosed to protect the integrity of specific investigations, aggregated data published by the European Union shows increasing use of JITs, including for high-profile investigations such as the incident involving the crash of flight MH17 in Ukraine and the recent arrest in Germany of three high-ranking former Syrian government officials for crimes against humanity.

III. ROLE OF CIVIL SOCIETY: JUSTICE ACTIVISTS AND ENTREPRENEURS

Increasingly, NGOs seeking to directly prompt, advance, or participate in criminal judicial proceedings for atrocity crimes embody a third force (besides states and international

222. JITs Network, Eurojust, *Second JIT Evaluation Report*, at 26 (2018), [http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/Second%20JIT%20Evaluation%20Report%20\(February%202018\)/2018-02_2nd-Report-JIT-Evaluation_EN.pdf](http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/Second%20JIT%20Evaluation%20Report%20(February%202018)/2018-02_2nd-Report-JIT-Evaluation_EN.pdf) [hereinafter *Second JIT Evaluation Report*].

223. *See id.* at 18–20.

224. *Id.* at 14.

225. *Id.* at 18.

226. *See* JITs Practical Guide, *supra* note 219, at 4.

institutions) within the system of international justice and accountability. These NGOs comprise an increasingly sophisticated set of non-governmental actors seeking to multiply available accountability fora for victims of mass atrocities, including in national and foreign jurisdictions. They move between the interstices of the often disconnected system of global justice, bridge international institutions and local organizations, and narrow the impunity gaps in the global system.²²⁷ In the context of the trends identified in this paper, these actors connect with both international COIs and FFMs, and increasingly interact with national authorities, especially specialized war crimes units.²²⁸ These NGOs are diverse, and not all of them seek to directly compel litigation. Some are small organizations focused on accountability for atrocities in a single country or sub-region,²²⁹ while others are global in scope and operation.²³⁰ A non-exhaustive list of these organizations includes the European Center for Constitutional and Human Rights, Syria Justice and Accountability Center, International Truth and Justice Project, Foundation Cristosal, International Federation for Human Rights, the Guernica Group, Southern

227. See, e.g., *Who We Are*, EUR. CTR. FOR CONST. & HUM. RTS., <https://www.echr.eu/en/about-us/> (last visited Apr. 15, 2019); *What We Do*, SYRIA JUST. & ACCOUNTABILITY CTR., <https://syriaaccountability.org/what-we-do/> (last visited Apr. 15, 2019); INT'L TRUTH & JUST. PROJECT, <http://www.itjpsl.com/> (last visited Apr. 15, 2019); *Who We Are*, CRISTOSAL, <https://www.cristosal.org/who-we-are> (last visited Apr. 15, 2019); *The Worldwide Human Rights Movement*, FIDH, <https://www.fidh.org/en/about-us/What-is-FIDH/> (last visited Apr. 15, 2019) [hereinafter FIDH]; *About*, GUERNICA GROUP, <https://www.guernicagroup.org/aboutus> (last visited Apr. 15, 2019); *Overview*, S. AFR. LITIG. CTR., <http://www.southernafricalitigationcentre.org/about/overview-and-history/> (last visited Apr. 15, 2019); Reed Brody, *A Campaign for Justice in Gambia Is Born: Jammeh Implicated in Slew of Abuses During 22-Year Rule*, HUM. RTS. WATCH (Oct. 23, 2017), <https://www.hrw.org/news/2017/10/23/campaign-justice-gambia-born>; *Who We Are*, GLOBAL JUST. & RES. PROJECT, <http://www.globaljustice-research.org/> (last visited Apr. 15, 2019) [hereinafter GLOBAL JUST. & RES. PROJECT]; CANADIAN CTR. FOR INT'L JUST., <https://www.ccij.ca/> (last visited Apr. 15, 2019); *Mission and History*, CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/who-we-are/mission-and-history/> (last visited Apr. 15, 2019); Nathaniel Hurd, *Interview with Chris Engels, Director of Investigations and Operations, Commission for International Justice and Accountability*, COMMISSION ON SECURITY & COOPERATION IN EUR. (Sept. 18, 2018), <https://www.csce.gov/international-impact/interview-chris-engels-director-investigations-and-operations-commission>.

228. See, e.g., GLOBAL JUST. & RES. PROJECT, *supra* note 227.

229. See, e.g., CIVITAS MAXIMA, <https://www.civitas-maxima.org/en> (last visited Apr. 15, 2019); GLOBAL JUST. & RES. PROJECT, *supra* note 227; INT'L TRUTH & JUST. PROJECT, *supra* note 227.

