Strategic Litigation in International Criminal Justice

Facilitating a View from Within

Florian Jeßberger* and Leonie Steinl**

Abstract

This article inquires into strategic litigation in international criminal justice. Drawing on the findings of an empirical study, it sheds light on the practice and self-perception of Strategic Litigation NGOs (so-called SLiNGOs) who employ international criminal law not only as an advocacy tool but use litigation to target perpetrators of international crimes as part of a larger juridical–political strategy transcending the individual case. Following a brief reflection on the role and significance of NGOs in international criminal justice in general and an examination of the basic idea of strategic litigation, the article delves into an analysis of the concept of strategic litigation as employed by SLiNGOs as well as the various functions of strategic litigation specifically in the international criminal justice context. Relying on interviews with SLiNGO representatives, the authors examine whether SLiNGOs — in their self-perception — serve merely as 'assistant prosecutors' or rather as kickstarters, pacemakers and watchdogs of the enforcement of international criminal law. They further explore the counter-hegemonic potential of strategic litigation and SLiNGO's attitudes towards international criminal justice as such. Analysing potential pitfalls and critiques directed at strategic litigation and the responses of SLiNGOs to such criticisms, the authors conclude that strategic litigation can indeed fill a gap in the current state-based system of international criminal justice and suggest an agenda for further research.

* Florian Jeßberger is Professor of Law at Humboldt-Universität zu Berlin (Germany) and a Member of the Board of Editors of the *Journal*. He also serves on the Advisory Board of the European Center for Constitutional and Human Rights (ECCHR). [florian.jessberger@hu-berlin.de]

** Leonie Steinl is a Postdoctoral Researcher and Lecturer in Law at Humboldt-Universität zu Berlin (Germany). [leonie.steinl@hu-berlin.de]

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1. Introduction

It is undisputed that NGOs play a crucial role in international criminal justice. While much has been written on their importance on the road *to* Rome, considerably less attention is being paid to their roles *after* Rome, such as their efforts to further the ratification of the statute of the International Criminal Court (ICC) and its domestic implementation.[1] Yet, the least is known about their impact on the system of international criminal justice through engaging in strategic litigation.[2] The term strategic litigation, in our context, refers to the practice of engaging in a legal process to further objectives, which go beyond the outcome of that particular legal process.[3] This article seeks to shed some light on this phenomenon by presenting the results of an empirical study involving NGOs who are pursuing strategic litigation in the field of international criminal justice. These organizations will henceforth be referred to as Strategic Litigation NGOs (SLiNGOs).

To illustrate the topic, let us begin by briefly highlighting three different, but paradigmatic cases: In November 2004, the New York based Centre for Constitutional Rights (CCR) submitted a criminal complaint to the Federal Prosecutor in Germany.[4] In the 180-pages long document, the Centre argued that Donald Rumsfeld, at the time US Secretary of Defence, and other high-ranking US-government and military officials were responsible and criminally liable under German criminal law for war crimes.[5] The complaint found significant public attention and the Pentagon warned Germany that such 'frivolous lawsuits' would impact the relationship between the two countries.[6] By the end of January 2005, the US embassy in Germany announced that Rumsfeld, who was scheduled to participate in the Munich Security

1 But see K. Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice* (Oxford University Press, 2019); M. Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from ''Global Enforcer'' to ''No Save Haven'' Universal Jurisdiction', 13 *Journal of International Criminal Justice (JICJ)* (2015) 245–256, at 252 *et seq.*; M. Langer and M. Eason, 'The Quiet Expansion of Universal Jurisdiction', 30 *European Journal of International Law (EJIL)* (2019) 779–817.

2 Notable exceptions include the *JICJ*-Symposium 'Litigating Universal Jurisdiction', edited by F. Jeßberger and J. Geneuss, on which this article builds. See F. Jeßberger and J. Geneuss, 'Litigating Universal Jurisdiction' — Introduction, 13 *JICJ* (2015) 205–208.

3 H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart Publishing, 2018), at 3; C. Barber, 'Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations', 16 *International Journal of Human Rights* (2012) 411–435, at 417; M. Ramsden and K. Gledhill, 'Defining Strategic Litigation', 4 *Civil Justice Quarterly* (2019) 407–438, at 407.

4 See M. Ratner, 'Litigating Universal Jurisdiction — ein Bericht aus der Praxis', in F. Jeßberger and J. Geneuss (eds), *10 Jahre Völkerstrafgesetzbuch: Bilanz und Perspektiven eines ''deutschen Völkerstrafrechts''* (Nomos, 2013) 207–223, at 215; W. Kaleck, *Law Versus Power: Our Global Fight for Human Rights* (OR Books, 2018), at 111.

5 See A. Fischer-Lescano, 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law', 6 *German Law Journal (GLJ)* (2005) 689–724, at 689 *et seq.*; Ratner, *supra* note 4, at 222.

6 See M. Ratner, *The Trial of Donald Rumsfeld: A Prosecution by Book* (The New Press, 2008), at 223.

Conference, had cancelled his trip to Germany. On 10 February 2005, one day before the opening of the conference, the German Federal Prosecutor disclosed that he would not open an investigation arguing in particular that there were no indications that the competent courts and authorities in the US would refrain from penal measures.[7] Two days later, Rumsfeld arrived in Munich. Commenting on the case, then CCR-president Michael Ratner explained:

> The aim of our activities is not necessarily direct legal success . . . Instead, our intention is to raise awareness in the US in order to initiate a broad public discussion to emphasize the need to prosecute those responsible for implementing the torture and abduction program. Incidentally, we try to make life as difficult for these people as possible and to reduce their travel radius considerably in view of the risk of criminal investigations.[8]

In 2016, the Paris based NGO Sherpa, together with the European Centre for Constitutional and Human Rights (ECCHR) based in Berlin, filed a complaint in France on behalf of 11 employees against the multinational corporation Lafarge inter alia for complicity in crimes against humanity in Syria. In November 2019, French courts revoked the indictment for complicity in crimes against humanity but confirmed the charges concerning the deliberate endangering of the lives of workers, financing of terrorism and violating a trade embargo. The decision was appealed and in September 2021, the French Supreme Court held that Lafarge could also be indicted for crimes against humanity. The case is ongoing. The lawyers from Sherpa and ECCHR argue that the proceedings could be 'a major driver for expanding the application of criminal law to multinational [corporate] groups, and for better capturing criminal behavior within complex corporate structures'.[9]

In December 2019, ECCHR with the support of the Yemeni organization Mwatana for Human Rights and other groups submitted a communication to the ICC concerning the alleged criminal responsibility of European arms exporters for aiding and abetting war crimes committed by the military coalition led by Saudi Arabia and the United Arab Emirates in Yemen. The communication concerns the responsibility of corporate and political actors who, by authorizing and exporting arms to members of the military commission, have contributed to serious violations of international humanitarian law in Yemen. ECCHR vice legal director Miriam Saage-Maaß explains the reasoning behind the communication as follows:

> [The states who support the ICC] must be willing to apply the standards of the International Criminal Court also to citizens of their countries. There cannot be double standards in

7 See 'Decision of the General Federal Prosecutor at the Federal Court of Justice: Center for Constitutional Rights et al. v. Donald Rumsfeld et al.', 45 *International Legal Materials (ILM)* (2006) 119–121.

