**Concept Note: The Impact of Strategic Litigation of Conflict-related Atrocity Crimes**

**Short-Term Consultancy for Wellspring Philanthropic Fund International Human Rights Program**

1. The Philanthropic Fund International Human Rights Program (Wellspring) has asked Professors Helen Duffy and Philip Leach (the Consultancy Team) to conduct a short term consultancy focused on gaining insights into ‘*the impact and role of strategic litigation and prosecutions in ensuring accountability for war and other serious crimes and justice for victims, survivors and affected communities’*. With this in mind, the consultancy team are conducting research and interviews with a diverse range of stakeholders over the next few months.
2. The **consultancy team** has extensive experience in strategic litigation practice, academia and in various roles within civil society. Both Helen and Philp have been involved in strategic litigation, written on strategic human rights litigation and on giving effect to the law in armed conflict, and carried out reviews for other human rights funders and/or NGOs on the impact of strategic litigation in particular contexts (see bios attached).
3. The overall **purpose** of this consultancy is to seek to better understand how litigation is being used in relation to serious violations in situations of armed conflict (and post-conflict), and to what effect. It is not an academic study, nor an assessment or evaluation of organisations. The focus is on identifying, supporting and illustrating the forms of impact, or the contributions to change, that strategic litigation by or with the support of civil society organisations (CSOs) can have and has had in these contexts.
4. While specific questions may be sent to interviewees in advance, the broad **primary research questions** [as agreed with Wellspring] are as follows:

a. What are the **diverse forms of strategic litigation** being employed to address crimes and serious violations in armed conflict scenarios in the world today, including on the national, regional or international levels? What does experience tell us about trends, challenges, opportunities of relevance to developing strategic litigation in the future?

b. What **levels of impact**, and what **indicators** of that impact, can we identify? What support is there for strategic litigation having an impact on:

i. ceasing or preventing ongoing or future perpetration of grave crimes;

ii. providing victims, survivors, and affected communities with protection, a sense of justice or empowerment;

iii. remedy and reparations, such as compensation, rehabilitation and guarantees of non-repetition?

iv. are the needs of particular groups addressed equitably (women, minorities etc.)?

v. are there examples of negative impact and what can we learn from them?

c. What **factors** have influenced impact, positively or negatively? This would include to what extent have the following increased the likelihood of positive impact:

i. the characteristics of the conflict, atrocities/crimes or perpetrators

ii. other external environmental conditions (eg. international pressure, media attention etc.);

iii. the nature of the litigation (criminal civil etc) and fora?

iv. characteristics of litigation strategy or how and by/with whom litigation unfolded?

d. Where does the **literature** currently stand on the impact of litigation in armed conflict, and are there gaps in analysis and evaluations that could usefully be filled?

1. While the main aim is understanding the impact of litigation that has taken place, or is underway, as appropriate we seek insights into litigation that is *not* happening, and **gaps and opportunities** that may arise for the future.

*Clarifying* *Approach and Scope*

1. Considerable efforts have been made in recent years to address strategic human rights litigation and attempt to assess its impact. These include, among others, Helen’s book on [Strategic Human Rights Litigation](https://www.bloomsbury.com/uk/strategic-human-rights-litigation-9781509921973/) (SHRL) which identified a framework for impact assessment and the extensive work carried out by the [Open Society Justice Initiative](https://www.justiceinitiative.org/publications/strategic-litigation-impacts-insights-global-experience) (in which both Helen and Philip were involved). This consultancy will build on this work and the broader prior body of research which provides a framework for our more specific research.
2. This is an open and flexible enquiry, without rigid criteria, so we can be guided to a large extent by interviewees as to the issues and examples they consider to provide the most valuable sources of learning. However, the following are some initial thoughts on scope and approach, to explain our starting point and address common preliminary questions.

*Scope of ‘****litigation’*** *– mapping the full range:*

1. The study seeks to map the range of forms that rights-related judicial or quasi-judicial claims take in a diversifying litigation landscape. From our experience and preliminary research it is clear that litigation, including by Wellspring grantees and others, encompasses an extraordinarily wide field. This includes diverse forms of litigation before a broad variety of national, transitional and international fora, against a growing range of types of defendants, in relation to many serious human rights concerns. It covers cases against individuals, non-state actors (especially corporations) and states, individually and collectively. Individual accountability is often pursued through criminal law, and strategic interventions embrace diverse forms of engagement with or support for national prosecutions, foreign domestic investigations and prosecutions (including through universal jurisdiction) or supporting cases at the ICC or other international criminal fora. It also involves diverse civil claims against state and non-state actors, pursuing various remedies and outcomes – such as compelling action, constraining it or seeking damages or other reparation. This is complemented by resort to alternative laws and processes, such as those governing immigration, trade, investment or customs. A broad range of regional, supranational courts and bodies provide complementary mechanisms.
2. Litigation should be understood beyond the confines of the active stage of judicial or quasi-judicial engagement, covering often lengthy processes of preparation, or indeed consideration whether to litigate and how to use the prospect of litigation strategically, as well as implementation and giving effect to litigation long after judgment. Likewise consistent with the approach to ‘strategic’ litigation and impact below, we are interested in the dynamics between litigation and other processes for change. We are mindful that CSO roles span different stages and methods of work, and few embrace all of them equally.
3. The first dimension of the study will be to map this diversifying landscape, to understand the range of types of litigation that has been employed and the experience derived from that, as well as emerging trends, gaps and opportunities. We would therefore welcome interviewees input not only on litigation initiatives underway but also those being explored that could provide additional avenues for impact down the line, or whether there are avenues that remain neglected to date and why.