230. See, e.g., FIDH, *supra* note 227; CIVITAS MAXIMA, *supra* note 229.

African Litigation Centre, the Sentry, Jammeh2Justice Campaign, TRIAL International, Global Justice and Research Project (GJRP), and the Center for Justice and Accountability (CJA).²³¹

These groups pick and choose to perform a range of functions: directly litigating human rights abuses, legally representing victims, collecting evidence with an eye toward transmitting it to prosecutors, reporting on human rights violations, brokering relationships between national judicial authorities and victims and actors in local contexts, serving as experts and guides to local cultural and political dynamics, and monitoring trials. They can also carry out the traditional human rights NGO functions of disseminating norms through advocacy, awareness raising, and “naming-and-shaming.” Many of the NGOs also perform a capacity-building role by providing technical assistance through trainings and by inserting selected staff and experts into national, hybrid, and international courts, aiming to fill gaps.²³² The significant overlap between organizations conducting capacity-building and those engaged in litigation, evidence collection, and advocacy suggests a thickening of the professional field, and points to the variety of ways that NGOs interface with national prosecutors, including in specialized units.

These justice actors and human rights advocates draw on and continue in a rich tradition of human rights and “public impact litigation” that seeks to “use[] judicial processes to transcend the dispute between individual litigants, advance a particular political cause or agenda, and produce lasting and systemic changes in countries where human rights violations occur.”²³³ Some of those involved bring years of skills and experience garnered as prosecutors in international tribunals, such as Bill

231. See *supra* note 227 and accompanying text.

232. See WAR CRIMES COMM. OF THE INT’L BAR ASSOC., ANALYSIS OF OVERCROWDED AND UNDER-EXAMINED AREAS, FOLLOWING A MAPPING OF ORGANISATIONS’ WORD ON AMELIORATING DOMESTIC CAPACITY TO TRY SERIOUS INTERNATIONAL CRIMES (July 2018) (on file with the Drexel Law Review).

233. Van Schaack, *supra* note 196, at 2306.

Wiley of the Commission for International Justice and Accountability (CIJA), or as veteran organizers in building effective global advocacy campaigns, such as Reed Brody of Human Rights Watch, who accompanied a coalition of victims of Chadian dictator Hissène Habré in their decades-long, ultimately successful quest for Habré's criminal prosecution and conviction.²³⁴

However much these organizations draw on decades of experience and strategic goals, some of them are engaging with criminal justice authorities in new ways to seek criminal accountability for mass atrocity prosecutions. Such organizations gather and analyze evidence of human rights violations, identify potential accountability fora, and then present this information to authorities in foreign countries, either through filing litigation directly against perpetrators, filing litigation to compel state investigation and prosecution, or, with increasing frequency, by working collaboratively with national war crimes units to share information.²³⁵ The organizations at the vanguard of this trend serve as non-governmental investigative units, and "build cases against perpetrators of atrocities by collecting and analyzing information from victims, victims associations, witnesses and other reliable sources to develop trial-ready dossiers on suspected perpetrators of war crimes. This information is then submitted to the competent authorities for further investigation and prosecution."²³⁶ The organization's work has resulted in an impressive array of cases, from "a case against Liberian warlords to US courts, a case against Syrian generals to French courts, and a case against the former Minister of Interior of The Gambia to Swiss courts."²³⁷

Two such organizations, CIJA and Swiss-based Civitas Maxima (CM), exemplify this emerging practice, although with

234. See generally REED BRODY, *VICTIMS BRING A DICTATOR TO JUSTICE: THE CASE OF HISSÈNE HABRÉ* (2d ed. 2017) (describing the criminal prosecution and conviction of former Dictator of Chad, Hissène Habré for torture, war crimes, and crimes against humanity).

235. See, e.g., CTR. FOR JUST. & ACCOUNTABILITY, *supra* note 227; CIVITAS MAXIMA, *supra* note 229; EUR. CTR. FOR CONST. & HUM. RTS., *supra* note 227.

236. Mahnad, *supra* note 85.

237. *Id.*

significant variance in scope and methods. CM was founded in 2012 by director Alain Werner, who had years of experience as an investigator and prosecutor at international and hybrid tribunals.²³⁸ CM takes a “pragmatic and result-oriented approach to case initiation” for core international crimes committed in Sierra Leone, Liberia, and Cote d’Ivoire.²³⁹ The organization works with victims and local human rights investigators, and since 2012 “has assembled over 600 files of victims of international crimes” and assisted “national prosecutors in” assembling cases.²⁴⁰ CM’s approach to achieve justice “however, whenever, and wherever possible,” recognizes that perpetrators often are located “thousands of miles” away from the “bulk of the evidence, including the majority of witnesses,” and so CM “function[s] as the link between the location of the crimes committed and the country in which the alleged war criminals are present,” seeking to connect the victims and the evidence to any available court system.²⁴¹ CM takes a rigorous approach to collecting evidence using standards admissible in criminal proceedings, and complements this investigative approach with advocacy, outreach, and awareness raising.²⁴²

A larger organization, CIJA also functions as a kind of non-governmental criminal investigative unit, gathering evidence and compiling “trial-ready” dossiers.²⁴³ Founded in 2012²⁴⁴ and led by William Wiley, CIJA began investigating regime crimes

238. See CIVITAS MAXIMA, *supra* note 229; William Thatcher Dowell, *Civitas Maxima – A Tiny Swiss Group of Lawyers Takes on War Crimes and Crimes Against Humanity*, GLOBAL GENEVA (Mar. 15, 2017), <http://www.global-geneva.com/civitas-maxima-a-tiny-swiss-group-of-lawyers-takes-on-war-crimes-and-crimes-against-humanity/>.