8 See Ratner, *supra* note 4, at 222.

9 C. Tixeire, C. Lavite and M. Guislain, 'Holding Transnational Corporations Accountable for International Crimes in Syria: Update on the Developments in the Lafarge Case (Part II)', Opinio Juris, 27 July 2020, available online at http://opiniojuris.org/2020/07/27/holding-transnational-corporations-accountable-for-international-crimes-in-syria-update-on-the-developments-in-the-lafarge-case-part-ii.

> international criminal law. So … you may go after the war criminals all over the world, but you must be also looking at the responsibility of Western actors.[10]

These three cases serve to illustrate the theme of this article in a nutshell. They demonstrate not only the multi-faceted practice of strategic litigation in international criminal justice, but also exhibit some typical features of this practice as detailed by the practitioners themselves. These findings relate both to the subject matter of the litigation — i.e. the 'war on terror', corporate involvement in international crime, and the involvement of political actors from the Global North in crimes committed in the Global South — as well as to the different legal venues where these cases are pursued — i.e. national courts in different countries and international courts, such as the ICC. Of particular interest for our purposes are also the actors behind these cases: four SLiNGOs located in the USA, France, Yemen and Germany, who have on these occasions also joined forces to pursue their cases.

This article is based on semi-structured interviews conducted by the authors with representatives of SLiNGOs.[11] Between February and December 2019, the authors interviewed 17 staff members of 13 NGOs engaging in strategic litigation in the field of international criminal justice, located in Africa, Europe, North America and South America.[12] The interviews were fully transcribed and indexed in order to identify emergent themes based on commonalities and disagreements on key issues concerning the concept, actors and practice of strategic litigation. The analysis was further informed by the SLiNGOs' online representations of agendas, issues and activities.

The article presents the main findings from this analysis. It is intended to serve as a first proposition to conceive SLiNGOs as relevant actors in the international criminal justice system. Its primary aim is to bring to the fore the views and perspectives of these actors, unfiltered to the extent possible. Hence, we chose to include a considerable number of direct quotes from the interviews in our analysis. Their often distinct yet similar claims suggest certain patterns in the roles SLiNGOs perform (or proclaim to perform) to seek

10 J. Anderson, 'Looking for Ways to Address War Crimes in Yemen, Justice in Conflict', Justiceinfo.net, 3 March 2020, available online at www.justiceinfo.net/en/43939-looking-for-ways-to-address-war-crimes-in-yemen.html.

11 The interviews as well as this article form part of a larger research project on 'Strategic Litigation Networks and Accountability for Gross Violations of Human Rights', conducted by the authors, which is funded by the German Research Council (DFG).

12 We defined international criminal justice in this sense to include conduct amounting to — in the opinion of the actors — crimes under international law even if the cases were not pursued in criminal courts but for instance in human rights courts or as civil law or public law claims. The organizations interviewed were first selected based on research by the authors. Subsequently, each interviewee was asked to name other organizations that they found relevant to the project's objectives. All but one of the organizations that were suggested by the interviewees were interviewed (the one interview could not take place due to scheduling conflicts on the organization's side). Most of the interviews were conducted in person and at the organization's headquarters (one interview had to be conducted virtually due to scheduling difficulties, another interview took place not at the organization's headquarters but in The Hague on the occasion of the Assembly of States Parties of the ICC).

implementation and enforcement of international criminal law. This article supplements their self-identification with a first analysis of their (possible and actual) functions within the international criminal justice system. In order to complement the picture, we also engage with critiques of strategic litigation put forward in the literature as well as by other stakeholders and bring them into conversation with SLiNGOs' own understandings of the pitfalls of their work. Our hope is that this preliminary mapping of strategic litigation in international criminal justice leads to further scholarly engagement on the recognition, legitimacy and impact of this practice.

2. NGOs and the International Criminal Justice System: Beyond Advocacy

It is generally acknowledged that NGOs play an important role within the international criminal justice system. In fact, the Rome Conference establishing the ICC is claimed to be the most prominent instance of successful NGO involvement in any international law-making conference.[13] There is broad agreement that NGOs played a crucial role in the creation and design of the Court and the literature is full of praise for their work during the negotiations of the Rome Statute, often holding that without their lobbying, the creation of a permanent ICC would not have been possible.[14] Yet, it is important to realize that NGO's contributions towards the international criminal justice system did not cease with the establishment of the ICC. On the contrary, the dynamic development of a fully-fledged international criminal justice system since the early 2000s, through both, the creation of the ICC on the one hand and the 'domestication' of international criminal law and the creation of national legislation and institutions on the other, has opened new spaces for NGO involvement and, in this process, also given rise to a new phenomenon in international criminal justice: strategic litigation.

A. Strategic Litigation: Concept and Actors

Strategic litigation is a term commonly used but seldom conceptualized.[15] In the literature, it is sometimes used interchangeably with a number of other

13 This led then UN Secretary-General Kofi Annan to conclude that 'an unprecedented level of participation by civil-society in a law-making conference' had been reached. See K. Annan, 'Preface to C. Bassiouni', *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers Inc., 1999), at ix. See also A. Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005), at 477 *et seq*.

14 M. Politi, 'Some Concluding Remarks on the Role of NGOs', in T. Treves et al. (eds), *Civil Society, International Courts and Compliance Bodies* (T.M.C. Asser Press, 2005) 143–146, at 144.

15 Ramsden and Gledhill, *supra* note 3, at 407. See also Barber, *supra* note 3, at 417; G. Fuchs, 'Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries', 28 *Canadian Journal of Law and Society* (2013) 189–208; E. González-Ocantos, 'Legal Preferences and Strategic Litigation: A Theory of Judicial Change', in idem,

terms, such as (strategic) human rights litigation, public interest litigation, impact litigation or impact lawyering, change lawyering, cause lawyering, legal intervention, radical lawyering, rebellious lawyering, critical lawyering, progressive lawyering and movement lawyering — to name just the most common terms.[16] These terms are also used — again sometimes interchangeably — as self-descriptions by various actors engaging in the practice of strategic litigation, in particular NGOs.[17]

All of the terms mentioned above accentuate different aspects of this practice — be it the objective of it (such as impact and change), the practice itself (litigation versus lawyering), the political or ideological impetus behind it (e.g. radical, rebellious, critical or progressive), the relevant area of law (e.g. human rights), the legitimacy of it (e.g. public interest) or actors driving it (e.g. movements). Yet, despite these different accentuations, there is one common idea behind these terms, which seems to be generally accepted: The idea of engaging in a legal process to further objectives, which go beyond the outcome of that particular legal process.[18] These objectives behind any given legal process can again be multifold. Examples include raising public awareness and stimulating debate, initiating public protest to create political pressure, holding actors accountable in the court of public opinion, stimulating legal changes, law reform processes and policy changes, documenting violations and exposing structural inequalities or discriminatory practices, creating an alternative narrative and thereby a more nuanced historical record, contributing to peacebuilding and societal reconstruction efforts, and strengthening survivors and social movements as well as inspiring others to join the cause.[19] Behind these different objectives lie the broader goals of facilitating legal, political and social changes.[20]

Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America (Cambridge University Press, 2016) 27–70; J. Goldschmidt, 'Strategic Litigation by Equality Bodies and National Human Rights Institutions to Promote Equality', in Y. Haeck et al. (eds.), *The Realisation of Human Rights: When Theory Meets Practice* (Intersentia Publishing Ltd., 2014) 461–474; A. O'Neill, 'Strategic litigation before the European Courts', 16 *ERA Forum* (2015) 495–509; O. Solvang, 'Chechnya and the European Court of Human Rights: The Merits of Strategic Litigation', 19 *Security and Human Rights* (2008) 208–219; F. van der Vet, 'Finding Justice at the European Court of Human Rights: The Dynamics of Strategic Litigation and Human Rights Defense in the Russian Federation', University of Helsinki, Faculty of Social Sciences (2014), available online at https://helda.helsinki.fi/handle/10138/136525.