*Focus on ‘Strategic’ litigation by/with* ***CSOs***

1. Strategic litigation can be employed by a range of actors for diverse ends (rights-favourable or not). While trends in the role of diverse actors or institutions may be interesting to note, in principle our main focus is likely to be on the strategic use of judicial and quasi-judicial fora by or with the support of CSOs. It will reflect on the diverse roles in and around litigation and their impact and implications. Current Wellspring grantees’ work covers a great deal of the remarkable work being done in this field and will be a major focus of interviews and outreach. However, the study will also enquire into other examples, as it seeks to engage relevant actors and obtain diverse perspectives from those affected by and/or engaged in this work.
2. As such, it is hoped to engage interviewees not only on their own experience, though this is key, but their insights on the field more broadly.

***Who we will interview*** *- engaging diverse perspectives and experiences including survivors*

1. The Consultancy Team hopes to meet with NGOs, litigants, representatives of affected communities, and others including academics and members of courts and bodies, and lawyers and non-lawyers with diverse perspectives. The voices of those most affected are clearly crucial, but the potential complexities of this needs to be recognised, and we will discuss safe and appropriate outreach with partners.
2. The discussions will mostly take place through online informal interviews, but can involve group discussions and there is scope for some travel, where this is justified and would facilitate a more productive exchange of views.
3. Suggestions as to who to interview to ensure inclusivity and a suitable range of voices, including those less often heard and who may have competing perspectives on litigation in armed conflict situations, would be appreciated.

*Focus on atrocities in ‘****armed conflict’*** *or related crises?*

1. The intention is to focus on grave crimes and systematic human rights violations in contexts of armed conflict (or post-conflict). It is not intended to take a strict approach to assessing whether situations constitute an ‘armed conflict’ or not, and how the conflict is classified, which are often controversial issues and are not essential for present purposes. While there will be a flexible approach, the consultancy reflects the fact that armed conflicts and associated security crises often provide the context for some of the most serious crimes and violations, yet assessments of the role of impact of ‘strategic litigation’ in this area remains limited.

Approach to ‘***Impact’***:

1. We are open-minded to hear interviewees’ experiences of impact in its diverse forms and how it is assessed. Based on prior work, we adopt a flexible and ‘multidimensional impact model’ which assesses broad categories of impact, recognising it can be direct and indirect, short and longer term, incremental (rather than considered in isolation), and that it varies when considered from diverse perspectives and over time. The SHRL book and OSJI studies mentioned above, among others, suggest multiple potential levels of impact that can be considered. These include direct and indirect impacts on victims/affected communities’ material situation or perceptions, on law, policies and practice, access to information and historical record, accountability and rule of law, attitudes and norms, institutions, protest and mobilisation, among others). The study is open-minded and interested in how you have seen particular litigation processes playing a role in contributing in some way to human rights change on these or other levels. It is important to draw out negative impacts and risks as well as positive ones, on each of these levels. We are keen to consider the gendered impacts of litigation, and to ascertain the particular effects on marginalised communities and power differentials, including whether litigation addresses - or perhaps contributes to - disempowerment and discrimination in conflict and post-conflict contexts.
2. As a starting point then, it is recognised that litigation may arise directly and indirectly, at various stages (before during and after cases are brought), whether the case is won or lost, and that litigation often needs to be considered in the context of long term initiatives including intersection between law and other forms of advocacy and action.
3. We are acutely aware, as literature recognises, that impact is extremely difficult to measure and impossible to quantify. Nonetheless interviewees will be asked about efforts and approaches to evaluate impact of litigation from which we might learn.

***Case Studies***

1. We are keen to hone in on a small number of conflict scenarios and litigation experiences to assess impact in more detail, and are open to suggestions. The factors relevant to these selections are likely to include: geographic and thematic diversity; the gravity and extent of impacts on victims; and the nature and range of litigation efforts employed in the scenario and their perceived impacts.
2. We are grateful for your time and really look forward to your insights.

**Helen Duffy and Philip Leach**

**22 August 2023**

***Annex A - Bios Consultancy Team***

**Helen Duffy** is professor of International Human Rights and Humanitarian Law at Leiden University and runs [Human Rights in Practice](http://www.rightsinpractice.org). Previous positions include Legal Director of INTERIGHTS and of *CALDH* Guatemala, Legal Officer Prosecutor’s Office of the International Criminal Tribunal for former Yugoslavia (ICTY) and Counsel to Human Rights Watch. Her litigation spans the U.N., African, European and Inter-American systems and national courts, often addressing conflict and crisis. Relevant publications include ‘Strategic Human Rights Litigation: Understanding and Maximising Impact’ (Hart, 2018), Torture in Custody: Litigation Impacts (OSJI, 2018), the ’War on Terror’ (CUP 2015) and Law in Armed Conflict (CUP 2020).

**Philip Leach** is Professor of Human Rights Law at Middlesex University in London, and a human rights consultant and solicitor. Until March 2022 he was Director of the European Human Rights Advocacy Centre (EHRAC). He is the former Legal Director of Liberty (UK), and of the Kurdish Human Rights Project. Philip has litigated numerous international human rights cases relating to conflict and post-conflict situations in Chechnya, south-east Turkey, South Ossetia, Nagorno-Karabakh and eastern Ukraine. He is author of ‘Taking a Case to the European Court of Human Rights’, 4th ed., Oxford University Press, 2017.

***Annex B – Information for interviewees***