239. CIVITAS MAXIMA, 2017 ANNUAL REPORT 8 (2017), https://www.civitas-maxima.org/sites/default/files/docs/2018-07/civitas_maxima-ra_2017-internet_2.pdf [hereinafter CM ANNUAL REPORT].

240. *Our Work: The Files of Civitas Maxima*, CIVITAS MAXIMA, <https://www.civitas-maxima.org/en/our-work> (last visited Mar. 19, 2019).

241. CM ANNUAL REPORT, *supra* note 239, at 6, 9.

242. See generally *id.* (providing details about evidence collection and about how CM generates awareness and engages in advocacy).

243. See, e.g., *Expert: Syria War Crimes Case at ICC “Unlikely,”* ARUTZ SHEVA (May 15, 2015), <http://www.israelnationalnews.com/News/News.aspx/195450>.

244. Seema Kassab, *Justice in Syria: Individual Criminal Liability for Highest Officials in the Assad Regime*, 39 MICH. J. INT’L L. 283, 287 (2018).

in Syria, expanding to investigate ISIL/Da'esh crimes in Iraq and Syria.²⁴⁵ CIJA's model is similar to CM's in that it relies on and trains local (Syrian and Iraqi) human rights activists and organizations to gather initial evidence, often at significant personal risk, in a way that "would be admissible in any future criminal prosecution."²⁴⁶ CIJA serves as a clearinghouse for that evidence, applying "expertise in criminal linkage to establish individual criminal liability of senior leaders."²⁴⁷ As of 2017, CIJA compiled "trial-ready" dossiers against at least fifty senior Syrian government leaders.²⁴⁸ CIJA, unlike some of the other groups, does not directly file cases with national prosecutors in order to compel investigations or prosecutions.

The core impetus for CIJA's work is also very similar to CM's credo of seeking justice "whenever, wherever, and however possible."²⁴⁹ As recounted by one of the founders of CIJA, the organization offered

an innovative approach to solving a key problem for international criminal justice, namely that you did not need to wait until a particular tribunal was identified or established in order to start collecting evidence and preparing case briefs that were "ready to go for a national, regional or international tribunal" as and when courts became available.²⁵⁰

CIJA did not just wait for such an accountability forum to become available, but actively participated, along with other civil society groups, in discussions during the drafting of the Syria IIIM, as it was envisioned CIJA would be a primary

245. See William Wiley, Executive Director, Comm'n for Int'l Justice & Accountability, Remarks to the Subcommittee on International Human Rights (Nov. 22, 2016), <https://openparliament.ca/committees/international-human-rights/42-1/33/william-wiley-1/only/>.

246. Rankin, *supra* note 37, at 397.

247. *Id.* at 395.

248. *Id.* at 404.

249. CM ANNUAL REPORT, *supra* note 239, at 8.

250. Rankin, *supra* note 37, at 403 (quoting CIJA Commissioner Larry Johnson).

supplier of evidence to the IIIM.²⁵¹ CIJA works with the UNSC Investigative Team on Iraq and national Iraqi authorities, and may provide case files and related material to those officials.²⁵² Similarly, CIJA has worked with European national units to share information, identify senior leaders and returned Da'esh fighters present in Europe, and brief national prosecutors.²⁵³

There are significant differences between the organizations—for example, CM engages in human rights advocacy, while CIJA does not. Yet both CIJA and CM fall within a wider milieu of NGOs that seek to complement and enhance the work of national prosecutors, bringing a range of contacts, an understanding of context, and an ability to conduct on-the-ground investigations many national war crimes units lack.²⁵⁴ In other important ways, these groups influence and shift how national war crimes units conduct their work, pushing the units to take a “more systematic” and less reactive approach to accountability.²⁵⁵

Many of these groups complement the work of national units by not only helping to advance concrete cases, but also by broadcasting and diffusing accountability norms, and leveraging their experience in advocacy, education, grassroots mobilization, and outreach. National prosecutors may be constrained by practice, professional regulations, and codes of conduct from widely publicizing various aspects of investigations and prosecutions of atrocity crimes.²⁵⁶ Justice activists,

251. See generally Ingrid Elliot, “A Meaningful Step Towards Accountability?": A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria, 15 J. INT'L CRIM. JUST. 239 (2017) (discussing the relationship between CIJA and the Syrian IIIM).

252. Christine Gibbons, Note, *CEDAW, the Islamic State, and Conflict-Related Sexual Violence*, 51 VAND. J. TRANSNAT'L L. 1424, 1454 (2018).