16 See Ramsden and Gledhill, *supra* note 3, at 407; C. Menkel-Meadow, 'The Causes of Lawyering', in A. Sarat and S. Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, 1998) 31–68, at 33.

17 See Ramsden and Gledhill, *supra* note 3, at 407. See also the contributions in A. Graser and C. Helmrich (eds), *Strategic Litigation: Begriff und Praxis* (Nomos, 2019).

18 See also Helen Duffy's recent work on strategic human rights litigation, describing it as 'litigation that pursue goals — or which concerns interests — that are broader than … the particular victims or applicants at the centre of the particular case', Duffy, *supra* note 3, at 3; Barber, *supra* note 3, at 417; Ramsden and Gledhill, *supra* note 3, at 407.

19 See the contributions in Graser and Helmrich (eds), *supra* note 17, at 4 *et seq*.

20 Barber, *supra* note 3, at 411.

These multifold objectives demonstrate that the basic general presumption — the baseline so to speak — of strategic litigation is very broad. This means that a variety of activities could be labelled as strategic litigation, thereby potentially limiting the usefulness of the term. For that reason we would suggest that it might be helpful to limit the term strategic litigation to such cases, where achieving the objectives behind the specific case or process significantly outweighs, in the eyes of the actors pursuing litigation, the immediate outcome of that case or process. In other words, the strategic goals steer the litigation rather than the conventional other way around. A potential control question for litigants in this sense could be: Even in case of a legal loss, would it still be worth the litigation effort? Or to put it differently and to borrow a phrase coined by Jules Lobel: would a legal loss still entail 'success without victory'[21]? Thus, in essence what distinguishes strategic litigation from other types of litigation is that it is not necessarily about winning the case. Rather, as Lobel explains, courts are used as forums of protest.[22]

B. SLiNGOs and International Criminal Justice

While scholars of international criminal justice have to date engaged very little with the practice and concept of strategic litigation,[23] SLiNGOs active in the field have been using the term to describe their work for a long time. We hence begin our exploration by taking a closer look at the self-descriptions given by some of the most prominent SLiNGOs active in the field of international criminal law, who use the term strategic litigation to describe their own work.

It seems important to note at this point that these SLiNGOs exhibit great differences in their structures and mandates: While some are large human rights organizations who have dedicated one particular unit (or even only one individual) to engaging in strategic litigation — inter alia in the area of international criminal law — while working primarily on other areas, other organizations' work consists mainly or primarily of strategic litigation for crimes under international law. While some exhibit a strong focus on a particular human rights issue, a particular geographic region or a specific field of law, others choose to address various issues that align with their particular political strategy.

21 J. Lobel, *Success Without Victory: Lost Legal Battles and the Long Road to Justice in America* (New York University Press, 2003). See also B. Depoorter, 'The Upside of Losing', 113 *Columbia Law Review* (2013) 817–862.

22 Lobel, *ibid.*, at 4–9.

23 This is different with regard to international human rights law, see in particular Duffy, *supra* note 3. In international criminal law scholarship, Barrie Sander has developed the concept of strategic expressivism, according to which 'different types of actors might mobilize the expressive power of the vocabulary and institutions of international criminal justice to advance their strategic agendas'; see B. Sander, 'The expressive turn of international criminal justice: A field in search of meaning', 32 *Leiden Journal of International Law* (2019) 851–872, at 866 *et seq.*

1. SLiNGOs' Understandings of Strategic Litigation

SLiNGOs are not in agreement on a common definition of strategic litigation. To illustrate the commonalities in their different definitions, we present some of the organizations who explicitly define their work as strategic litigation. These organizations include the Centro de Estudios Legales y Sociales (CELS) based in Argentina, the European Center for Constitutional and Human Rights (ECCHR) based in Germany, the Open Society Justice Initiative (OSJI) headquartered in the US, Redress based in the UK, Sherpa based in France and Trial International (Trial) based in Switzerland.[24] They describe strategic litigation, i.e. what they do, in the following ways:

CELS speaks of a 'range of different legal actions' by which they 'unveil and expose patterns of illegal conduct' by those responsible for systematic human rights violations. The goal is to render visibility to neglected issues in the public discourse. They explain:

> [T]he cases demonstrate that it is possible to use legal tools to affirm rights that are not otherwise guaranteed or protected, whether because of particular insufficiencies of existing government bodies, or because the effective protection of such rights could only arise from the pointed assertions of individuals immediately affected.[25]

ECCHR defines strategic litigation as using legal means aiming to 'bring about broad societal changes beyond the scope of the individual case at hand':

> It gives a platform for people affected by rights violations to be seen and heard, triggers discussion of these violations, and highlights weaknesses and gaps in the law. Successful strategic litigation brings about lasting political, economic or social changes and develops the existing law. Public outreach materials accompanying the case can help to explain the context of the proceedings. This increases the progressive and precedent-setting impact of the legal action.[26]

OSJI defines strategic human rights litigation as bringing a legal action in court 'that is consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s)'.[27] Redress speaks of creating 'legal, political, or social impact beyond the case, by combining casework with other civil society techniques',[28]

24 These organizations have been selected because they use the term strategic litigation and provide specific descriptions. A number of other organizations, also included in the project, who are pursuing this work are not using the term strategic litigation but are employing alternative concepts and terms such as 'creative legal strategies' or 'movement lawyering', or they simply use the term 'litigation' or refer to it as 'international (criminal) justice work'.

25 CELS, *Clínica jurídica* (2013), available online at www.cels.org.ar/web/wp-content/uploads/2013/10/Clinica-juridica.pdf.

26 ECCHR, Glossary: *Strategic Litigation* (n.d.), available online at www.ecchr.eu/en/glossary/strategic-litigation. ECCHR additionally uses the term 'legal intervention' to describe their work.

27 OSJI, *Strategic Litigation Impacts: Insights from Global Experience* (2018), available online at www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf. OSJI points out, however, that this definition is used for the purposes this report.

28 Redress, About us: *How we work* (n.d.), available online at https://redress.org/about-us/how-we-work. Redress speaks of 'holistic strategic litigation'.

while emphasizing the need to work together with civil society organizations and ensuring that the client's needs are met. Sherpa launches 'strategic judicial or extra judicial actions using a variety of legal tools' in order to 'demonstrate the existence of violations and their dramatic consequences on populations and expose the legal weaknesses that need to be tackled'.[29] Lastly, Trial defines strategic litigation as 'the identification and pursuit of legal cases as part of a strategy to promote human rights' — as such, an individual case is used 'in order to bring about broader social change'.[30] The objectives mentioned include exposing injustices to the public, bringing public awareness, setting precedents and changing laws.

All of the different definitions have in common that they allude to the baseline identified above of aiming for objectives beyond the case at hand. In terms of the nature of these objectives, ECCHR, Redress and Trial speak of social or societal changes or impact. All organizations mention legal changes, some of them allude specifically to legislative changes. All organizations understand litigation in the broader sense of bringing any kind of legal action — not necessarily limited to filing criminal complaints or representing survivors of crimes under international law in domestic as well as international courts but also including other legal actions, such as e.g. submitting *amicus curiae* briefs. Another element common to all definitions of strategic litigation is the goal of awareness-raising and triggering discussion. As such, all definitions share the objective of influencing the discourse on a legal and political level. Another commonality relates to the positive impact on those who are directly affected by the violations. In this regard, ECCHR for instance speaks of giving a platform to the people affected, while Redress also mentions the risk of prioritizing the cause over the client.

2. SLiNGOs as Assistant Prosecutors?

While it is not explicitly mentioned in these descriptions, it is clear that SLiNGOs are pursuing accountability for crimes under international law by initiating and supporting criminal prosecutions of individuals, for instance by submitting criminal complaints to prosecutors or representing survivors in criminal proceedings. We have found that they generally do not, however, represent the defendants in these cases. Hence, at first sight, strategic litigation in international criminal justice differs significantly from other — more traditional areas — of strategic litigation, such as those pertaining to civil rights, constitutional rights, and human rights of individuals. In these cases, the litigation is generally directed *against* the state who acts as the 'defendant' and is not pursued against individual defendants — in effect by joining forces *with* state authorities — as is usually the case in strategic litigation in international criminal justice. Traditionally, NGOs working in the general field of criminal

29 Sherpa, *About us* (n.d.), available online at www.asso-sherpa.org/mandate.

30 Trial, *Strategic Litigation* (n.d.), available online at https://trialinternational.org/topics-post/strategic-litigation.

justice have often held a critical stance towards the criminal justice system as such and its enforcement by state authorities, while focusing their attention primarily on the protection of defendants' rights. This is different when it comes to international law.[31] Some SLiNGOs are still grappling with this shift. As a senior human rights lawyer speaking about their organization's stance on their engagement in strategic litigation in international criminal justice has told us: 'There was a lot of nervousness ... with what I was doing. Because the job of human rights organizations is usually to keep people out of jail, it's not to put people in jail.'[32]

These initial observations prompt us to consider the following question: If it is the function of states and international courts to prosecute and punish persons responsible for crimes under international law, why do we see SLiNGOs performing that function? Does it constitute an attempt to fill a vacuum or are they merely supporting the state by acting as assistant prosecutors?

(a) Prosecuting state crimes in a state-centred system: The dilemma of international criminal justice

To answer these questions, it seems helpful to take a brief look at the current design of the international criminal justice system. It becomes apparent that international criminal justice is in fact dominated by state interests as the whole system is based on state sovereignty.[33] This state-centeredness is engrained in the establishment, institutional structure and enforcement of the international criminal justice system. States or state-based institutions, such as the UN Security Council, have created the institutions of international criminal law, namely international criminal courts, including the ICC. The state-centeredness is also apparent in the mode in which the ICC functions: It does not possess universal jurisdiction over all crimes under international law but its jurisdiction is limited to crimes occurring on the territory of a state party or committed by a national of a state party. Only in the (exceptional) case, that the UN Security Council — a body consisting of states — transfers a situation to the Court under Chapter VII of the UN Charter does the ICC have jurisdiction over individuals of non-state parties. Yet, in both cases, the Court is dependent on the willingness of states to submit themselves or other states to its jurisdiction. In addition, the Court possesses no enforcement mechanisms of its own and is thus again contingent on the willingness of states to

31 See K. Lohne, 'NGOs for International Justice: Criminal or Victims' Justice?', in A. Follesdal and G. Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press, 2018) 109–127, at 109 *et seq*.

32 Interview with senior human rights lawyer, leading the organization's strategic litigation work, conducted on 19 May 2019.

33 For an elaboration of this argument see E. Koskimies, *Norm Contestation, Sovereignty and (Ir)responsibility at the International Criminal Court* (Springer, 2021).

cooperate.[34] States' interests are even more evident on the domestic level, where international criminal law is usually enforced only against 'weak' actors and in cases which bear no political costs for the prosecuting state.[35] This, we submit, results in a somewhat skewed accountability framework. Even more so in light of the fact that crimes under international law can typically be characterized as a form of state-sponsored macro-criminality: The participation of state organs amounts to a characteristic feature of crimes under international law.[36] Due to the fact that states are typically involved in the commission of crimes under international law, they are often unwilling to investigate and prosecute these crimes. The involvement of state organs is the main reason for the widespread impunity of crimes under international law.[37] Hence, there exists a tension between the state-centeredness of the international criminal justice system and the state-enhanced nature of crimes under international law.[38] It is in this spot of tension that SLiNGOs seek to position themselves.

(b) SLiNGOs and prosecutors

Our study has shown that SLiNGOs view one of their key roles as pushing prosecutors — both on the domestic as well as the international level — to investigate and prosecute crimes under international law.[39] As one SLiNGO-interviewee working on universal jurisdiction cases aptly framed it: 'We basically try to trigger state authorities to do their job'.[40] Nonetheless, it is clear that SLiNGOs have to, at some point, side with the authorities to achieve this

34 While the Rome Statute clearly emphasizes the primary responsibility of states to establish accountability for crimes under international law — thereby reinforcing the state-centeredness of international criminal justice — the creation of the Court has of course, at the same time, mitigated the dependence on states for the enforcement of international criminal justice due to the creation of a permanent forum for the prosecution of crimes under international law.

35 See M. Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law (AJIL)* (2011) 1–49, at 1 *et seq.*; M. Langer, 'The Archipelago and the Wheel — The Universal Jurisdiction and the International Criminal Court Regimes', in M. Minow, C. True-Frost and A. Whiting (eds), *The First Global Prosecutor: Promise and Constraints* (University of Michigan Press, 2015) 204–250, at 221 *et seq.*, 241. See also J. Geneuss, *Völkerrechtsverbrechen und Verfolgungsermessen: § 153f StPO im System völkerrechtlicher Strafrechtspflege* (Nomos, 2013), at 237 et seq.

36 See G. Werle and F. Jeßberger, *Principles of International Criminal Law* (4th edn., Oxford University Press, 2020), at marg. no. 102. It is true that since recently, international criminal law is increasingly enforced against individuals linked to non-state actors, such as ISIS or similar groups. This recent practice, however, does not alter the fact that the international criminal law primarily addresses state-sponsored crime.

37 *Ibid.*, at marg. no. 118, fn. 243.

38 This very tension is framed as one between a sovereignty-based system and a sovereignty-limiting rationale by Koskimies, *supra* note 33.

39 On prosecutors as cause lawyers, see A. Batesmith, 'International Prosecutors as Cause Lawyers', 19 *JICJ* (2021) 803–830.