253. Wiley, *supra* note 245, at 1310.

254. See, e.g., Nick Robins-Early, *Inside One Group's Mission to Bring Assad's Regime to Justice*, HUFFPOST (Apr. 26, 2016, 2:05 PM), https://www.huffingtonpost.com/entry/assad-war-crimes-cija_us_571ed6e6e4b0f309baee63e0 (explaining the important role of CIJA in acting in ways that a governmental unit does not or cannot).

255. See Kaleck & Kroker, *supra* note 140, at 174.

256. Langer & Eason, *supra* note 100, at 36 (noting that “state officials . . . not only lack the incentives to publicize their work but are often prevented by professional or legal regulations from publicly discussing ongoing investigations”). In Germany, prosecutors “usually hold a press conference once a trial is over and convene a press conference once a year to discuss their

on the other hand, while at times strategically quiet to maximize success in pending cases,²⁵⁷ carry flexibility and an institutional predisposition to highlight and publicize accountability initiatives, thereby advancing the broader normative and deterrence goals of accountability prosecutions.

These norm-advancement goals underlie the justification of foreign prosecutions for mass atrocities. Some of these NGOs seek foreign prosecutions with the eventual goal of increasing the prospects of accountability in the country where the crimes were committed, nesting foreign initiatives on specific cases within broader advocacy strategies, so that prosecutions may have an accountability “boomerang” effect on the country where the crimes were committed.²⁵⁸ Thus, these groups seek to

work overall.” *These Are the Crimes We Are Fleeing*, *supra* note 36. Efforts are underway by authorities in Germany and Sweden to improve outreach. *Id.*

257. The following example illustrates the importance of strategic silence. In 2017, human rights groups, led by ITJP, an evidence-gathering organization, filed litigation in South America against the general for war crimes charges. However, Jayasuriya fled to Sri Lanka before he could be arrested. According to the head of ITJP, Yasmin Sooka, “He was tipped off, and he skipped from Brazil.” Ana Pararajasingham, *Can the Application of Universal Jurisdiction Foster Accountability in Sri Lanka?*, DIPLOMAT (May 3, 2018), <https://thediplomat.com/2018/05/can-the-application-of-universal-jurisdiction-foster-accountability-in-sri-lanka/>.

258. An example illustrates the potential for a “reverse boomerang” effect, across decades. Spanish courts in the 1980s heard cases brought by victims of crimes carried out in Argentina by that country’s military regime, at a time when Argentine “Full Stop” and “Due Obedience” laws effectively granted amnesty for serious human rights violations. *See Argentina: Amnesty Laws Struck Down*, HUM. RTS. WATCH (June 14, 2005, 8:00 PM), <https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down>. When those laws were eventually overturned in the mid-2000s, Argentine victims used the momentum gathered by the cases filed in Spain to bring such cases in Argentine courts. *See id.* The situation was reversed in the early 2010s: Spanish victims of crimes committed under the Franco dictatorship brought cases in Argentine courts, as they were barred from doing so in Spanish courts under a 1977 amnesty law. *See* Gina Benevento, *Will Spain’s “Disappeared” Find Justice in Argentina?*, AL JAZEERA (Aug. 30, 2017), <https://www.aljazeera.com/indepth/opinion/2017/08/spain-disappeared-find-justice-argentina-170810110327087.html>; Natalia Junquera, *Spain Stonewalls on Franco-Era Abuses*, EL PAÍS (Oct. 8, 2013, 8:09 AM), https://elpais.com/elpais/2013/10/08/inenglish/1381233605_231882.html. By filing cases in foreign courts, Spanish victims hoped to “foster territorial prosecutions over these crimes in Spain, in the same way that . . . universal jurisdiction investigations in Spain of international crimes committed in Argentina had facilitated later Argentine territorial prosecution over these crimes.” Langer & Eason, *supra* note 100, at 24–25. The cases in Argentina led to the first issuance of a court order to exhume the bodies of Spanish civil war victims, leading to the opening of a mass grave in a cemetery outside Madrid. Sonya Dowsett, *Spanish Grave Opened on Order of Argentine Judge Unearths Painful Past*, REUTERS (Feb. 8, 2016), <https://uk.reuters.com/article/uk-spain-graves/spanish-grave-opened-on-order-of-argentine-judge-unearths-painful-past-idUKKCN0VH0NK>. The Argentine court case was part of a multi-pronged push from civil society groups to establish a broader transitional justice process to

increase the “moral, legal, and political challenges to mechanisms that may have been put in place—such as amnesty laws—to shield perpetrators from liability for past abuses in their home countries and end a conspiracy of silence about abuses.”²⁵⁹

Contemporary examples of such diasporic transnational litigation and advocacy campaigns exemplify the multi-faceted approach. CM, for instance, plays a pivotal role in compiling evidence and presenting it to national prosecutors, resulting in criminal and civil cases against Liberians for wartime atrocities in foreign courts, including in the United States, Switzerland, Belgium, the Netherlands, and the United Kingdom.²⁶⁰ CM also engages in broader advocacy, outreach, and human rights education, unlike CIJA, which focuses on evidence collection.²⁶¹