40 Interview with head of international crimes unit at SLiNGO conducted on 15 April 2019.

goal. This position is also reflected in the following statement by another SLiNGO-interviewee — referring to a case concerning the involvement of former government officials in crimes under international law:

> My cases were often against the state authorities, so they weren't partners as such. But in instances … where we managed to get a ruling that the case should be investigated possibly for prosecution, I had to work with the state prosecutors to build the case because we had access to the victims and we had done all the initial dossiers. We had to collaborate with them to take the case to the next level. But initially, the case was against them.[41]

As also becomes clear in this statement, SLiNGOs often facilitate the work of prosecutors by investigating crimes under international law, for instance by interviewing victims and witnesses, by preparing criminal complaints in some cases containing highly complex legal analyses, and by enabling state authorities' access to victims and witnesses of such crimes. As another SLiNGO-interviewee details:

> The prosecutors realized pretty quickly they have a lot to get from us. … They understood that we are making it easier for the people to appear, which is true; at least half — probably a lot more — of the witnesses would have said no without us.[42]

In addition, we have found that SLiNGOs can also serve as a sort of political ally of the war crimes prosecutors by publicly acknowledging the importance of their work. As a SLiNGO-interviewee explains:

> [The prosecutors] worked out that they kind of need us to help them identify cases, give them experts, give them clients, give them witnesses, give them background, and also to support them politically … make public statements saying how important this is, recognize their work, praise them … [T]hey need that, they realized. They had very few other supporters because most people say: 'Why are they doing this, it doesn't matter.' But we will publish reports saying there are hundreds of war criminals in this country, why are we doing nothing. And then they get money and they get kudos … .[43]

Hence, we can see that SLiNGOs are in fact often assisting and collaborating with prosecutors, although the study revealed varying levels of cooperation depending on the state that the organization was active in. In terms of the functions of prosecutors, one could argue that some prosecutors may litigate crimes under international law with some of the same objectives as those pursued by the SLiNGOs: to document violations for the public and create a historical record, to contribute to peace-building efforts or to strengthen survivors for example. This becomes clear when looking at statements given by the Office of the Prosecutor of the ICC but can also apply to national prosecutors.[44] Hence, the objectives of SLiNGOs pursuing strategic litigation in cases

41 Interview with senior lawyer at SLiNGO, leading cases on state involvement in torture, conducted on 24 October 2019.

42 Interview with senior lawyer at SLiNGO, leading cases on state involvement in international crimes during an armed conflict, conducted on 5 April 2019.

43 Interview with director of a SLiNGO conducted on 18 June 2019.

44 See in particular Batesmith, *supra* note 39, at 815 *et seq*. See also the following statement by the German Federal Prosecutor General on the efforts to prosecute crimes under international

of crimes under international law and the objectives of the state actors, in particular prosecutors, may also overlap in some cases. In conclusion on this aspect, we can tentatively submit that there are indicators for a partial overlap of interests, motives and even activities between SLiNGOs on the one hand and those prosecutors who are specifically in charge of investigating and prosecuting crimes under international law on the other — one reason for this overlap may be that some international prosecutors in fact view themselves 'cause lawyers' as has been argued in this Journal.[45]

3. SLiNGOs as Kickstarters, Pacemakers and Watchdogs

While SLiNGOs through their work undeniably often assist the state authorities, it would be short-sighted to conclude that they are merely seeking to serve as assistant prosecutors. Rather, as the cases mentioned in the beginning of this article insinuate, SLiNGOs are attempting to set the agenda by bringing certain crimes and certain responsibilities to light and pushing prosecutors in a direction of investigating and prosecuting particular issues that tend to be neglected otherwise. This idea is reflected in the following statement by a SLiNGO-interviewee:

> We are not just assistant prosecutors or assistant judges, we have to do more. We have to always be some steps ahead and also, we have to connect professional practical work with a much broader critique, not only of the law but also critique of the society.[46]

As has been noted above, in some cases, SLiNGOs possess more information than state authorities because of their connection to victims and social movements. For instance, they get alerted to certain violations and witnesses or the presence of alleged perpetrators in a certain country by these communities and then inform the state authorities and submit corresponding criminal complaints. They can therefore also fulfil a kick-starter function within the international criminal justice system.

In addition, SLiNGOs not only seek to trigger investigations but can also, in their own view, serve as pacemakers during the investigation as is reflected in the following statement by a SLiNGO-interviewee:

> We handed in the complaint and it just exploded in all different dimensions . . . . We had the successes in the form of attention that we got . . . . We thought we will chase them [the

law under the principle of universal jurisdiction in Germany: '[I]t is to be hoped that the knowledge gained during the national prosecution can one day be made available to an international tribunal before which those primarily responsible for the Syria-Iraq conflict — state and non-state violent actors — will have to answer. The political and social dimension of such a prosecution should not be underestimated. It can and will . . . make a contribution to the stabilization of conflict regions.', see P. Frank and H. Schneider-Glockzin, 'Terrorismus und Völkerstraftaten im bewaffneten Konflikt', 37 *Neue Zeitschrift für Strafrecht* (2017) 1–7, at 7 (translation by authors).

45 See Batesmith, *supra* note 39.

46 Interview with director of a SLiNGO conducted on13 February 2019.

> prosecutors] even more. This had created a huge wave of pressure on the prosecutors … . We then handed in the criminal complaints on [two other cases]. And when that was done … we thought, we did a lot in [country X], we have given them a lot to chew on, we didn't know if [country X] can do more, so we moved to the European level.[47]

As has been explained above, states often shy away from politically costly moves, such as prosecutions of powerful actors or political allies for crimes under international law. This is also true for the ICC although arguably to a lesser degree. SLiNGOs, through their work, aim at raising the political costs of not investigating and closing a certain case, inter alia by publicizing their complaints and their demands for accountability. Hence, they can also fulfil a watchdog function. This becomes clear in the following statements by a SLiNGO-interviewee reflecting on the need for strategic litigation:

> The international law system and international criminal justice system — it is very imperfect and it's not coherent at all. … We don't always have a very robust justice system, and obviously we have a lot of difficulties in practice because prosecutors and judges … are not willing to go after powerful actors. Also, because they don't have the backing from political decision-makers.[48]

In a similar vein, several SLiNGO-interviewees highlighted the fact that 'the main obstacles of course … are not legal obstacles, but they are political obstacles'[49] or — differently put — 'if it's an unpopular case, there's going to be a legal obstacle'.[50] As another SLiNGO-interviewee elaborates:

> [T]he obstacles are basically the same [everywhere], for example of course political resistance towards all kinds of accountability for powerful actors, be it state actors or companies. Also, there is a lot of resistance of the enforcers of human rights, as they would frame themselves in Europe, addressing their own responsibility. … Nobody wants to investigate their own wrong.[51]

As the latter statement also demonstrates, SLiNGOs seek to counter the dilemma of international criminal justice, as it has been identified above, by attempting to ensure the prosecution of state crimes in a state-centred system.

In addition, SLiNGOs argue that state authorities are sometimes ignorant of structural discrimination inherent in legal practice and hence may neglect certain categories of violations, such as for instance sexualized and gender-based violations.[52] This amounts to another facet of SLiNGOs' watchdog role: in essence, pushing prosecutors, domestic courts and other institutions of international criminal justice, such as the ICC, to investigate these neglected

47 Interview with senior lawyer, leading cases on state involvement in international crimes during an armed conflict, conducted on 5 April 2019.
48 Interview with director of a SLiNGO conducted on 13 February 2019.
49 Interview with head of litigation department of a SLiNGO conducted on 24 September 2019.
50 Interview with senior lawyer of a SLiNGO, involved in litigating various cases of international crimes, conducted on 4 June 2019.
51 Interview with director of a SLiNGO conducted on 13 February 2019.
52 Interview with director of a SLiNGO on 13 February 2019; Interview with director of a SLiNGO conducted on 6 May 2019; Interview with director of a SLiNGO conducted on 18 June 2019; Interview with head of litigation department of a SLiNGO conducted on 24 September 2019.

violations as well.[53] As one SLiNGO-interviewee details with regard to the prosecution of cases of sexual violence as crimes under international law by a domestic court:

> So, our goal was to link up with them [: the victims], try to understand their needs, what they had done, where there were obstacles, and how to overcome these obstacles. And … we were trying to see with the state prosecutor how they were prioritizing these cases — they were not — and trying to overcome the obstacles and sometimes just the prejudice … . So that was organizing workshops and coming with new ideas and structuring. … We acted as a bit of a filter between the two and it started to launch a very fruitful discussion which ended up in them changing their prosecutorial strategy. Now we have more and more of these sexual violence cases.[54]

4. Strategic Litigation as a Counter-hegemonic Practice

As the cases we initially highlighted indicate, some SLiNGOs also seek to specifically target powerful actors from the Global North — be it state actors or corporations — and thereby challenge the existing power asymmetries and double standards within the international criminal justice system. This objective gains relevance when looking at the important critique directed towards the international criminal justice system in recent times. Critical perspectives on international criminal justice highlight a wide variety of shortcomings, blindspots and inadequacies of the current system.[55] A particularly influential strands of critique relates to international criminal justice's asymmetrical enforcement.

(a) Critique of double standards

The selective enforcement of international criminal law has been criticized since the very beginning.[56] Yet, in recent years, postcolonial legal theory and Third World Approaches to International Law (TWAIL) scholars in

53 In the recently concluded universal jurisdiction proceedings against members of the Syrian military police in Koblenz, Germany, for instance, sexual violence was initially only charged as a domestic offence. Only after an intervention by *ECCHR* did the court recategorize the charge as a crime against humanity. See S. Studzinsky and A. Kather, 'Will Universal Jurisdiction Advance Accountability for Sexualized and Gender-based Crimes? A View from Within on Progress and Challenges in Germany', 22 *GLJ* (2021) 894–913, at 910; T. Altunjan and L. Steinl, 'Zum Schutz der sexuellen und reproduktiven Selbstbestimmung — Aktuelle Entwicklungen und Reformbedarf im Völkerstrafgesetzbuch', 3 *Rechtswissenschaft* (2021) 335–355, at 336. The conviction dated 13 January 2021 includes acts of sexual violence as crimes against humanity, see Legal Tribune Online, 'Lebenslange Haft für Folter in Syrien', 13 January 2021, available online at https://www.lto.de/recht/nachrichten/n/olg-koblenz-1ste919-staatsfolter-buergerkrieg-syrien-erster-strafprozess-lebenslange-haft-urteil/.

54 Interview with director of a SLiNGO conducted on 6 May 2019.

55 See S. Vasiliev, 'The Crises and Critiques of International Criminal Justice', in K.J. Heller et al. (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020), 626 *et seq.*; Werle and Jeßberger, *supra* note 36, at marg. no. 153 *et seq.*

56 See A. Kiyani, 'Third World Approaches to International Criminal Law', 109 *AJIL Unbound* (2015) 255–259, at 257; Werle and Jeßberger, *supra* note 36, at marg. no. 113 *et seq.*

particular have pointed towards specific mechanisms of exclusion and selectivity associated with international criminal law and demonstrated how they perpetuate the status quo of the asymmetrically formed international order.[57] While norms of international criminal law are considered universally valid, the 'recipients' of international criminal legal sanctions are almost exclusively citizens of politically and economically marginalized states, especially in the Global South.[58]

This asymmetrical order is also enforced with the help of the principle of complementarity.[59] As critics argue, while the affected states are granted first access to deal with contexts of macro-criminality, any deviation from the narrow guidelines imposed justifies a legal intervention by the ICC.[60] This creates the impression that the states of the Global North are well capable of judging isolated, rather accidental, but never systematic violations of international criminal law independently, while in the states of the Global South, interventions by international institutions are necessary.[61] This can convey the message that violence relevant to international criminal law is perpetrated exclusively or at least mainly by states and actors from the Global South, whereas actors from the Global North are implicitly absolved of responsibility and 'innocented'.[62]

(b) SLiNGOs as a counter-hegemonic force

Some SLiNGOs, including those based in the Global North, aim primarily at targeting 'powerful actors'[63] as is illustrated by the examples we presented in

57 See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007); A. Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', *2 Chinese Journal of International Law* (2003) 77–103; B.S. Chimni, 'Third World Approaches to International Law: A Manifesto', 8 *International Community Law Review* (2006) 3–27; M.W. Mutua, 'What is TWAIL?', 94 *American Society of International Law Proceedings* (2000) 31–38; C. Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', 10 *International Community Law Review* (2008) 371–378.

58 See e.g. W. Kaleck, 'Mit zweierlei Maß: Der Westen und das Völkerstrafrecht' (Verlag Klaus Wagenbach, 2012); J. Reynolds and S. Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice', 14 *JICJ* (2016) 959–983, at 959 *et seq*. See also Langer, *supra* note 35.

59 See Werle and Jeßberger, *supra* note 36, marg. no. 312 *et seq*.

60 See M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007), at 123 *et seq*., therefore speaks of 'legal mimicry'.

61 On the categories of 'developed' and 'underdeveloped' which — in particular with regard to legal systems — have superseded those of 'civilized' and 'uncivilized' in the discourse on international law, see Anghie, *supra* note 57, at 203 *et seq*.

62 See F. Mégret, 'International Criminal Justice: A Critical Research Agenda', in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law* (Routledge, 2014) 17–53, at 34: 'Yet, arguably, international criminal justice is not only about condemning, it is also about, implicitly, "innocenting".'

63 Interview with director of a SLiNGO on 13 February 2019.

the introduction. This observation finds further support in the following two statements by SLiNGO-interviewees:

> We care about equality before the law, speaking in a global manner. There are considerable political influences in ICL. They are huge. This system of international relations, law and politics is of course shaped by power relationships, hierarchies etc. We are a counter-voice to that. We display that in the case work and utter that.[64]

> [O]ur goal is that, on a very abstract level, we want to challenge global power relationships. We believe that those global power relationships do not only exist between governments and states but probably even more power structures exist between economic actors' economic interests and other interests. We want to challenge economic actors.[65]

Hence, SLiNGOs also seek to counter the asymmetrical enforcement of international criminal law and the innocenting of actors from the Global North through their work. In addition, SLiNGOs also aim at establishing certain (counter-)narratives and highlighting certain dimensions relating to the double standards implicit in the enforcement of international criminal justice, as the following quote serves to illustrate:

> We choose the fora basically depending on the fact if it's about establishing certain ideas or certain narratives, not really about winning a case at this stage. Especially ... at the ICC. The case has no chance of ever being taken up but maybe you can show certain European dimensions .... So, we would choose according to that.[66]