As an example of how advocacy and litigation can complement each other, CM built on the momentum gained by foreign prosecutions of Liberians by partnering with GJRP, CJA, Human Rights Watch (HRW), OHCHR, and the Advocates for Human Rights to hold a national justice conference in Monrovia in November 2018, seeking to push accountability onto the political agenda.²⁶² CM and the GJRP also launched a campaign, the “Liberia Quest for Justice,” to publicize the foreign trials inside Liberia, spur public debate, and engage the post-war generation through multimedia education, cartoons, and other artistic projects.²⁶³

address the legacy of mass abuses under the Franco regime. See ICTJ Executive Director Fernando Travesi on Victims of Fascism and Memorialization in Spain, ICTJ (June 29, 2018), <https://www.ictj.org/news/ictj-executive-director-fernando-travesi%C3%AD-victims-fascism-and-memorialization-spain>; Sam Jones, *Judge to Investigate Franco-Era Crimes Against Spanish Women*, GUARDIAN (Oct. 26, 2018, 8:15 AM), <https://www.theguardian.com/world/2018/oct/26/judge-investigate-franco-era-crimes-against-spanish-women-sexual-assault-forced-abortion-child-theft>.

259. Van Schaack, *supra* note 196, at 2340.

260. See generally CM ANNUAL REPORT, *supra* note 239 (discussing extensive efforts made to fight international war crimes, focusing heavily on the work leading to Liberia’s liberation).

261. See *id.*

262. *Liberia: Conference on Justice, Officials, Activists to Meet Amid Push for War Crimes Court*, CIVITAS MAXIMA (Nov. 6, 2018), https://www.civitas-maxima.org/sites/default/files/docs/2018-11/liberia_conference_on_justice_officials_activists_to_meet_amid_push_for_war_crimes_court.pdf.

263. CM ANNUAL REPORT, *supra* note 239, at 5.

Liberia has never prosecuted atrocity crimes domestically, and it remains to be seen whether these efforts will bear fruit, but a former Liberian commissioner of the Truth and Reconciliation Commission succinctly framed the dynamics at work and the hoped-for “boomerang” effect: “The Liberian human rights community is now turning to the international human rights community for assistance [T]he wave of arrests and prosecutions of perpetrators in Europe and America signals the inevitable collapse of the culture of impunity in Liberia.”²⁶⁴

In The Gambia, similar advocacy and litigation coalitions are at work. International NGOs have long gathered evidence of the human rights violations carried out under the regime of Yahya Jammeh.²⁶⁵ Based on filings by TRIAL International in 2017, former Gambian Interior Minister Ousman Sanko was arrested and charged by prosecutors in Switzerland in January 2017.²⁶⁶ Around the same time, Jammeh fled into exile, and the newly-elected government began to explore implementing criminal justice and other transitional justice measures, including a Truth, Reconciliation, and Reparations Commis-

264. *Id.* at 29–31. CM and the GJRP also launched a campaign, the “Liberia Quest for Justice,” publicizing the foreign trials inside Liberia, spurring public debate, and engaging the post-war generation through multimedia education, cartoons, and other artistic projects. *Id.* at 5. The TRC had itself engaged in transnational engagement and organizing with the diaspora in order to contribute to Liberian transitional justice, through a project it organized in 2008 with the Advocates for Human Rights. *Liberia Truth and Reconciliation*, ADVOC. FOR HUM. RTS., www.theadvocatesforhumanrights.org/liberia_trc (last visited Apr. 15, 2019). The TRC held hearings in the United States and gathered testimonies and statements from Liberians living in the United States, the United Kingdom, and Ghana. The resulting report, entitled “A House with Two Rooms,” focused on the experience of the Liberian diaspora. See DULCE FOSTER ET AL., A HOUSE WITH TWO ROOMS: FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF LIBERIA DIASPORA PROJECT (2009); see also Eric Wiebelhaus-Brahm, *A Volunteer’s Perspective on the Liberian Truth and Reconciliation Commission Diaspora Project*, 2 J. HUM. RTS. PRAC. 386, 398–99 (2010); Laura A. Young & Rosalyn Park, *Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project*, 3 INT’L J. TRANSITIONAL JUST. 341, 342–46 (2009).

265. *Gambia Probes Human Rights Abuses of Jammeh’s Regime*, AFRICANEWS, <https://www.africanews.com/2018/10/16/gambia-probes-human-rights-abuses-of-jammeh-s-regime/> (last visited Mar. 23, 2019).