5. *SLiNGOs as Proponents of International Criminal Justice*

Lastly, we have found that SLiNGOs act specifically with the view of developing and strengthening the international criminal justice system on different levels — an understanding which is reflected in the following statements by a SLiNGO-interviewee:

> [Our] role ... is to trigger actions by others. We are thinking ahead: What could be the next big case to strengthen the ICJ system, what does such a case need to look like, how does it need to be built to trigger actions by authorities, to set another precedent or debate, to address with legal means a conflict situation? ... I see the role of NGOs like ours to start something, to push others, to take certain cases or topics on, to set the scene and then look what's the next important step.[67]

C. Pitfalls and Critiques

Despite these well-intentioned objectives pursued by SLiNGOs and the potential positive impact on the enforcement and development of the international criminal justice system, it is important to realize that strategic litigation does not

64 Interview with senior lawyer, leading cases on state involvement in international crimes during an armed conflict, conducted on 5 April 2019.
65 Interview with vice legal director of a SLiNGO conducted on 22 August 2019.
66 *Ibid.*
67 Interview with head of international crimes unit of a SLiNGO conducted on 15 April 2019.

necessarily entail that the system develops as is envisaged by the actors engaging in this practice. On the contrary, strategic litigation can also trigger serious counter-effects. In the following, we will explore potential pitfalls and critiques directed at strategic litigation from the outside, while again in particular highlighting SLiNGO's views on these matters.

1. 'The empire always strikes back'[68]

As Helen Duffy explains with regard to strategic human rights litigation, it 'can lead to the erosion of legal standards due to poor jurisprudence or regressive legislative responses'.[69] One rather drastic example of such a potential counter-effect is the possibility of states' withdrawal from the Rome Statute of the ICC. As such, the South African government publicly stated that it would withdraw from the Rome Statute after the South African SLiNGO Southern Africa Litigation Centre successfully litigated before the North Gauteng High Court to reach a finding that the government had violated its obligations under the Statute by not arresting *Al Bashir* when he visited the country for a meeting of the African Union in June 2015.[70] Yet, it should also be noted that this threat by the South African government did not lead to further action until now.

Another example of backlash is the amendment or abolishment of the mechanisms that allowed SLiNGOs to act within the system in the first place, such as the 'amputation' of universal jurisdiction laws in Belgium and Spain after litigation directed at heads of states and high-ranking public figures by SLiNGOs.[71] Yet, as Máximo Langer notes, the complaints that led to the amendments of the Spanish universal jurisdiction laws were not brought by SLiNGOs or even international human rights NGOs, but by — as Langer describes them — smaller arguably much less professional groups.[72] This latter point also raises an interesting question regarding the (perceived) professionalism of the actors pursuing strategic litigation in the international criminal justice system.

This is closely related to another line of critique addressed in an article written by two German war crimes prosecutors who argue that the publicity created by SLiNGOs can prove counterproductive for a criminal investigation

68 Interview with legal director of a SLiNGO conducted on 3 June 2019.

69 Duffy, *supra* note 3, at 5.

70 See J. Dugard, 'Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development (N. Gauteng High Ct., Pretoria)', 54 *ILM* (2015) 927–944.

71 In detail, see Langer, *supra* note 1, at 252 *et seq.*; S. Ratner, 'Belgium's War Crimes Statute: A Postmortem', 97 *AJIL* (2003) 888–897.

72 See Langer, *supra* note 1, at 254: '[T]he complaints against American and Chinese officials that led to the two amendments of the Spanish global enforcer' universal jurisdiction statute in 2009 and 2014 were not presented by any of the main global human rights NGOs, but by groups such as the Association for the Dignity of Male and Female Prisoners in Spain (an association that did not even have its own website), the Tibet Support Committee, the Private Foundation House of Tibet and by members of Falun Gong.'

because of the need for undercover investigations.[73] They further claim that 'criminal complaints whose filing and content is communicated to the public usually do not seek to fulfil a criminal procedural objective but instead serve to achieve political or even private commercial (marketing) interests'[74]. While the authors are certainly correct in pointing out that public communication can under certain circumstances hamper a criminal investigation, we would disagree with their statement that all criminal complaints that are communicated to the public do not seek to fulfil a criminal procedural perspective. In cases where the factual basis as such has been previously sufficiently established and the complaint is directed at initiating criminal proceedings, its public disclose does not harm the investigation. On the contrary, as we have advanced above, it creates pressure on the authorities to begin or continue investigating and thus can advance the investigation.

In general, our research suggests that strategic litigation in international criminal justice is increasingly pursued by a small group of highly professional SLiNGOs. In addition, these past developments are also self-critically reflected by SLiNGOs, as becomes clear in the following statements by two SLiNGO-interviewees:

> [O]ne thing is very clear, wherever you are active, you have to be good. ... [W]hat you can't do is to attack let's say some powerful actors, appear in the media, and then jurists all over the world would read your piece of litigation and would find out that it's stupid, it's unprofessional. We're talking about very complex issues, about very complex questions of law ... I'm not saying that you have to write every criminal complaint which fulfills the standard of a PhD. But if you go out and say somebody like Pinochet or Rumsfeld or Assad has to be investigated and prosecuted that should be based on a very profound analysis of the facts as well as of the law. Sometimes that's not possible, and then that's not a case. Although you are angry, you are outraged about certain things which are happening in the world, but there must be an angle for this kind of litigation, how so ever, you want to frame it.[75]

> [T]o be honest a lot of the dossiers that were submitted — not all of them ... but in a lot, people submit very poor evidence and they basically just submit a newspaper article saying, 'Oh! Donald Rumsfeld is a war criminal' or 'Tony Blair is a war criminal'. Well, tell me how that works and where the evidence is? So, the cops didn't like that and now, we have moved on to a new phase: less dramatic, less newspaper headlines, less glamorous perhaps. But it is much more effective where the NGOs are professionalized.[76]

The latter perception corresponds closely to Máximo Langer and Mackenzie Eason's recent assessment of a 'quiet expansion' of universal jurisdiction trials, naming the institutional learning of NGOs as one explanatory factor for this development.[77]

73 See T. Beck and C. Ritscher, 'Do Criminal Complaints Make Sense in (German) International Criminal Law?', 13 *JICJ* (2015) 229–235, at 234.

74 *Ibid.*

75 Interview with director of a SLiNGO conducted on 13 February 2019.

76 Interview with director of a SLiNGO conducted on 18 June 2019.

77 See Langer and Eason, *supra* note 1, at 792 *et seq.*

2. Institutional Costs and Perception Costs

Other critiques aimed at strategic litigation point to the toll it can take on the institutions of international criminal justice and the increased workload for these institutions. Megan Fairlie, for instance, has argued that strategic communications to the ICC would undermine the Court's objective.[78] She defines strategic communications as 'highly publicized investigation requests aimed not at securing any ICC-related activity, but at obtaining some non-Court related advantage'.[79] These communications would place an administrative burden on the Court through the additional work generated for the Office of the Prosecutor. Even more damaging though, she argues, are the perception costs: Strategic communications would create the impression that the ICC is actually investigating and will prosecute a certain actor and conduct, damaging the Court by causing a loss of credibility and legitimacy in the eyes of the public and of victims of crimes under international law.[80] This point has also been raised by other critics with regard to specific communications.[81]

While Fairlie acknowledges that not all strategic litigation directed towards the ICC amounts to strategic communication in her definition, this distinction seems problematic to us nonetheless. This becomes clear in her assessment of a communication to the ICC filed by CCR. In 2011, CCR submitted a communication to the Court 'requesting the investigation and prosecution of high-level Vatican officials, including Pope Benedict XVI, for their role in facilitating, aiding and abetting, failing to prevent and punish, and for covering up widespread and systematic rape and other forms of sexual violence and torture of children across the globe'.[82] Fairlie argues that this was not a 'genuine' communication but a strategic one as 'even the attorney who authored the CCR filings publicly acknowledged that she was "not hopeful" about the prospects for an investigation' and because this view was shared by 'multiple academics and international criminal law practitioners'.[83]

While it seems unconvincing to us to label communications as 'not genuine' because the chances of success are slim and because academics and practitioners are sceptical, the concerns regarding the perception cost cannot be dismissed upfront. However, we would argue that these costs are not caused by the ICC communications as such but by the public communication about them. Yet, in this regard, it should also be noted that it is often not SLiNGOs themselves who

78 See M. Faerlie, 'The Hidden Costs of Strategic Communications for the International Criminal Court', 51 *Texas International Law Journal* (2016) 281–319, at 319.

79 *Ibid.*, at 281.

80 *Ibid.*

81 See also T. Ackermann, 'COVID-19 at the International Criminal Court: Brazil's health policy as a crime against humanity?', *Völkerrechtsblog*, 14 August 2020, available online at https://voelkerrechtsblog.org/de/covid-19-at-the-international-criminal-court-2: 'The recent criminal complaint is limited to signalling public outcry. It will disappear into thin air at the Prosecutor's office. Problematically, this could not only devalue the court in the eyes of the public, but also bolster Bolsonaro's position.'

82 CCR, *Seeking Justice in the ICC: Holding Vatican Officials Responsible for Rape and Sexual Violence as Crimes Against Humanity (FAQ)*, 22 February 2012, available online at https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/fact-sheet-seeking-justice-icc.

83 See Faerlie, *supra* note 78, at 300.

are claiming that the ICC is investigating and/or will prosecute and thereby are causing perception costs. In fact, these misunderstandings are often created by other actors, such as journalists but sometimes also politicians. This comes back to the challenges in communication that were mentioned above, which are also reflected upon in the following statement by a SLiNGO-interviewee:

> [Y]ou can lose a lot with communicating the wrong way and creating false expectations, for the victims on one hand but also for the general public. This can certainly backfire. If you engage in strategic litigation, it needs to be carefully crafted what the communication line is and which expectations you raise and how to manage them.[84]

3. An Elitist Enterprise?

Lastly, critique is also directed at the concept of strategic litigation itself.[85] Duffy for instance argues that strategic human rights litigation is 'not a neutral enterprise that at worst does little good, while not doing any harm'.[86] She points in particular to possible repercussions for victims, families, and communities, in addition to problematizing the false expectations strategic litigation may generate. Thus, she poses the question 'how much really changed beyond the confines of the courtroom, while lengthy and resource-intensive proceedings were depleting resources that could perhaps more effectively have been channeled elsewhere'.[87] She thereby builds on a strand of literature criticizing the legal co-optation of social movements, which leads to a dependence on lawyers and forces them to think within the boundaries of legal frameworks.[88] Furthermore, it is argued that a legal win can distract from the actual inequalities that continue to exist.[89]

84 Interview with head of international crimes unit of a SLiNGO conducted on 15 April 2019.

85 On the general critique of attempts to pursue social change by law, see A. Chayes, 'The Role of the Judge in Public Law Litigation', 89 *Harvard Law Review* (1976) 1281–1316, at 1282–1284; J.F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (Academic Press, 1978), at 233; D. Luban, 'Settlements and the Erosion of the Public Realm', 83 *Georgetown Law Journal* (1995) 2619–2662, at 2646; G.N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn., University of Chicago Press, 2008), at 422: courts can 'almost never be effective producers of meaningful social reform'.

86 See Duffy, *supra* note 3, at 5.

87 *Ibid.*

88 See A.V. Alfieri, 'Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative', 100 *Yale Law Journal* (1991) 2107–2147, at 2119; M. McCann and H. Silverstein, 'Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States', in A. Sarat and S. Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, 1998) 261–292, at 263. This critique of strategic litigation is also mentioned in a report by *OSJI*, which explains that the critics of strategic litigation view it 'as an expensive, time-consuming, risky, unaccountable, and often elitist enterprise that too often fails to advance rights protection in practice and privileges the lawyer's goals over the client's', see OSJI, *supra* note 27, at 13.

89 See Depoorter, *supra* note 21, at 828; O. Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics', 120 *Harvard Law Review* (2007) 937–988, at 957.

These concerns continue to remain valid and worthy of consideration although SLiNGOs claim to be mindful and mitigate the risks, as the following statements indicate:

> I think strategic litigation doesn't always serve the interests of the victims. That's a realization that people need to be very real about. It's something you also need to be very honest to become aware of . . . I think you really need to be honestly communicating to the people you work with.[90]

> I see one risk in expectations and expectation management — that needs to be good . . . It's important to see how other lawyers can follow up on a strategic cases, so that it's not in an empty space and that affected communities can later benefit from what you achieved and step in and follow up on their own. Otherwise, there's a danger in strategic litigation, if you win good cases but nothing follows in society, how it is taken up there, how domestic actors can use it, and also how judgments can be enforced. Especially when it comes to law reform and other changes that a government would be obliged to undertake. I think there's also the bigger question how to embed strategic litigation in a broader effort to overcome violence and change and transform societies. There are some risks, if that is not done and there's instances of strategic litigation where that's the end of the story, then it probably wasn't worth the effort.[91]

3. Conclusion

Despite the fact that SLiNGOs' activities to date remain largely unexplored by international criminal law scholarship, they — practically speaking — already form an important part of the landscape of international criminal justice. In this article, we have mainly listened to what SLiNGOs have to say about their work. On this basis, we have attempted to systematically explain what they are doing and why they do it, by highlighting what they aim to achieve with their work. We have, however, *not* inquired into the question as to whether they are actually successful in achieving what they aim for. This remains for future research.

Our analysis shows that SLiNGOs seek to function not only, to a certain extent, as assistant prosecutors but as kickstarters, pacemakers and watchdogs of the institutions enforcing international criminal law on both the domestic as well as the international level. They operate on the basis of the belief that the international criminal justice system, which they aim to develop and strengthen, is of fundamental importance. Furthermore, they seek to contextualize individual cases and attempt to address the asymmetries and blindspots engrained in the current system, thereby striving to uncover the counter-hegemonic potential of international criminal justice. Still, possible pitfalls and fundamental critiques of strategic litigation should not be disregarded but warrant a closer analysis.

90 Interview with vice legal director of a SLiNGO conducted on 22 August 2019.
91 Interview with head of international crimes unit of a SLiNGO conducted on 15 April 2019.

And indeed, we believe that it is time for international criminal law scholarship to actively — yet critically — engage with what appears to be an important facet of today's international criminal justice system. Our hope is that this article may form one element of a research agenda exploring the role of strategic litigation and in particular its impact on the system of international criminal justice.