266. See generally *Ousman Sonko*, TRIAL INT’L (Nov. 1, 2018), <https://trialinternational.org/latest-post/ousman-sonko-2/> (discussing the legal procedure of Ousman Sonko’s international war crimes charges).

sion.²⁶⁷ International NGOs sent criminal forensic experts to assist national prosecution authorities in human rights cases²⁶⁸ and provide technical assistance to the government and victims on transitional justice initiatives.²⁶⁹

But the “Jammeh2Justice Campaign,” launched in mid-2018, built a coalition seeking to advance justice on multiple fronts: pushing Ghanaian authorities to use foreign jurisdiction to investigate Jammeh, engaging in transnational, grassroots organizing, and combining human rights advocacy with legal investigations and evidence collection—all in search of available accountability fora.²⁷⁰ The campaign comprises a coalition of Gambian and Ghanaian victims, working with national and international human rights NGOs, investigators, lawyers, and a veteran human rights researcher from HRW.²⁷¹

At the heart of both of these initiatives is a strategy and belief that foreign prosecutions can eventually catalyze domestic accountability measures. In order for this claim to be vindicated, the vanguard NGOs profiled in this section undertake a complex, sophisticated approach to the global system of international justice, gathering high-quality evidence for use in foreign courts, cultivating relationships with foreign prosecutors and diplomats, pursuing criminal and non-criminal transitional justice measures to build broader demands for accountability, and sharing evidence with international investigation commissions.²⁷²

267. Abdul-Jalilu Ateku, *How The Gambia Is Searching for Truth and Reconciliation*, IPI GLOBAL OBSERVATORY (Mar. 28, 2019), <https://theglobalobservatory.org/2019/03/how-gambia-searching-truth-reconciliation/>.

268. *From Fear to Freedom: The Search for Justice in The Gambia*, JUST. RAPID RESPONSE (Nov. 1, 2018), <http://www.justicerapidresponse.org/from-fear-to-freedom-gambia/>.

269. *The Gambia*, ICTJ, <https://www.ictj.org/our-work/regions-and-countries/gambia> (last visited Apr. 15, 2019); *Global Initiative for Justice, Truth and Reconciliation*, INT’L COALITION OF SITES OF CONSCIENCE, <https://www.sitesofconscience.org/en/global-initiative-for-justice-truth-and-reconciliation/> (last visited Apr. 15, 2019).

270. *See generally* Jammeh2Justice, FACEBOOK, <https://www.facebook.com/Jammeh2Justice/> (last visited Apr. 15, 2019) (posting materials advocating for the liberation of Liberia).

271. Brody, *supra* note 227.

272. *See supra* notes 227–31 and accompanying text.

IV. CONCLUSION: INTEROPERABILITY OF JUSTICE ACTIVISTS,
SPECIALIZED WAR CRIMES UNITS, AND INTERNATIONAL
INVESTIGATIVE MECHANISMS

The three justice vectors profiled in this paper increasingly collaborate and engage with each other. Specialized national war crimes units partner with those NGOs who seek accountability and, in turn, those NGOs often rewire their own protocols and operations to make their work more useful for criminal prosecutions.²⁷³ National war crimes units, international investigative mechanisms, and non-governmental investigative organizations such as CIJA increasingly collaborate, share information, and learn from each other.²⁷⁴

Such engagement is happening at multiple levels. The E.U. Genocide Network often invites NGOs to its meetings to facilitate exchanges with national war crimes units, forming personal and institutional relationships to make their respective activities more interoperable and discussing topics such as understanding the documentation methodologies of NGOs and the modalities of sharing information.²⁷⁵ The Syria IIM Head reports that the IIM is “working much more closely with civil society than in the past.”²⁷⁶ UNITAD is “engaging with [NGOs] with a view to benefiting from their expertise [and] gaining access to relevant evidentiary material.”²⁷⁷ The Myanmar IIMM, while not yet staffed or operational, can look at the efforts by UNITAD and the Syria IIM as a guide for building its own institutional relationships and information sharing arrangements.

273. See UNITAD First Report, *supra* note 55, ¶ 40.

274. See *id.* ¶¶ 40–41, 97–97.

275. See Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes, Eurojust, *Conclusions of the 23rd Meeting of the Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes* (Oct. 25, 2017), <http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetworkmeetings/Conclusions%20of%20the%2023rd%20meeting%20of%20the%20Genocide%20Network,%2025-27%20October%202017/Conclusions%20of%20the%2023rd%20GNM.pdf>.

276. Burnand, *supra* note 8.

277. UNITAD First Report, *supra* note 55, ¶ 94.

These interactions and information exchanges carry risks and challenges, including that many NGOs may not use evidentiary standards of proof admissible in criminal proceedings. The proliferation of documentation and investigative initiatives—both U.N. and non-governmental mechanisms—creates a patchwork of evidence which can be duplicative. These initiatives also carry ethical risks, such as the danger of re-traumatizing witnesses, and legal risks, such as the inadmissibility of evidence gathered using different legal standards or without proper chain of custody, or the existence of contradictory statements given by the same witness to different bodies.²⁷⁸ There are, moreover, “questions about the legitimacy of private, non-state actors to investigate and prepare case briefs.”²⁷⁹ Such efforts might be perceived as biased and conducted with a political agenda.²⁸⁰ The creation of international investigative mechanisms, such as UNITAD, the Myanmar IIMM, and the Syria IIMM are intended to mitigate some of the downsides and inefficiencies of non-governmental documentation and investigation initiatives, by serving as a clearinghouse and central repository of information.

Few studies delve into details regarding the “interoperability” between international investigative mechanisms and international courts and tribunals, rarely mentioning national courts.²⁸¹ Even the detailed guidelines for national war crimes units issued by the E.U. Genocide Network in 2014 do not specifically reference interacting with U.N. or international fact-finding missions, perhaps reflecting how recent the need for such practice has become.²⁸²

278. See Rankin, *supra* note 37, at 404–05.

279. *Id.* at 404.

280. Rapp, *supra* note 112, at 9 (“The reliance on private groups is open to objection at future trials on the grounds that the collection was built with help of groups hostile to particular defendants or biased because of the political position of the donor states in the relevant conflict.”).

281. *But see generally* Grace & Coster van Voorhout, *supra* note 12 (discussing ways to improve the “interoperability” between international accountability efforts).

282. E.U. Genocide Network meetings after 2014 have at times focused on interacting with international mechanisms such as the Syria IIMM and U.N. HRC fact-finding bodies. See, e.g., Network for the Investigation and Prosecution of Genocide, Crimes Against Humanity and War

Nevertheless, national judicial actors, especially specialized war crimes units, increasingly cooperate with the new generation of international fact-finding missions, COIs, and IIIMs. The Syria IIIM alone reports receiving “more than a dozen requests for assistance from national prosecutors who have ongoing investigations concerning Syria.”²⁸³ The Head of the Syria IIIM stated that during the IIIM’s first year of work, it “engage[d] directly with war crimes units that have ongoing investigations into crimes committed in Syria . . . [to develop] a mode of cooperation between [national] war crimes units that gives hope that justice will be done in a number of cases.”²⁸⁴ UNITAD plans to hold forums to engage national authorities to “identify common challenges in the prosecution of such cases and explore how the investigative activities of [UNITAD] can be conducted in a way that maximizes the potential use of its evidentiary material in domestic proceedings.”²⁸⁵

National prosecutors are already examining ways to retool their structures to enhance cooperation, such as establishing a dedicated contact point to interface with the Syria COI.²⁸⁶ These international bodies can collect evidence for use by national criminal justice processes much in the same way they do so for international criminal justice processes, namely, by catalyzing or triggering national proceedings and investigations, sharing information and evidence, sharing and complementing capacity, and providing baseline legal analysis of the conflict and abuses.²⁸⁷ This potential has yet to be realized; nevertheless, specific opportunities and challenges for cooperation between national specialized units and IIIMs are being identified and worked through, and merit attention.

Crimes, Eurojust, *Conclusions of the 18th Meeting of the European Network of Contact Points for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes*, ¶ 13 (Apr. 23, 2015), [http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetworkmeeting/Conclusions%20of%20the%2018th%20meeting%20of%20the%20Genocide%20Network,%2022-23%20April%202015/Conclusions-18th-Genocide-Netwo Network-Meeting-2015-04-EN.pdf](http://www.eurojust.europa.eu/doclibrary/genocide-network/genocidenetworkmeeting/Conclusions%20of%20the%2018th%20meeting%20of%20the%20Genocide%20Network,%2022-23%20April%202015/Conclusions-18th-Genocide-Netwo%20Network-Meeting-2015-04-EN.pdf).

283. Burnand, *supra* note 8.

284. *Id.*

285. UNITAD First Report, *supra* note 55, ¶ 65.

286. *These Are the Crimes We Are Fleeing*, *supra* note 36.

287. Grace & Coster van Voorhout, *supra* note 12, at 8.

IIIMs and COIs carry potential to address the manifold challenges facing national atrocity crimes units detailed above. They could reduce the logistical and financial burdens on national authorities by collecting, analyzing, and properly maintaining custodial chains of evidence, and by establishing frameworks of cooperation with national units to exchange such evidence.²⁸⁸ The nature of the Syria IIIM investigations, focusing on criminal structures as well as key individuals, for example, offers a potential wealth of legal analysis and contextual information that resource-strapped national units could not otherwise gather or would be duplicative, such as

judicial elements [needed] to establish . . . that an act can be prosecuted as a war crime or crime against humanity, information on the context in which the crimes were committed, the parties to the conflict and also the various people who could be implicated in the commission of such crimes, which structure they are working for and how they interact.²⁸⁹

Thus, IIIMs can perform a kind of burden-shifting that reduces inefficiencies of different national units conducting duplicative legal analysis, such as proving the underlying contextual elements of a war crime, providing they are properly staffed and established.

Moreover, the Syria IIIM and Myanmar IIMM may ameliorate some of the limitations and shortcomings of predecessor fact-finding mechanisms. Swedish and German judicial authorities noted that “cooperation with the [Syria COI] . . . proved difficult due to the commission’s strict disclosure protocols and its limited staff.”²⁹⁰ Those authorities stated that information collected by NGOs, intergovernmental actors, and the Syria COI, “while useful at the investigation stage, might not meet

288. *See id.* at 9–13.

289. Burnand, *supra* note 8.

290. *These Are the Crimes We Are Fleeing*, *supra* note 36, at 58.

domestic thresholds for admissible evidence in criminal proceedings.”²⁹¹ Information gathered under the structural nature of international investigations, while useful for the broader contextual reasons outlined above, might conversely not be specific enough to respond to “information requests from national authorities often pertain[ing] to specific individuals or events that were not subject of the commission’s investigations.”²⁹² National authorities may be seeking information on lower-level perpetrators more likely to be within their reach, rather than high-level perpetrators often investigated by international mechanisms.²⁹³

Increased collaboration helps all involved to identify and address many of these issues. Holly Dranginis, an international lawyer and Senior Legal Analyst at the Sentry, an NGO that investigates the financing of atrocities in the Central African Republic, Sudan, and South Sudan, reflected that working with the E.U. Genocide Network was beneficial because, “as an NGO, we don’t want to just conduct research and reports—foreign litigation is increasingly a goal for NGOs about under-reported conflicts.”²⁹⁴ For NGOs like the Sentry, “we can be the eyes and ears on the ground for a lot of these prosecutors assigned to war crimes units, who might not have the resources to travel to a place like the eastern Congo or the Central African Republic, and they often start from scratch in terms of understanding the conflict dynamics.”²⁹⁵

Understanding how the national war crimes units can use evidence prompts NGOs like the Sentry to begin revising standard operating procedures to address issues in advance and to try and identify possible prosecutorial fora:

We now think constantly about the relevance of
our investigations to assist national prosecutors,

291. *Id.* at 3–4.

292. *Id.* at 59.

293. *Id.*

294. Interview with Holly Dranginis, Senior Legal Analyst, Sentry (Feb. 23, 2019).

295. *Id.*

with an eye towards admissibility: how are we going to trace the chain of custody? Would our witness or informant be willing to testify in court? We are used to completely protecting the anonymity of sources, but now we have to think about whether handing over evidence could trigger a situation where a source could be identified, or prosecutors might need to disclose a source, and it would be out of our control. We are proceeding very carefully to still protect our sources, while also trying to seek justice and accountability. It would be very unwieldy to say to a witness, “here are the twelve jurisdictions you might be called to testify in, and they all have different rules” [B]y meeting with the Network prosecutors, we can try to narrow down the potential number of jurisdictions who might take the case. We want a multiplicity of possible jurisdictions, but we also want to be very careful. It’s very helpful to work together with other NGOs, especially European NGOs familiar with the specific jurisdiction and rules of European war crimes courts. We are learning from each other about how best to work with prosecutors.²⁹⁶

Such encounters model how “states and NGOs [are] engaging in a process of ‘learning by interacting’” on investigations of core international crimes.²⁹⁷ Not all NGOs can or want to orient their work towards criminal prosecutions. And there are reputational, institutional, and operational risks of being associated with or perceived to be associated with criminal justice authorities—the same risks underpinning an international organization to adhere to well-founded principles of neutrality and

296. *Id.*

297. Langer & Eason, *supra* note 100, at 17.

objectivity.²⁹⁸ But for those NGOs who wish to inform and accompany criminal prosecutions, direct engagement with these units has proven valuable.

Improving the linked but decentralized system of international justice for atrocity crimes is in large part an engineering and architectural problem regarding three components of that system profiled in this Article: how best to design international investigative mechanisms, national justice units, and non-governmental initiatives to gather evidence and collaborate in efforts to prosecute those responsible. But it is not solely about engineering technical solutions to improve the machinery of international justice. At their core, the design solutions engineered by various justice actors are also an effort to seed accountability norms and imperatives into national and international governance structures.

The creative approaches and new designs profiled in this paper may arise from frustration over impunity—a need to do something to confront the gaping hole in the fabric of international justice. The tragedy of the Syrian conflict partially explains the increasing revitalization of the exercise of foreign jurisdiction, especially in Europe. The number of civilians killed since the conflict broke out in 2011 has grown so high that many international monitoring groups, as well as the United Nations, have stopped counting.²⁹⁹ The devastation has far-reaching impacts. But it is not only the lack of action to create or use international or hybrid tribunals, or this particular crisis, driving the trends described in this paper. The pursuit of foreign prosecutions, the deliberate design of international mechanisms to furnish evidence to national prosecutions, and the efforts of entrepreneurial non-governmental actors who move through the interstices of the international and national system are evidence of the hardwiring of accountability norms and actions into a global system of justice.

298. See *Fundamental Principles*, ICRC, <https://www.icrc.org/en/fundamental-principles> (last visited Apr. 19, 2019).

299. See Megan Specia, *How Syria's Death Toll Is Lost in the Fog of War*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/syria-death-toll.html>.